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OLIVER WENDELL HOLMES (1841–1935)—IN MEMORIAM*

(On the fortieth anniversary of his death)

*By Shalom Kassan***

For well nigh half a century (December 1882—January 1932) Mr. Justice Holmes served the American judiciary. For the first twenty years he served on the bench of the Supreme Judicial Court of Massachusetts, the last three years as its Chief Justice. For nearly thirty years he served on the United States Supreme Court as Associate Justice, retiring in 1932 at the age of ninety-one when Cardozo succeeded him.[1]

In the course of these five decades, Holmes J. developed both a characteristic method of judicial interpretation and a unique style in expressing that method. In this article an attempt is made to evaluate these important qualities.

Schooling and Early Life

Holmes' schooling was that of his time: elementary school, followed by a boy's school conducted by a Unitarian minister, then, following his family tradition, preparation for Harvard. Philosophy was his first love and Emerson was his true mentor.

The Civil War erupted during Holmes' senior year and he enlisted immediately. He was thrice wounded and thrice he returned to his regiment. When he came back from the war in 1864, he returned to Harvard. At his father's suggestion he entered the Harvard Law School. He became interested in the study of the common law which he regarded as the perfect legal system. He graduated in 1866 and then set off for a visit to England, returning in 1867 to be admitted to the Bar. He joined a law firm and worked hard for

* This is the third in a series of three articles by Shalom Kassan on Justice Wendell Holmes and his two disciples Justices Brandeis and Cardozo [Ed.].

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1 See Kassan, "Benjamin Nathan Cardozo—In Memoriam" (1974) 9 Is.L.R. 159 at p. 163.

three years as an apprentice. But after that, his rise was rapid. In 1870 he became a contributor to the American Law Review and its Co-editor.

Books

In 1869 Holmes undertook the extensive job of editing the 12th edition of Kent's Commentaries on American Law. In 1873 it was published in four volumes with a considerable body of notes from his own pen. His success seemed to have a momentum of its own. In 1870, not yet thirty, he became a lecturer in constitutional law at Harvard, at which time he was entirely dedicated to the law, continuing to read philosophy, as a sideline. The beginning of the '80's found him moving forward in his chosen profession of legal teaching, scholarship and commentary.

"The Common Law"

In 1880 Holmes was asked to deliver a course at the Lowell Institute. He chose as his topic "The Common Law". These lectures became one of his most important contributions to legal thinking. His book *The Common Law,* which consists of this series of lectures, was published in 1881.[2] "The book is a classic in the sense that its stock of ideas has been absorbed and became part of common juristic thought... they placed law in a perspective which legal scholarship ever since has merely confirmed".[3]

Who else was able to pack a whole philosophy of legal method into a fragment of a paragraph, as in those reverberating sentences on the opening page of this immortal book? Familiar though they are, the temptation to quote them is irresistible:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

Professor Holmes

His book, *The Common Law* came close to opening something of a new era in Anglo-American jurisprudence. It led to a professorship at the Harvard Law School in 1882. Holmes accepted the offer on condition that should he be offered a judicial post, he would be free to take it. He taught for only one term.

2 Little, Brown & Co., Boston, 2nd ed., 1938.

3 Felix Frankfurter, *Of Law and Men* (Harcourt, Brace and Co. Inc., New York, 1956).

Justice Holmes

Less than a year later he was appointed as Justice on the Supreme Judicial Court of Massachusetts at the age of 41. Holmes could not be content with the detached vision of the student's closet. He was eager to be closer to the actualities of life. Twenty years later President Theodore Roosevelt appointed Holmes to the Supreme Court of the United States. "Taking his seat on 8 December, 1902, Mr. Justice Holmes came to the Supreme Court at the high tide of the Roosevelt era. Politics reflected vigorously the clash of the great political and economic forces which the Civil War had released and the Spanish War intensified. Government extended its activities widely. It was a period of legislative exuberance, both at Washington and in the States. The political ferment brought to the Court problems of State and national powers in greater volume and in subtler forms than ever before... Questions whose decision touched the life of men widely and intimately became the staple business of the Court. To an extent unparalleled in the country's and the Court's history, the Supreme Court became the arbiter of political controversies".[4]

At that time it was already quite clear that the dominant issue in American constitutional law was the relation of government to business. American capitalism had been developed so rapidly that it brought forth new conditions and problems which increasingly were becoming the direct concern of government. The phenomenal advances in transportation, communication and mass production were revolutionizing the life of the people. Mr. Brandeis' (then the well-known "People's Attorney") indictment of the business community was fundamental. His major thesis was that business had become too big and socially irresponsible.[5] These recent economic and social consequences of the development naturally had their effect on the legal institutions of the United States.

The First Supreme Court Case

In his reaction to the new issues, Holmes J. had occasion to reveal himself as a member of the Supreme Court in his very first opinion delivered in a case which was argued three days after he took his seat on the bench. This case was *Otis* v. *Parker*.[6] This opinion showed clearly his way of thinking—to give state legislative action a broad margin of tolerance, even if it implied a system of state regulation of economic activity.

4 Felix Frankfurter, "Mr. Justice Holmes and the Constitution" (1941) 41 Harv. L.R., reprinted in Felix Frankfurter ed., *Mr. Justice Holmes* (New York, Conrad-McCann, Inc.) 46 at pp. 54–55.

5 See Kassan, "Louis Dembitz Brandeis—In Memoriam" (1971) 6 Is.L.R. 447 at 452.

6 187 U.S. 606 (1903).

Speaking for the majority of the Court, Holmes J. sustained the validity of a section of the California constitution prohibiting contracts for the sale of mining stock on margin or for future delivery. The principal objection to the provision in question was the argument that it unduly restricted liberty and property in violation of the first section of the Fourteenth Amendment of the Constitution of the United States.[7] Conceding that the States are not free to interfere arbitrarily with "private business or transactions", Holmes J. advised judges against the temptation of deciding cases on the basis of their own general economic or ethical views. One paragraph in particular contained the clue to much that was to come from Holmes later with growing sharpness, often in dissent.

> It is true, no doubt, that neither a state legislature nor a state constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts... But general propositions do not carry us far. While the courts must exercise a judgment of their own, 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 relatively 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 ubique et ab omnibus*.[8]

Surely *Otis* v. *Parker* did not concern any of the really controversial manifestations of governmental action in the field of economic or social melioration. But Holmes J.'s first opinion as a member of the U.S. Supreme Court presaged the stand he was to take in more bitterly contested cases. In retrospect, it may be looked upon as the epitome of the attitude he was to exhibit toward the chief constitutional struggle into which the Court was more and more being drawn between the two powers—the Union and the States.

"On both these two basic problems of constitutional law—the power of the States and the Power of the Nation", Professor Frankfurter observed in 1916, "Mr. Justice Holmes' influence has been steady and consistent and growing. His opinions form a coherent body of constitutional law, and their

7 This amendment reads: "Sec. 1 ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

8 187 U.S. 606, at p. 608.

effect upon the development of the law is the outstanding characteristic of constitutional history in the last decade".[9]

Interpretation of the Constitution

Since the Court must interpret the law, it is the judge and not the legislator who is in fact, often the law-giver. This is particularly true of Constitutions, which are couched in broad, general terms, such as "liberty", and "property"; "due process of law" and "equal protection of the laws". Just how far the provision of the American Constitution that gives Congress control over interstate and foreign commerce limits the rights of the States, admits of wide differences of opinion. The answers given are likely to affect the interests and stir the feeling of the community. Moreover, the Court, while in form it is concerned merely with construction, in practice necessarily at times must seek to control the government of a State or the Federal Executive or Legislature. Such power inevitably involves danger both of excessive exercise by the Court and of unreasonable resentment in those who are restive under its control. During his entire judicial career, Holmes J. established the rule that no statute should be held unconstitutional except when the case admitted of no other result. He consistently refused to attempt unduly to narrow the power of the Legislature. In the history of the United States Supreme Court many of the justices have adhered to this principle. It was only natural that some justices should seek where possible to hold some statutes inconsistent with constitutional provisions. Holmes J. said:

> It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half of his fellowmen to be wrong. I think that we have suffered from this misfortune, in State courts at least, and that this is another and very important truth to be extracted from the popular discontent. When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought, and still think, that fear was translated into doctrines that had no proper place in the Constitution or the common law. Judges are apt to be naive, simple-minded men, and they need something of Mephistopheles. We, too, need education in the obvious—to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law.[10]

9 Frankfurter, "The Constitutional Opinions of Mr. Justice Holmes" (1915–16) 29 Harv. L.R. 683, 684.

10 "Law and the Court", speech at a dinner at the Harvard Law School Association of New York on 15 Feb., 1913, reprinted in *Speeches of Oliver Wendell Holmes* (Boston, Little, Brown & Co., 1913) 98–103.

As here suggested, the State Courts were perhaps the ones to go farthest, but the Supreme Court of the United States was not immune from the same tendency.

Justice Holmes — a Liberal

It was indeed the Supreme Court's more extreme interpretations which stirred Holmes J. to some of his most pungent protests against the abuse of judicial power and which gave him his reputation as a "liberal". The most celebrated of these protests in the early period was doubtless his dissenting opinion in *Lochner* v. *New York*. There is hardly a law student who does not make his acquaintance with Holmes J. through this classic opinion, also known as "Long Hours and Liberty".

Lochner v. *New York*[11]

In this case, by a bare majority of five to four, the Supreme Court set aside a New York law which prohibited employment in bakeries for more than ten hours a day or sixty hours a week.

A baking company in Utica, which was fined twice for violating the law, contended that the statute contravened the Constitution by being class legislation and denying "equal protection of the laws".

According to Peckham J. who wrote the opinion for the majority, the question indeed was which of the two rights should prevail: the police power of the State or the sacred freedom to contract. Peckham J. called the Act in question a "meddlesome interference with the rights of the individual" holding that the right to purchase or sell labour was part of the liberty guaranteed by the constitution. Peckham J. deplored the spread of such laws in the various states and believed that the motive for them was not so much to protect health as to regulate the hours of labour, remarking that "... almost all occupations affect health more or less.... Clean and wholesome bread does not depend on whether a baker works but ten hours per day or only sixty hours a week".[12] This was the majority view. But on the other hand, the majority decision was wholly inconsistent with the principle adopted by the Court in *Holden* v. *Hardy*,[13] a case decided only seven years earlier when the Court sustained a Utah statute establishing an eight-hour day for mine workers. One sentence from Brown J.'s opinion will suffice: "These employments, when too long pursued, the legislature has pledged to be detrimental to the health of the employees, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal Courts".[14] Since the

11 198 U.S. 45, 65, 74 (1905).
12 *Ibid.*, at p. 57.
13 169 U.S. 366 (1898).
14 *Ibid.*, at p. 395.

facts in the *Lochner* case were also concerned with a law intended to protect the health of employees by limiting their hours of labour, it is difficult to explain the Court's failure to adhere to the principle of its decision in *Holden* v. *Hardy*.

A technically smart answer might be that the majority had in mind that bakers enjoy a constitutional right to contract to work for as long as they pleased. But again, the Court's dilemma originated from the fact that its decisions recognized the right of the States to restrict the individual's freedom of contract in the interest of the public. What then stimulated the Court to refuse to treat the ten-hour law as either a health law or one intended to safeguard the public?

Peckham J. addressed himself to both issues: "There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labour law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation".[15] Turning to medical expertise, Peckham J. stated that: "We think that there can be no fair doubt that the trade of the baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor and with the right of free contract on the part of the individual, either as employer or employee . . . To the common understanding, the trade of a baker has never been regarded as an unhealthy one".[16]

Harlan, White, Day and Holmes JJ. dissented. Because of its eloquence and its insight into the deeper philosophic issue, Holmes J.'s dissent was described by Dean Roscoe Pound shortly after its delivery as the "best exposition" of sociological jurisprudence,and was, soon after that to become "classical".[17] The dissent will bear quoting liberally even at this late date:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, be-

15 198 U.S. at p. 57.

16 *Ibid.*, at p. 59.

17 Pound, "Liberty of Contract" (1909) 18 Yale L. J. 454. Reprinted in *Two Selected Essays on Constitutional Law* 208, 231.

> cause I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinion in law... The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been the shibboleth[18] for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.... Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez-faire*. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.
>
> General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.... I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health—men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work.[19]

The debate in the *Lochner* case—between Peckham J. and the dissenters Holmes, Harlan, White and Day JJ.—continues to serve as a most instructive lesson in the intellectual tug of war which the police power cases were bringing to the fore. In pointing up the possibility that the different notions as to the "liberty" guaranteed by the Constitution were the fundamental cause of division in the Court, it enhanced our understanding of the real roots of judicial decisions.

With respect, this writer takes leave to say that in light of the outcome in *Holden* v. *Hardy*,[20] the *Lochner* majority decision was "reactionary" even for its day.

Despite the fact that the cases in which state laws were held invalid under the Fourteenth Amendment[21] were not so numerous, the "evil" of which the

18 Judges 12:6.
19 198 U.S. 45, 74 at pp. 75–76.
20 166 U.S. 366 (1898).
21 See *supra* n. 7.

Lochner decision became a symbol cannot be understood or measured by mere statistics. Excpetions are sometimes more revealing than the general rule. The spectacle of the United States Supreme Court losing all sense of reality about a vital human and social problem was bound to hurt the Court's standing with the public. If the resulting dissatisfaction damaged the Court as the highest tribunal of the land, the wound may be said to have been "self-inflicted".[22]

It is well-known that many of the cases concerned with the legal rights of labour involved issues towards which Holmes had revealed a progressive and enlightened view as long ago as when he served on the bench of the Supreme Judicial Court of Massachusetts, as shown in the following case:

Vegelahn v. *Guntner*[23]

The opinion in this case is chiefly of importance because of Holmes' challenging dissent. It contains the germ of much of what followed in his thinking both on economic topics and on civil liberties.

A union called a strike to secure better wages and working hours. They established a picket line to back up the strike, to persuade loyal workers to join them and to discourage new employees from accepting jobs. By that time, it was evidently well settled law in Massachusetts that strikes for direct objectives like higher wages and shorter work hours were lawful. The issue before the Court in this case was the propriety of an order forbidding peaceful picketing—a patrol posted outside the employer's premises merely to accost and speak to persons leaving and proposing to enter the plant. A majority of the Court thought the order was proper. Allen J., for the majority, sustained a sweeping injunction forbidding picketing by strikers. Although there was no evidence of violence, the Court seemed to assume that the mere presence of the pickets necessarily carried with it the threat of force. The attempt to persuade persons looking for jobs not to enter the plant was a form of moral intimidation and therefore no part of lawful competition. Holmes and Field disagreed. Field C.J. thought it unwise to prevent a striker from trying to dissuade applicants from applying for jobs, by simply relating the truth, believing it "a dangerous principle to leave his liability to be determined by a jury upon the question of his malice or want of malice". Holmes said that he did not think, that "two men, walking together up and down a sidewalk and speaking to those who enter a certain shop, do necessarily and always thereby convey a threat of force".[24] Furthermore, he raised some broad issues in stating what he called "the less popular view". He denied the Court's assumption that the patrol necessarily implied a threat of

22 Hughes, *The Supreme Court of the United States* (Long Island, Garden City Publishing Co., 1936) 50.

23 167 Mass. 92, 104 (1896).

24 *Ibid.*, at p. 105.

bodily harm to anyone. Conceding the infliction of temporary damage and the proposition that it is actionable unless justified, he observed that the law recognizes justification in countless instances. The passages in which Holmes' ideas were set forth have continued to serve as one of the chief sources of commentary on his fundamental economic outlook. At the peak of his dissent he used language which has been for many years widely quoted, as follows:

> It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever-increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.
> One of the external conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is potent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.[25]

When it is considered that Holmes wrote this in 1896, its tolerance and its penetrating wisdom are those of a true legal prophet.[26]

The First Child Labour Case (*Hammer* v. *Dagenhart*)[27]

Shortly after Brandeis joined the United States Supreme Court,[28] he agreed, with one of the most moving opinions, from a humanitarian standpoint, written by Holmes J. This dissenting opinion may be seen as presaging the kinship between the two justices on constitutional questions. The opinion contains ideas which help explain why Holmes and Brandeis so often reached the same results.

Early in the century many States began to pass eight-hour laws for children. Strangely enough, this put a premium on backwardness, since mills and factories moved to the States where they could get cheap child labour. As Congress could not enter a State and forbid factories to employ children

25 *Ibid.*, at p. 108.

26 Suggestive of a definite economic philosophy as these observations were, they did not quite convey the whole of it. Alongside these observations must be placed the ideas revealed by Holmes in a case—again in dissent—which is in a very real sense a companion to *Vegelahn* v. *Guntner*, though decided four years later, namely: *Plant* v. *Woods* (176 Mass. 492, 504 (1900)).

27 247 U.S. 251 (1917).

28 *Re* the battle preceding this appointment see Kassan, *op. cit. supra* n. 5 at p. 447.

under fourteen, in the interests of uniformity and spurred by an awakened social consciousness, the Keating-Owen Act was passed in 1916. This act prohibited the transportation in interstate commerce of any products from factories in which children were employed, under the conditions described by Holmes J. in his opinion. The Act became effective in 1917, and almost immediately was put to the test in North Carolina.

Dagenhart had two sons, one under fourteen and one between fourteen and sixteen. Both of them were working in a North Carolina textile mill, where they were allowed to work under the State law (forbidding child labour under twelve), but who were affected by the federal law, namely by the Keating-Owen Act. The father sued for an injunction against Hammer, United States Attorney for Western District of North Carolina, to prevent him from enforcing the law. The district court held the law unconstitutional and the Supreme Court affirmed the judgment by a five-to-four decision. Day J. wrote the majority opinion and Holmes J. was joined in dissent by McKenna, Brandeis and Clarke JJ. An argument employed in opposition to the Act was: "Has Congress absorbed the police power of the State? In that event it is difficult to see what is left to the States".

The controlling question, said Day J., was whether Congress had overstepped its authority, and he added: "The act in its effect does not regulate transportation among the States but aims to standardize the ages at which children may be employed in mining and manufacturing within the States.... The goods shipped are of themselves harmless.... In interpreting the Constitution it must never be forgotten that the Nation is made up of States to which are entrusted the powers of local government."

The majority of the Court felt that if the Act were not held invalid these powers might finally be eliminated and "our system of government be practically destroyed".[29]

In opening his dissent, Holmes J. declared:

> The single question in this case is whether Congress has power to prohibit the shipment in interstate of foreign commerce of any product of a cotton mill situated in the United States, in which within thirty days before the removal of the product children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in any week, or between seven in the evening and six in the morning.
> The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them.... I agree to it and suppose that no one denies it. But if an Act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have... I should have thought that

29 247 U.S. 251 at pp. 271–272.

> that matter had been disposed of so fully as to leave no room for doubt.[30]
>
> . . .
>
> The act does not meddle with anything belonging to the States. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its uderstanding by all means at its command.[31]

Holmes' dissent is primarily an argument against the injection into judicial decisions of such personal views of social policy.

"This opinion is one of Holmes' most powerful, both in its analysis of the distribution of powers under the federal system and in his marshalling of precedent".[32]

Almost a quarter of a century later, the Supreme Court overruled its majority decision of this case, when Stone J. spokesman for a unanimous Court, in effect adopted Holmes' dissent, which he characterized as "powerful and now classic".[33]

"What is law? What is its origin? What are its capacities and its limits? What its ends and aims, the purpose of its being? Is a legal concept a finality, or only a pragmatic tool? Shall we think of liberty as a constant or better, as a variable that may shift from age to age? Is its content given us by deduction from circumstances of time and place? Shall we say that restraints and experiments will be permitted if all that is affected is the liberty to act, when experiment or restraint will be forbidden if the result is an encroachment upon liberty of thought or speech? Are the origins of a precept subordinate to its ends, or are ends to be sacrificed if to adhere to them is to be unfaithful to beginnings"?[34]

How Holmes J. answered these questions can best be seen in his dissenting opinions in the following three cases in which he was joined by Brandeis J.:

Abrams and others v. *United States*:[35] When American troops were sent into Russia after the revolution in 1917, a group of Russian-born people met in a basement room in New York and printed a few thousand leaflets of protest.

These leaflets were distributed secretly, and some of them fell into the hands

30 *Ibid.*, at p. 278.

31 *Ibid.*, at p. 281.

32 Max Lerner, *The Mind and Faith of Justice Holmes* (New York, Modern Library, 1954) 166–67.

33 *U.S.* v. *Darby*, 312 U.S. 100 (1941).

34 These queries were asked by Benjamin Cardozo, the Chief Judge of New York, Court of Appeals, in his masterly contribution to *Mr. Justice Holmes, op. cit. supra* n. 4 at pp. 6–7.

35 250 U.S. 616, 624 (1919).

of the Department of Justice. Four men and a girl were convicted and sentenced to twenty years in prison.

The indictment contained four counts charging conspiracy of four different categories, and was wholly founded upon the publication of two leaflets.

One of these leaflets said that the President's cowardly silence about the intervention in Russia revealed the hypocrisy of the plutocratic gang in Washington. It intimated that "German militarism combined with allied capitalism to crush the Russian revolution". It said that there was only one enemy of the workers of the world and that was capitalism. The leaflet ended with the words "Awake! awake! You workers of the world!".

The other leaflet headed "Workers—Wake Up"! with abusive language said that America together with the Allies would march for Russia to help the Czecho-Slovaks in their struggle against the Bolsheviks. After a few sentences on the spirit of revolution, it ended by saying: "Workers, our reply to this barbaric intervention has to be a general strike!" It concluded ". . . woe unto those who will be in the way of progress. Let solidarity live!! The Rebels". By a vote of seven to two, the Supreme Court upheld the conviction of Abrams and his fellow accused. The problem of the majority was to establish the "specific" intent of the accused to hinder the war with Germany. Clarke J. met the challenge and his reasoning was as follows: "It will not do to say . . . that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States, for the obvious effect of this appeal, if it should become effective, as they hoped it might, would be to persuade persons . . . not to aid government loans and not to work in ammunition factories".[36]

The Court said that evidence was plentiful that the "defendant alien anarchists" intended to provoke resistance to the United States in the war. Holmes thought that evidence was meagre. His dissent is much more than an attempt to refute Clarke's logic on the crucial issue of intent. It is a passionate defence of the high value of freedom of expression.

He advanced two reasons for questioning the soundness of the court's decision. In the first place, he was not convinced that the Governmnt had proved that the accused actually intended to "hinder or to cripple the United States in the prosecution of the war" against Germany, as they were charged. He wrote:

> I am aware of course that the word "intent" as vaguely used in ordinary legal discussion means no more than knowledge at the time of

36 *Ibid.*, at p. 621.

> the act that the consequences said to be intended will ensue . . . even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could forsee them or not.[37]

But he called for a new view of the meaning of 'intent", maintaining that an accused person ought not to be charged with having done something with the intent of bringing about the illegal result "unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind".

Holmes could not find in the words of the accused any evidence of an "actual intent" to commit the offences with which they were charged. There was "no hint of resistance" to the Uniter States in its war, since the "resistance" within the meaning of the Espionage Act must be "some forcible act of opposition to some proceeding of the United States in pursuance of the war".

His second reason for dissenting—probably his fundamental objection—was that the facts of the case did not establish that the words used in the leaflets gave rise to any clear and present danger that the unlawful objectives would be realized.

Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without any follow-up, would present any immediate danger or in any way hinder the success of the Government arms production.[38]

The imposition of a twenty years prison sentence apparently only served to convince Holmes J. that the accused were convicted not because of the alleged danger flowing from their conduct but for the ideas they advocated.

> In this case sentences of twenty years' imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from "these poor and puny anonymities" to turn the color of legal litmus paper—I will add, even if what I think the necessary intent were shown—the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow—a creed that I believe to be the creed of ignorance and immaturity when honestly held, as I see no reason to believe that it was held here, but which, although made the subject of examination at the trial, no one has a right even to consider in dealing with the charges before the Court.[39]

37 *Ibid.*, at pp. 626–27.
38 *Ibid.*, at p. 628.
39 *Ibid.*, at pp. 629–30.

To sum up, Holmes J. expressed the view that every belief and every opinion must be open to criticism and attack, and is entitled to survive only if it can hold its own in the market-place of ideas, and it was only in such free expression that he saw the hope of future progress.

When Holmes spoke of freedom his words had a touch of passion. In theory, indeed, he recognized that the principle of free speech is itself debatable, but his life and writings show that he accepted it as a guide of conduct.

"The [American] Nation that was called into being by the [American] Constitution was adequately endowed to meet growth and change, and to maintain its dignity among the peoples of the world. But the Constitution was also the product of great historic conflicts. It sought to guard against the recurrence of historic grievances by prefering the risks of tolerance to the dangers of tyranny. Mr. Justice Holmes has been faithful to this tradition, and his dissenting opinion in the *Abrams* case will live as long as English prose has power to thrill".[40]

"In closing the dissent, Holmes penned three paragraphs on the worth of freedom of thought which inevitably has led observers to compare his *Abrams* dissent with the great tracts on toleration. It is likely to endure as long as human freedom remains a faith which men live by".[41] The passage reads as follows:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with

40 Felix Frankfurter, "Mr. Justice Holmes and the Constitution" in *Mr. Justice Holmes, supra* n. 4 at p. 72.

41 Samuel J. Konefsky, *The Legacy of Holmes and Brandeis* (MacMillan, New York, 1956) 207.

> the lawful and pressing purposes of the law that an immediate check is required to save the country.
> I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law... abridging the freedom of speech". Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States.[42]

Anarchism: Doctrine and its Enforcement

Gitlow v. *People of New York*:[43] The appellant, a member of the left wing of the Socialist Party and later a leader of the Communist Party, was convicted in the New York courts for violating the State's Criminal Anarchy Act of 1902, which the New York Legislature has adopted following the assassination of President McKinley by a supposed anarchist. It defined criminal anarchy as the "doctrine that organized government should be overthrown by force or violence... or by any unlawful means". It made the advocacy of such a doctrine either in print or by word of mouth punishable as a felony. Gitlow and three others were accused of having written a pamphlet called "The Left Wing Manifesto". They were also charged with having printed and distributed it in the paper called "The Revolutionary Age". The manifesto first spoke of some recent revolutionary struggles, and then called for destruction of the bourgeois parliamentary State by "establishment of the dictatorship of the proletariat".

Sanford J. wrote the Supreme Court decision, which affirmed Gitlow's conviction. Holmes and Brandeis JJ. dissented. Sanford J. stated in his judgment that the manifesto condemned "moderate socialism" for recognizing the necessity of the democratic parliamentary state; it repudiated the policy

42 For Holmes J.'s interpretation of the freedom of speech guaranteed by the Constitution, see the comments upon this case by Sir Frederic Pollock in (1920) 36 L.Q.R. 334. It will be of interest to note that Dean Pound and Professors Frank Sayre, Edward Adams (the Librarian), Zach Chafee and Felix Frankfurter, all of Harvard University, "signed a petition to the President of the United States to commute to lower sentences the heavy sentences which Holmes in his dissenting opinion so strongly condemned, though he could not do anything about it". *Felix Frankfurter Reminisces* (Reynal and Co., New York, 1960) 176.

43 268 U.S. 652, 672 (1925).

of introducing socialism by legislation; advocated "Communist Revolution", class struggle, the mobilizing of "the power of the proletariat", mass industrial revolts, political strikes, "revolutionary dictatorship of the proletariat".

The chief issue on which the Court divided is suggested by Sanford J.'s summary of the main argument against application of the Criminal Anarchy Act to what Gitlow said and did. "The sole contention", Sanford stated, "is essentially, that as there was no evidence of any concrete result flowing from publication of the Manifesto or of circumstances showing the likelihood of such result, the statute as construed and applied by the trial court penalizes the mere utterance, as such, of "doctrine" having no quality of incitement, without regard either to the circumstances of its utterance or to the likelihood of unlawful sequences". Over and over again, Sanford attempted to show that Gitlow was not convicted for the ideas or "doctrine" he advocated. He pointed out that the statute does not penalize the utterance or publication of abstract "doctrine" or academic discussion having no quality of incitement to any concrete action. "It is not aimed against mere historical or philosophical essays. It does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by unlawful means.... It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose".[44]

In order to prove that the accused was convicted because of the action called for by the Manifesto and not because of the principles it urged, Sanford J. quoted the two concluding sentences of the Manifesto: "The proletarian revolution and the Communist reconstruction of Society—the struggle for these—is now indispensable.... The Communist International calls the proletariat of the world to the final struggle".

"Was this a call to action", he asked, "or was it a restatement of traditional Marxist ideology?" To the majority of the Court it was a dangerous summons to immediate action. After quoting the final sentences from the Left Wing Manifesto, Sanford declared: "This is not the expression of philosophical abstraction, the mere prediction of future events; it is the language of direct incitement".[45] And later he added: "That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear.... The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweller's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration . . .".[46]

44 *Ibid.*, at pp. 666–5.

45 *Ibid.*, at p. 665.

46 *Ibid.*, at p. 669.

Holmes replied that Mr. Justice Brandeis and he are of opinion, that this judgment should be reversed. Holmes' retort to the talk of "incitement" was simply that "every idea is an incitement". But his fundamental quarrel with the majority can be deduced from his assertion that Gitlow's Left Wing Manifesto "had no chance of starting a present conflagration". In his view, the Court's decision failed to meet the test of clear and present danger. He continued:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that [the State] has a right to prevent.... It is true that this criterion was departed from in *Abrams* v. *United States*,[47] ... [but] the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that [they] have settled the law.[48]

If his test were applied correctly, Holmes maintained, it would be obvious that Gitlow's pamphlet said things which looked to "some indefinite time in the future", and did not urge immediate destruction of the Government. He saw "no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared Gitlow's views".[49]

Holmes rejected Sanford's easy assimilation of revolutionary speech into revolutionary action and expressed the belief that "the only meaning of free speech" is that even the advocacy of "proletarian dictatorship" must be tolerated:

> It is said that this Manifesto is more than a theory, that it was an incitement. Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.

Here could be seen Holmes' growing sense that men could do little by repression to divert the movement of events. This is sharply illustrated in the following paragraph:

> If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.[50]

47 See *supra* at n. 35.
48 *Supra* n. 43 at pp. 672–3.
49 *Ibid.*
50 *Ibid.*

In conclusion, Justice Holmes added a new element to the measure of clear and present danger—an "attempt" to bring about the evil apprehended. Hence he ended his opinion by saying:

> If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future, it would have presented a different question. The object would have been one with which the law might deal, subject to the doubt whether there was any danger that the publication could produce any result, or in other words, whether it was not futile and too remote from possible consequences. But the indictment alleges the publication and nothing more.[51]

"Freedom for the Thought that we Hate"

The Rosika Schwimmer Case:[52] Holmes J., who was thrice wounded in the Civil War, and who believed that war was both "inevitable and rational"[53] showed his objectivity as a judge when he dissented in this case. He himself a vigorous anti-pacifist sought to uphold the right of a pacifist to become naturalized as an American citizen.

Mrs. Schwimmer, a woman of fifty or over, was denied U.S. citizenship because she stated in her application that she would not take up arms for the United States. She was willing to swear allegiance and do everything that a citizen might be called upon to do, except to go to war. Hence, the Naturalization Act of 1906 was applied. This Law required applicants to "support and defend the Constitution and the laws of United States against all enemies" and to satisfy the court of their attachment to the principles of the Constitution.

The Federal District Court doubted that this person held those principles dear and her application was denied. On the other hand, the Circuit Court of Appeals held that women were incapable of bearing arms. The Department of Justice appealed, arguing that Mrs. Schwimmer's incapacity because of her sexual status was immaterial; her attitude towards the Government's defence "with its necessary influence on others" was the vital matter: "in time of war she would be a menace to the country. If every citizen believed, as she does and acted as she will, we would have no Constitution and no Government".[54]

51 *Ibid.* It might be of interest to note, that following Holmes J.'s dissenting opinion, the appellant (Gitlow) was pardoned by Governor Smith of New York and then Gitlow broke away from the Communist party and became one of its bitterest critics. See Max Lerner, *supra* n. 32, at p. 324. Furthermore, in 1951 Frankfurter J. remarked, "... it would be disingenous to deny that the dissent in *Gitlow* has been treated with the respect usually accorded to a decision" (concurring in *Dennis* v. *United States,* 341 U.S. 494, 517 at p. 541.)

52 *United States* v. *Schwimmer* 279 U.S. 644, 653 (1928).

53 Holmes-Pollock, *Letters* vol. 2, p. 230.

54 *Ibid.*, at p. 653.

Six Justices of the Supreme Court accepted that view. This self-described uncompromising pacifist, who classed herself with male conscientious objectors and asserted she had no sense of nationalism, was said by Butler J. to be lacking in "that attachment to the principles of the Constitution of which the applicant is required to give affirmative evidence by the Naturalization Act". He held it a fundamental duty to defend the Government by force of arms; it was important to find out whether an alien applying for citizenship held beliefs opposed to the discharge of that duty; "The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms. The fact that, by reason of sex, age or other cause, they may be unfit to serve does not lessen their purpose or power to influence others".[55] Holmes J. disagreed and was supported by Brandeis J. Holmes wrote:

> The applicant seems to be a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States. It is agreed that she is qualified for citizenship except so far as the views set forth in a statement of facts referred to by Mr. Justice Butler. These views [are] ... an extreme opinion in favour of pacifism and a statement that she would not bear arms to defend the Constitution. So far as the adequacy of her oath is concerned I hardly can see how it is affected by the statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to. And as to the opinion, the whole examination of the applicant shows that she holds none of the now-dreaded creeds but thoroughly believes in organized government and prefers that of the United States to any other in the world....[56] Surely it cannot show lack of attachment to the principles of the Constitution that she thinks it can be improved. I suppose that most intelligent people think that it might be.

This opinion was his last dissent in a free speech case. In one sentence,[57] frequently quoted ever since, he concentrated what is perhaps the very core of his philosophy of toleration:

> Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within, this country.[58]

55 *Ibid.*

56 *Ibid.*

57 *Ibid.*, at pp. 654–5.

58 This dissenting opinion became eventually the majority view of the U.S. Supreme Court. In the case *Re Summers* (325 U.S. 56, decided in 1945) Reed J.,

Trial by Mob

Frank v. *Mangum, Sheriff of Fulton County, Georgia*:[59] In this case Holmes J. wrote one of his famous dissents in the field of the administration of criminal justice, which eventually became the prevailing doctrine in the courts of the United States.

Judge Charles E. Wyzansky of New York expressed his view that Holmes' J. contribution in this field of criminal justice may have been more significant than his role in free speech cases. Judge Wyzansky wrote: "To my mind the most important change [the twentieth century has brought in Holmes' viewpoint and later in that of the majority of the Court] was not in the field of free speech as is sometimes asserted. It was the recognition that fair procedure in criminal trials conducted in State as well as federal courts is a civil liberty so fundamental to our democracy that it is covered by the constitutional assurance of 'due process'. When this point was first pressed it was denied by the Supreme Court of the United States. Indeed, as recently as 1915, in *Frank* v. *Mangum,* where the defendant has been convicted by a Georgia State jury which was terrorized by a mob surrounding the courtroom, only Holmes and Hughes JJ. thought that the Federal Supreme Court was warranted in involving the due process clause or any other constitutional provision to set aside the sentence. The majority view was that so long as the state authorities outwardly followed the established form of trial the defendant could not successfully assert that his constitutional rights had been impaired by what was in substance lynch law. Today the dissent of Holmes is regarded as almost self-evident. And from Holmes' doctrine have stemmed the myriad of cases which lay down as fundamentals of our democratic system protected by the Supreme Court, the right of a defendant in any criminal court in the land to a trial which is open to the public and free of inside pressure, which admits no evidence secured by torture or by third degree methods or by perjury known to the prosecution and which assures a defendant the right to the assistance of counsel in meeting a charge of undesirable gravity".[60]

The hearing before the Supreme Court attracted national attention, with Mr. Louis Marshall appearing for the accused.[61] The Supreme Court,

who spoke for the majority, relied on this opinion. Four Justices dissented in the *Re Summers* case. They were: Black, Douglas, who was Brandeis' successor, Murphy and Rutledge.

59 237 U.S. 309, 345 (1915).

60 Wyzansky, "The Democracy of Justice Oliver Wendell Holmes" reprinted in Julius J. Marke, ed. *The Holmes Reader* (Oceana Publications, New York, 1955) 263.

61 Louis Marshall (1856–1929), American born U.S. lawyer and Jewish community leader best known for his efforts to extend religious, cultural and political freedom to all racial, religious and linguistic minorities. He achieved eminence as an

in a long majority opinion by Pitney J. upheld the District Court. However, the majority opinion did not remain court doctrine long. Eight years later, in 1923, it was in effect overruled in *Moore* v. *Dempsey*[62] by a majority opinion, written by Holmes J.

The Holmes-Brandeis Tradition

After Brandeis joined the Supreme Court in 1916, he was often associated with Justice Holmes in dissent. Soon the American people spoke of them, almost interchangeable, as the two liberals of the Court, or as the two "great dissenters". Brandeis brought to the Court a fierce determination that nothing should destroy the right of criticism upon which democratic change depends. One may guess that in this association Brandeis helped enrich Holmes' grasp of the social values of the problem and Holmes' contribution was to give the conception sharpness of legal contour and his unique gift of form.[63] They both shared a common devotion to the ideals of democracy and individual liberty. They have not only furnished the highest expression, but they have been the very source and the intellectual leaders of liberalism in the United States.

It was their common approach to the judicial task which brought about the harmonious relationship between Holmes, the aged philosopher and the "constitutional skeptic" of the bench and Brandeis, the keen fact-finder and crusader for human rights. This approach is strikingly illustrated in many of their opinions, which found them together in dissent.

Regardless of the nature of the case—whether they were differing with their colleagues over the importance of common law principles, the interpretation of statutes, or the fact of constitutional limitations—these two justices usually put into their opinions some criticism of the judicial process itself.

In terms of political theory, Holmes believed that whether wise or not, the proximate test of a good government is that the dominant power has its way,[64] that the sovereign people, speaking through their authorized agent—the legislature—can, in general, embody their opinions in law; that there is nothing in the Constitution to prevent their doing so.

Brandeis, too, advocated the right of the legislature to experiment in things social and economic, yet he believed that the legislature can embody popular experiments in law only when such enactments conform with certain standards of social justice.

Both these men frequently reached the same goal in considering con-

appellate lawyer, and made many important contributions to legal and constitutional reforms.

62 261 U.S. 86 (1923).

63 See Max Lerner, *op. cit. supra* n. 32 at xliv, xlv.

64 Oliver Wendell Holmes, *Collected Legal Papers* (1920) 258.

stitutional issues, not necessarily always travelling the same route. If Brandeis sustained social legislation, it is because he believed it desirable and expedient as well as constitutional, whereas Holmes' fundamental belief in the right of States to make social experiments on occasion led him to uphold legislation even though the particular experiment seemed "futile or even noxious".[65] One good illustration of their divergent lines of thought and methods occurred in the case of *Meyer* v. *Nebraska.*[66]

As an aftermath of anti-German feeling of the First World War, some of the middle western states in the United States such as Nebraska, Iowa and Ohio, adopted laws prohibiting the teaching of German in the primary schools. The law in Ohio was specifically so phrased. The laws in Nebraska and Iowa forbade the use of any modern language except English in teaching.

Meyer, a teacher in a parochial school was convicted under the Nebraska statute for teaching a child of ten the German language.

McReynolds J. spoke for the majority, which included Brandeis J. It held that the Nebraska Law deprived Meyer of the "liberty" guaranteed to him by the Fourteenth Amendment.

The judgment of the court refers to certain aspects included in the conception of liberty which the state of Nebraska was unreasonably curtailing. "Without doubt it [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men".[67]

Finally, by declaring the statute to be invalid, the Court was denying to the legislature the right to use a particular educational device for achieving the legitimate purpose it had in mind. "Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means".[68]

Holmes J. appreciated the objection to the Nebraska Law, but he felt that it dealt with a matter concerning which "men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried".

He opened his dissent by saying:

> We all agree, I take it, ... that it is desirable that all the citizens of

65 Dissenting in *Truax* v. *Corrigan,* 257 U.S. 312 at 344 (1921).
66 262 U.S. 390 (1923).
67 *Ibid.,* at p. 399.
68 *Ibid.,* at p. 401.

> the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one.[69]

The only debatable point, he agreed, was the lawfulness of the means adopted toward that end, and as to that he felt that the Court should defer to those better acquainted with local conditions:

> It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the Act, with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the State where a child would hear only Polish or French or German spoken at home, I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school.[70]

The simple statistical fact is that most of the time Holmes and Brandeis were together on such issues as civil liberties cases. How to explain that in this particular case they were not convinced to think alike?

It appears to the present writer that Max Lerner's view on the case would seem to be the correct one. "There have been some who have expressed surprise at Holmes' opinion [in this case and in the case of *Bartels* v. *Iowa,* 262 U.S. 404, 412 (1923), which were considered together by the Court, and both those two cases involved similar state laws] on the ground that his civil liberties views should have put him on the side of freedom of teaching, and therefore against the validity of the statutes, as his liberal colleague Justice Brandeis was. Yet I feel that Holmes had a consistent position. He believed in judicial tolerance of state legislative action, even when he disapproved of the state policies. The question here again, as in so many of the economic cases, was whether the end the state sought to achieve was legitimate, and whether the means were not unreasonable in relation to the end. The end, as he saw it, was to further national cohesion by aiming at a common language in childhood, especially where (to use the words of the majority decision) 'certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere'. And the means . . . were not unreasonable".[71]

Conclusion

At a dinner given by the Boston Bar Association to Chief Justice Holmes of the Supreme Judicial Court of Massachussets, on 7 March 1900, two

69 *Ibid.,* at p. 412.
70 *Ibid.*
71 Max Lerner, *op. cit. supra* n. 32, at p. 318.

years before his elevation to the United States Supreme Court, in his reply to the toast, he asked what he had to show for this half lifetime that had passed.

> I look into my book in which I keep a docket of the decisions of the full court which fall to me to write, and find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly half a lifetime! A thousand cases, when one would have liked to study to the bottom and to say his say on every question which the law ever has presented, and then to go on and invent new problems which should be the test of doctrine, and then to generalize it all and write it in continuous, logical, philosophic exposition, setting forth the whole corpus with its roots in history and its justifications of expedience real or supposed.
>
> Alas, gentlemen, that is life. I often imagine Shakespeare or Napoleon summing himself up and thinking: "Yes, I have written five thousand lines of solid gold and a good deal of padding—I, who have covered the milky way with words that outshone the stars!! Yes, I beat the Austrians in Italy and elsewhere; I made a few brilliant campaigns, and I ended in middle life in a cul-de-sac—I, who had dreamed of a world monarchy and Asiatic power". We cannot live our dreams. We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done.[72]

This speech reads like a peroration. In fact it was a prelude to the richest maturity of Mr. Justice Holmes' life. Thirty more years on the Supreme Bench, over a thousand more opinions. To be sure, some of his weightiest utterances were dissenting opinions, but they are dissents that record prophecy and shape history. Of this body of constitutional adjudications, doubtless Mr. Justice Holmes would say what he said of his work on the Massachusetts Court. Then he would have paused, thinking perhaps his words sounded inadequate. How could he sum up in one sentence, work of nearly half a century? He might then have added, as he once said: "And never forget, 'life is painting a picture, not doing a sum'."[73]

72 Holmes, *op. cit. supra* n. 64 at pp. 245–6.

73 "The Profession of the Law" in *Speeches of Oliver Wendell Holmes* (1934) 24–25.