WILLIAM E. CONKLIN

The Political Theory Of Mr. Justice Holmes

INTRODUCTION

The Anglo-Canadian lawyer generally relies upon judicial decisions, statutes, regulations, constitutional documents and texts as the basic resource material for the law. The lawyer seeks out the *ratio decidendi* of earlier decisions, he distinguishes one decision from another in order to attain consistency, and he analogizes in hard cases where past precedents are silent with respect to an issue or where two lines of precedents collide with each other. This process of analysis, it is assumed, will bring us closer to what constitutes "the law". Possibly insights do flow from such analysis; but the possibility always remains that the lawyer has failed to open dark closets of resource material which might well provide alternative interpretations of the law and its makers. This essay attempts to show this possibility is a very real one with respect to an analysis of the judicial decisions of one particular judge.

The judge I have chosen is an American one. The reader may, at this point, characteristically react much as our Supreme Court judges respond when mention is made of American legal doctrine, precedents or writings: our Constitution is different than the American's, so the argument goes; therefore, whatever an American judge says with respect to any constitutional or civil liberties issue is irrelevant to Canada. This generalization is, of course, very debatable in that it raises serious questions with respect to the importance of customary constitutional law in both Canada and the United States; the political basis of the legal principle of legislative supremacy in Canada; the inevitable open-endedness of the words and phrases in the written part of the Canadian and American Constitutions; the "open-texture" of words in statutes of any jurisdiction; and, the different judicial techniques available in Canada and the United States to determine the *ratio* of a precedent or to construe the phrase of a statute—techniques which do lead to conflicting conclusions of law. It is unnecessary for me, however, to make a case as to why American constitutional law is relevant to the legal issues facing Canadian judges. For as we shall see, the judge whom I have chosen tried to justify the validity of the principle of legislative supremacy and, generally speaking, the importance of a passive judiciary. These two elements preoccupy the present Canadian Supreme Court. Holmes is often quoted as an "authority". Holmes also had an impact upon the legal and political perspective emanating from the Harvard Law School during this century. Traces of his impact can be seen in the writings of several Canadian law teachers who studied at Harvard as well as in the judgments of one of Harvard's better known Canadian graduate students, Chief Justice Laskin. Holmes experienced a deep philosophic education. He openly expressed his philosophic opinions in his judgments, articles, speeches and correspondence. His is a case which lends itself to the possibility that extra-legal resource material may provide insights as to what really underlay the *dicta* in his judgments and whether his views with respect to the Constitution might be consistent after all.

The political outlook of Mr. Justice Holmes seemed to have at least four important elements. One starting point was his general reaction to the idealism and rationalism of the eighteenth and early nineteenth century German philosophers. Secondly, Holmes had a Hobbesian view of human nature: man was an infinite appropriator of power. Man was motivated by his own self-interest. Thirdly, influenced by Darwin's theory of evolution, Holmes believed that the politically stronger groups in society would inevitably win out in the perpetual struggle for life. These three provided the central strands in Holmes' conception of the nature of the state. The state

William E. Conklin, B.A. (Hon.) (Toronto, 1967), M.Sc. (Econ.) (L.S.E., 1968), LL.B. (Toronto, 1971), LL.M. (Columbia, 1977), member of Ontario Bar, Associate Professor, Faculty of Law, University of Windsor. I should like to thank Professors Benno C. Schmidt and William E. Leuchtenburg of Columbia University, and Professor Edward Veitch of the Faculty of Law, University of Windsor, for their helpful comments.

was neither a social contract nor a metaphysical idea set up to fulfill some ideal. Rather, the state was a "fact of life" whose basis was power and, ultimately, force. An attempt will be made to exemplify how these four political presuppositions underlie several of Holmes legal doctrines and decisions.

HOLMES' REACTION TO IDEALISM AND RATIONALISM

Mr. Justice Holmes associated with a group of American philosophers who, in the late nineteenth and early twentieth centuries, developed a philosophy known as pragmatism largely in reaction to the idealism, rationalism, abstraction, logic, and deductive reasoning of such eighteenth and early nineteenth century German philosophers as Kant, Hegel, and Marx.[1] As Lucey has explained, Holmes and his friends believed

> that the human mind could not make value judgments which were universal and necessary. It [the human mind] could not get at the nature or essence of things, or at causality. There was no *necessity* in the physical order or moral necessity (ought) in the moral order.[2]

Man could not scientifically verify universal or "essential" propositions concerning the nature of matter. Such propositions were, therefore, untrue and should be discarded.

Holmes revolted against idealism.[3] He and his friends objected to idealism, William Barrett has explained, because idealism

> sweeps the dirt under the carpet and builds a picture of the world in which finite evil disappers but in which also the possibilities of chance, novelty, openness toward the future are equally stifled. Idealism seeks finality in truth that is impossible for man so long as he is a creature of time and is open toward the future.[4]

Holmes distrusted any form of dogma, whether it be an economic theory such as Herbert Spencer's Social Statics or an intellectual theory such as Marx's proletarian revolution. Holmes, a cultured and educated man, believed that his first duty was continuously to doubt his first premise.

It is not surprising, therefore, that Holmes' disbelief in natural law should come so "naturally." A lawyer who believed in natural law, Holmes wrote, possessed

> that naive state of mind that accepts what has been familiar and accepted by [him] and [his] neighbor as something that must be accepted by all men everywhere.[5]

To perveive the world through the lens of some external moral values dictated by natural law was both misguided and unrealistic. True values were not determined through objectively deduced rational criteria. Rather, truthfulness was what one feels, "what I can't help thinking."[6] The day had not yet arrived when man actually treated his fellow man as a "person" rather than as a "thing" as Kant would have him do. Accordingly, there was no point in talking and acting as if that time had come.[7]

HOLMES' CONCEPTION OF HUMAN NATURE

The Conception

But with what perspective did Holmes replace idealism? How did people really conduct themselves in Holmes' view? Holmes himself emphasized that

> the first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.[8]

What, then, were those "actual feelings and demands of the community"?

As in the case of his friend John Dewey,[9] Holmes presupposed that the basis of human nature was self-interest. In Holmes' words

> at bottom of all private relations, however empered by sympathy and all the social feelings, is a justifiable self-preference.[10]

Holmes confided to Laski at one point that he perceived man through Malthus' lens: men and women were

> as like flies—here swept away by a pestilence—there multiplying unduly and paying for it.[11]

Life constituted a struggle. That struggle inevitably erupted into violent conflict. Indeed, conflict was "the order of the world at which it is vain to repine."[12] In contrast to John Dewey who, according to Holmes, often expressed "emotional attitudes" about the exploitation of man by man, such talk about exploitation always "[got] my hair up."[13]

> All society rests on the death of men,

he wrote to Laski.

> If you don't kill 'em one way you kill 'em another....

Despite this negative perspective on life, Holmes saw joy and happiness in life's experiences. Since man's inherent nature was to seek power over his fellow man, the ultimate outcome of that power struggle brought happiness and pleasure. As he wrote,

> ... from the point of view of the world the end of life is life. Life is action, the use of one's powers. As to use them to their height is one joy and duty, so it is the one end that justifies itself.[14]

According to Holmes, this perpetual struggle for power was usually carried on in the legislative process. Philosophers, Holmes wrote, had falsely presumed that all the members of society possessed uniform interests.[15] But this was not so. He explained in *The Gas-Stokers' Strike* that:

> In the last resort a man rightly prefers his own interest to that of his neighbors. And this is as true in legislation as in any other form of corporate action.[16]

Even when the legislature was motivated by "the greatest good of the greatest number," "much or all legislation" invariably favors one economic or political class at the expense of the others. Legislation simply reflected the interests of the dominant or stronger political forces in the perpetual struggle for power within society.

But Holmes was quick to emphasize that the legislative process was not the only institutional means through which the power struggle was fought. Indeed, only in "civilized communities" was that so. In his correspondence as well as in The Common Law, Holmes repeated that

> the "ultima ratio", not only "regum", but of private persons, is force. . . . [17]

When political interests and beliefs were deep-seated, Holmes insisted, "we try to kill the other man rather than let him have his way."[18] Holmes asserted that killing the other man was entirely consistent

> with admitting that, so far as appears, his grounds (of belief) are just as good as ours. [19]

Holmes felt "no pangs of conscience" in marching conscripts to the frontlines of battle with bayonets in their backs or in treating the enemy "not even as a means but as an obstacle to be abolished".[20] What role did morality play? Morality functioned, according to Holmes, merely as

> a check on the ultimate *domination of force* just as our politeness is a check on the impulse of every pig to put his feet in the trough. [21]

Even towards the end of his life Holmes was unwilling to ameliorate his belief in the role of force in human conduct.

The power struggle of man over man could be neither avoided nor re-directed. Holmes insisted that the struggle for power flowed inevitably from the nature of things, though the outcome of that power struggle could be good or evil. It seems almost as if Holmes resigned himself to the eventual outcome of the struggle. "I see the inevitable everywhere", he once wrote to Pollock.[22] Holmes certainly saw little point in trying to resolve any power conflict through either reason or argument. Such a futile endeavor would be like "argu[ing] a man into liking a glass of beer."[23] Man stood helpless by the wayside as power conflict inevitably erupted about him and as the conflict proceeded to resolve itself. This was as true with respect to the relations between countries as between individuals. As he wrote to Pollock on another occasion, "war not only is absurd but is inevitable and rational."[24] With such an outlook Holmes found little difficulty as a judge to look out at the inevitable power struggles in his society with a detachment bordering on determinism.

Bernstein has documented how Holmes' perspective on human nature was partially a response to his own personal experience as a soldier in the Civil War.[25] Holmes had been seriously wounded on three occasions and believed himself close to death on at least one of them. A second influence upon his theory of human nature was Darwin's theory of evolution.[26] Darwin had established how, through the millenia of history, the stronger species had eventually come to dominate the weaker in the quest for survival. The human species had actually evolved from apes. In addition to affecting his outlook on human nature, Darwinian theory influenced Holmes' distate for dogma and ideals. Man continually evolved over time. But idealism sought finality in fixed truths.

The Relation Between Holmes' Conception Of Human Nature And His Legal Doctrines

We can now make some sense of Holmes' classic introduction to his The Common Law. His famous assertion that "the life of the law has not been logic; it has been experience" reflected Holmes' underlying respect for the natural evolutionary processes of the law. A genuine understanding of the law would only come about if one had appreciated the history of the law. His introductory statement in The Common Law continued:

> 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.

A belief or custom would initially establish a rule of law. But over time, as the original reason for the rule of law was forgotten,

> the rule adapts itself to the new reasons which have been found for it and [the rule] enters on a new career. The old form receives a new content. . . .[27]

Holmes carried this point even further in another context by arguing that the Constitution should be seen in this light. Constitutional provisions were not "mathematical formulas having their essence in their form". Rather, the courts gathered the meaning of the terms "by considering their origin and the line of their growth".[28] Judges erred when they conceived the law as a matter of deduction from *a priori* principles or as "a logical cohesion of part with part."[29]

According to Holmes, statutes, precedents, and texts served as the resource material for judicial analysis. But, "the secret root from which the law draws all the juices of life" involved "considerations which judges rarely

mention; considerations, that is, of public policy", Holmes wrote in The Common Law.[30] Holmes fell back upon "public policy" as the indispensable yardstick to decide cases. The judicial function, in other words, was to predict whether public policy or—to use another of his terms—"accurately measured social desires" could sustain "ancient rules".[31] This pursuit, to Holmes, constituted "the science of law". Judicial prediction of social desires served as the only scientific means to resolve a "doubtful case" "with certain analogies on one side and other analogies on the other". The "simple tool of logic" could not suffice.[32]

From Holmes' perspective on human nature there flowed a second doctrine characteristic of his judgments and writings in addition to his evolutionary theory of the law. The inevitability of human conflict led Holmes to advocate the separation of morals from the law. According to Holmes, the judge should not establish the law by appealing to his own moral convictions. "I should be glad", he wrote to Pollock on May 30, 1927, "if we could get rid of the whole moral phraseology which I think has tended to distort the law".[33] And in his classic essay The Path of the Law, he hoped that

> every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law.[34]

The judge and lawyer must concern themselves with the law as it is, not as it ought to be.

Holmes' concern for the separation of law from morals is reflected, for example, in his early chapters in The Common Law where he urged that the substantive criminal and tort law be made less dependent upon the personal moral culpability of a defendant. Primitive legal systems had required personal fault for civil liability, Holmes asserted. But "mature" legal systems had evolved to the point where persons were punished even though they were not necessarily blameworthy. Holmes argued that criminal and tortious responsibility be ascertained by a fixed standard, external to the defendant, rather than by his inner motives. That is, the law should disregard the personal peculiarities of individuals.[35] Accordingly, the "final justification" for criminal punishment was neither reformation nor retribution, but rather the prevention of future injury. Contrary to Kant's belief, it was "perfectly proper" for the law to treat an individual as a means, as "a tool" to increase the general welfare at his own expense.[36] Rogat has made a convincing case that the roots of Holmes' "externality" standard, which Holmes also used in his "clear and present danger" judgments,[37] lay not in his concern for certainty in the law nor in his utilitarian desire that harm be prevented.[38] Rather, in contrast to Savigny's attempt to relate the law to the subjective voluntary will of the individual Holmes feared that a "subjective" standard would catch the courts in the inevitable conflict of power between individuals and groups. When the judge examined the subjective motives of an individual, he created the risk of being an artificial obstacle to the natural evolution of conflict.

Holmes' attempt to separate law from morality by means of an "objective" test for criminal conduct is also reflected in his "clear and present danger" test. In *Schenck* (1919),[39] the defendant had been charged with attempting to cause insubordination in the military, and obstructing the recruitment service of the U.S. Whether section 3 of the Espionage Act infringed the First Amendment depended upon the circumstances surrounding the publication of the defendant's pamphlet. Holmes did not perceive the issue in terms of the subjective intent of Schenck but rather with reference to the "proximity and degree" of the publication to a "substantive evil".

Similarly, in *Frohwerk*,[40] *Debs*[41] and *Abrams*,[42] Holmes tried to dissociate moral considerations from the law by merely examining what he considered to be "objectively" ascertainable facts. In *Frohwerk* Holmes noted, for example, that a particular newspaper, the Missouri Staats Zeitung, deplored "the draft riots in Oklahoma and elsewhere". Frohwerk's newspaper referred to the riots "in language that might be taken to convey an innuendo of a different sort". In *Debs*, Holmes concerned himself with the "natural and probable effect" of a speech upon what Congress—not the courts—deemed to be a "substantive evil". Even in his *Abrams* dissent, Holmes reaffirmed his "clear and present danger" test of *Schenck*, *Frohwerk*, and *Debs*. He merely focused in *Abrams* upon the immediacy of the evil and the "appreciable tendency" of the defendant's conduct to magnify that evil in the facts of *Abrams*, not upon the intent of Abrams.

THE PRIMACY OF THE DOMINANT GROUP

Holmes' Theory

Flowing from Holmes' second postulate is his acceptance of the view that the conflict of power amongst self-interested individuals will be ultimately resolved in favor of the politically

stronger. With this in mind Holmes took the next logical step by equating "the interest of society" with "the predominant power in the community".[43] Monopolies and large trusts were the inevitable by-product of the "struggle for life". Legislation reflected the interests of the predominant power and, indeed, ought to do so.

> What proximate test of excellence [in good government] can be found [he asked] except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power? Of course, such conformity may lead to destruction and it is desirable that the dominant power should be wise. But wise or not, the proximate test of a good government is that the dominant power has its way. [44]

Holmes could see "no justification in a government's undertaking to rectify social desires" out of a paternalistic concern for politically weak minorities.[45] The interests of the predominant powers constituted the public interest and all minority interests were subordinated thereto. As a consequence,

> any man who prefers the success of his private club—trades union or other—to the public welfare *e.g.* by a general railroad strike, is a public enemy. [46]

Its Relation To Some Of His Legal Doctrines And Decisions

The Judicial Function

This somewhat deterministic regard for the eventual outcome of political conflict may provide at least a partial explanation to Holmes' conception of the judicial function. Although Holmes acknowledged that the politically stronger interest groups could represent only a minority of the society, Holmes believed that in the American system of government the politically stronger interest groups invariably prevailed in the legislature. That is, the legislative majority was an accurate reflection of the will of the politically stronger:

> The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest. [47]

Given Holmes' political presuppositions concerning the survival of the fittest in an inevitable struggle for power, and given his belief that the legislature in American society represented the dominant interests, the judge's role was to remain *as aloof as possible* from the political conflict.

Such was the judge's function especially in debatable cases where logic could not resolve an issue, according to Holmes. As we have seen,[48] in such a circumstance the judge's duty was to side with the dominate social forces as they were invariably represented in the legislature. If a judge decided a case on the basis of personal predilection, his decision would operate as an artificial obstacle to the natural evolution of conflict. The judge's prime function was to predict the outcome of the conflict. The judge simply did not face the reality of the situation if he categorized as "invalid", the "unjustifiable", or "unconstitutional" the outcomes of a natural instinct such as the aggrandizement of wealth in the form of trusts and monopolies.

Lochner

It is with this background that one can better understand Holmes' dissenting judgment in *Lochner*.[49] At issue in *Lochner* was a New York statute which prohibited the employment of bakery employees for more than 10 hours per day or 60 hours per week. Lochner had employed a person to work for more than 60 hours in one week. The Supreme Court, per Peckham, held the statute unconstitutional as being an unnecessary, unreasonable, and arbitrary interference with Lochner's right to contract as protected under the 14th Amendment. Holmes dissented. The first sentence of Holmes' judgment reflected his fatalistic respect for the primacy of the dominant political and social interests in society. "This case", he began, "is decided upon an economic theory *which a large part of the country does not entertain*".[50] Holmes then fell back upon his belief that the judiciary ought not to interfere with the inevitable evolutionary processes within society—

> ... my agreement or disagreement with the economic theory has nothing to do with the right of a majority to embody their opinions in law.

That is, Holmes objected to what he considered to be an artificial meddling with natural evolution. Holmes believed that Peckham's court had imposed its personal, narrow economic and moral values, as articulated in Herbert Spencer's Social Statics, upon the dominant forces in American society at the time. As Holmes himself concluded:

> I think the word liberty in the 14th Amendment is perverted when it is held to prevent the *natural* outcome of a *dominant* opinion

unless it infringed fundamental principles as reflected in society's traditions. The latter exception Holmes deemed relevant presumably because the dominant opinion on a particular issue at one point in time might itself be an aberration in the overall long term evolutionary pattern of the dominant forces in society.[51]

Buck v. Bell

Holmes' political theory as elaborated herein also helps us to understand his position

in the infamous case of *Buck v. Bell.*[51] At issue in *Buck v. Bell* was a Virginia statute authorizing the superintendent of the State Colony for Epileptics and Feeble Minded to perform the operation of salpingectomy upon the feeble minded. The operation involved sterilization. Carrie Buck's counsel argued that the statute violated the due proces sand equal protection clauses of the 14th Amendment. Holmes, J. who delivered the judgment of the court, held the statute constitutional.

Two points should be noted with respect to Holmes' judgment. In the first place the decision reflects Holmes' due deference to the legislature. The legislature had spoken. It had declared that the sterilization of mental defectives was in the public interest. Because of the legislature's declaration, Holmes explained,

> obviously we cannot say as a matter of law that the grounds [for sterilization] do not exist, and if they exist they justify the result. [52]

The more important, yet related, element of Holmes' *Buck v. Bell* opinion is that both the tenor and the wording of the judgment reflect Holmes' acceptance of the paramountcy of the interests of the dominant social forces in society over an individual's rights. He began his judgment by acknowledging the validity of the statute's assertion of the fact that both the health of the individual and the interests of society would be promoted by the sterilization of a mental defective such as Carrie Buck. He also approved of the preamble's statement that if a mental defective were discharged from a mental institution without being sterilized the individual would become a "menace" to society.[54] After all, it was the welfare of the society as a whole which Holmes deemed of sole importance. As he indicated toward the end of his judgment, Holmes just could not understand why a person such as Carrie Buck should believe that she might have some right not to be sterilized without her consent. In far more serious cases the public welfare had "call[ed] upon the best citizens for their lives". Sterilization was a far lesser sacrifice, the mental incompetents were already "sap[ping] the strength of the State", and, in any case, the incompetents themselves often did not consider sterilization to be a sacrifice. Emphasizing the importance of the primacy of the public welfare once again, Holmes concluded:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind ... Three generations of imbeciles are enough.

The Place Of Freedom Of Speech In Holmes' Overall Theory

But where does freedom of speech stand in Holmes' overall political philosophy? At first sight one might consider that in order to be consistent Holmes would support judicial deference to legislative interference with freedom of speech. It does appear from the letters uncovered by Gerald Gunther that Holmes seemed insensitive to any claim that the judiciary ought to protect freedom of speech at the time of the *Schenck, Frohwerk* and *Debs* decision.[55] Holmes' letters to Laski and Pollock during the same period, however, do indicate that Holmes did find it difficult to write the court's judgments in *Schenck, Frohwerk,* and *Debs.* He seemed genuinely to believe that he had little choice in that the decisions were clear applications of existing law. He wrote to Laski on March 16, 1919, for example, that he regretted

> (between ourselves) that the Government pressed them to a hearing. Of course I know that donkeys and knaves would represent us as concurring in the condemnation of Debs because he was a dangerous agitator. Of course, too, so far as that is concerned, he might split his guts without my interfering with him or sanctioning interference. But on the only questions before us I could not doubt about the law. The federal judges seem to me (again between ourselves) to have got hysterical about the war. I should think the President when he gets through with his present amusements might do some pardoning.[56]

After reading Freund's critique of the *Debs'* decision, Holmes again wrote to Laski:

> I hated to have to write the *Debs* case and still more those of the other poor devils before us the same day and the week before. I could not see the wisdom of pressing the cases, especially when the fighting was over and I think it quite possibe that if I had been on the jury I should have been for acquittal but I cannot doubt that there was evidence warranting a conviction on the disputed issues of fact. Moreover ... when people are putting out all their energies in battle I don't think it unreasonable to say we won't have obstacles intentionally put in the way of raising troops—by persuasion any more than by force. But in the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat.

It was not until Holmes' dissenting judgment in *Abrams* that Holmes publicly began to acknowledge that freedom of speech had a place to play in his theory of government. But what role did it have?

On the one hand, Holmes indicated in his correspondence as well as in some of his articles and judgments that he could fully appreciate why a government would restrict freedom of speech. In his *Abrams* dissent, for example, he wrote:

> Persecution of 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 you do not care whole-heartedly for the result, or that you doubt either your power or your premises.

Holmes expressed the same point earlier in a letter to Laski on July 7, 1918 in this way:

> My thesis would be (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power—you will do what you believe efficient to bring about what you want—by legislation or otherwise.[48]

Usually, he continued, one is not "cocksure". But if one is,

> we should deal with the act of speech as we deal with any other overt act that we don't like.

Holmes wrote on another occasion (October 26, 1919) that he saw little more moral wrong for the Catholic Church to have killed heretics or for the Puritans to have whipped Quakers than for Americans to have killed Germans during the War.[49] As he explained in his article *Natural Law*, "truth was the majority vote of that nation that could lick the others".[50] He explained that by this expression he meant that

> our test of truth is a reference to either a present or an imagined future majority in favor of our view.

From this we can see that, as in the *Lochner* and *Buck v. Bell* judgments, Holmes placed the interests of the stronger political forces within society above anyone's individual rights. Holmes could not conveive any autonomous area of free speech constitutionally protected *per se* from governmental interference. Both the nature and the scope of free speech were conditioned—to use Holmes' words—by the interests of the "greatest happiness of the greatest number" in American society although, in some other society, the politically dominant forces might be represented by a minority. Thus, the central issue in a "free speech" case had nothing to do with the accused's motive.[51] The sole consideration was whether the political exigencies of the situation justified legislative interference with an individual's speech. This was the thrust of the *Schenck*, *Frohwerk*, and *Debs* decisions. Holmes explained in *Schenck* that "in many places and in ordinary times" Schenck's conduct would have been constitutional. "But", Holmes cautioned, "the character of every act depends upon the circumstances in which it is done".[52] The issue "in every case" was whether the words were expressed in such circumstances as to create "a clear and present danger" to the state. When a nation was at war tbe exigencies of the situation rendered unconstitutional what had ordinarily been constitutional conduct. In *Frohwerk* and *Debs*, Holmes similarly focused on whether in the particular circumstances the words had created a "bad tendency" and whether a "presumed intent" could be detected from the situation.

But how can one understand Holmes dissent in the *Gitlow*[53] decision in the light of the above? Gitlow's newspaper, The Revolutionary Age, had published 16,000 copies of a Manifesto advocating a Communist Revolution. It had urged mass industrial revolts and "revolutionary mass action". Gitlow was charged pursuant to section 161 of the New York Penal law which had made it an offence for anyone who by word of mouth, writing, publishing, or selling

> advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence ... or by any unlawful means.

The issue was whether the United States Government was required to produce evidence of "some definite or immediate act" of violence or unlawful activity which flowed from the Manifesto's publication. No such evidence had been proffered and the Supreme Court (per Sanford, J.) held that none was necessary. The initial portion of Sanford's judgment assessed whether Gitlow's conduct came within the scope of section 161. After holding affirmatively, he examined the social consequences of ruling section 161 unconstitutional. The Manifesto's utterances were "inimical to the general welfare" and entailed "such danger of substantive evil". They involved "danger to the public peace and to the security of the State". Even the immediate consequences were "real and substantial".

As with Sanford, Holmes too assumed that the issue of free speech had to be resolved by reference to the social consequences involved. The state's interests were paramount. The only question was whether Gitlow's utterances obstructed the interests of society. Holmes still adhered to the *Schenck* "clear and present danger" test. It was "manifest", he concluded,

> that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views.

Furthermore, repression of political speech was not in the interests of the society. But how could Holmes as a judge suggest what society's interests were when he so adamantly respected the legislature's dictates in the earlier case of *Lochner* and the later decisions of *Buck v. Bell*, and when he had publicly urged judicial restraint in his speeches, writings, and correspondence at the same time?

I have argued here that Holmes' political

presuppositions underlay his perspective on judicial restraint. It seems to me that his political theory similarly provides insight into his *Gitlow* dissent. For, one should recall, Holmes perceived the law from a historical or evolutionary perspective. Having taken that outlook Holmes believed that life was a struggle for power and that, over time, the politically stronger interest groups invariably and inevitably won out in that conflict. Society was continually evolving, and what had at one time been a minority viewpoint had often eventually become the representative beliefs of the dominant interests. This was what Holmes meant when he stated in *Gitlow* that Gitlow's Manifesto

> 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.

Holmes believed in a somewhat deterministic fashion that the politically stronger interest groups would always win out over the long term. Thus, there was no point in legislating repression of free speech. Although it was usually the judiciary who had created the artificial obstacles to the natural evolutionary flow of the political process, *legislative* interference created that very obstacle. And though, in the case of free speech, the "dominant forces" might believe that society should evolve in a certain direction, why should they not be able to suppress speech that hindered or even threatened that evolution? Because, according to Holmes, history had shown that *in the long term* the initial minority opinion had often eventually been adopted by the majority. Indeed, even if the Communist movement were becoming the dominant political force in society, repression of Communist speakers could not possibly redirect the course of political events. In Holmes' words—

> If in the long run the beliefs expressed in the 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.[64]

Or, expressing the same point in a different fashion in *Abrams*, "time has upset many fighting faiths".[65] The function of the state, therefore, was to permit the free-flow of expression amongst the conflicting political forces within society.

It is in this light that one can better understand Holmes' dissents in the *Schwimmer*[66] and *Mackintosh*[67] cases. Holmes gave reasons for his dissent only in *Schwimmer*, although he did concur in Butler's dissent in *Mackintosh*. Rosika Schwimmer was of Hungarian-Jewish descent who applied for American citizenship. During the hearings she testified that she would not take up arms in defence of the United States because she was an uncompromising pacifist with little sense of nationalism. Butler held for the majority that Rosika had the burden of showing by satisfactory evidence that she had met the specified qualifications of being an American citizen. One such requirement, which was at the same time a fundamental principle of the Constitution, was that the citizen be willing to bear arms for the country.[68] As in *Gitlow*, Holmes held that on the facts before the court there was no possible threat to the public interest

> inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to.[69]

Rather than being a threat, she "thoroughly believes in organized government and prefers that of the United States to any other in the world". Her "position and motives" were "wholly different" from Schenck's.

Having decided that Rosika was harmless, Holmes went on to explain that her opinions had to be considered in the same light as other *political* opinions such as the proposal for a seven-year term for the President. In other words, Holmes perceived the issue as one of political speech rather than freedom of conscience. Given that perception, Holmes believed that any legislative interference with Rosika's opinions might risk creating an artificial lid on the natural political evolution of society. After all, minority groups with unorthodox political opinions such as the Quakers had "done their share to make the country what it is".[70]

If Holmes was willing to protect Rosika Schwimmer's pacifist beliefs, why was he unwilling to protect the beliefs of the teachers and parents that children should be taught the German language at school in the *Meyer*[71] and *Bartels*[72] cases? In *Meyer* and *Bartels* the court had struck down statutes which had prohibited the teaching of any subject in any language other than English. McReynolds, speaking for the court in both cases, had held that the legislature could not interfere with the citizen's liberty arbitrarily or without reasonable relation to some legitimate state purpose "under the guise of protecting the public interest". Holmes, who dissented in both cases, held in *Bartels* that "we all agree" that the aim of requiring a common tongue to be spoken in the country was both lawful and proper. "No one would doubt", he continued, "that a teacher might be forbidden to teach many things". The only issue was whether the state had chosen a reasonable means to accomplish the unilingual policy.

On a close examination, Holmes' judgments in *Schwimmer* on the one hand, and *Meyer* and *Bartels* on the other, are consistent from the point of view of Holmes' political philosophy. Rosika Schwimmer's pacifist beliefs were, for Holmes, *political* opinions and a legislative restriction upon them might run the risk of artificially obstructing the natural political evolution of society. On the other hand the teaching of German in elementary school in the *Meyer* and *Bartels* cases, in Holmes' opinion, *did not involve political speech.* Rather, the teaching of German involved the right to a parent's autonomy, the teacher's entitlement to a due process hearing if the school effectively closed down because German could not be taught, or, possibly, the freedom of religion. Whatever the constituent element of liberty might be involved, the issue in *Meyer* and *Bartels* clearly did not involve *political* speech. Thus, interference with the teaching of foreign languages did not create any artificial obstacle to the political processes of society. Indeed, legislative experimentation was important because the human species had progressed over time through experimentation. Holmes was unable to say that the Constitution "prevents the experiment being tried". Because "men might reasonably differ" as to the advisability of this method of attaining unilingualism in the United States, Holmes' political theory instructed judicial deference to the legislature's experiment.

THE NATURE OF HOLMES' STATE

Holmes' Conception Of The State

There have existed various ways in which philosophers and lawyers have traditionally conceived the nature of the state. According to C.A. W. Manning,[73] the state is merely an idea which is real only because other states in the international system act *as if* it were real. Though only an idea, the state exists because it is deeply believed in. Rousseau believed that the state was a social contract entered into by primitive man.[74] John Rawls on the other hand conceives the social contract as merely a methodological technique to find the principles of justice in society.[75] Rawls' state exists solely to fulfill an ideal, the principles of justice. Holmes' state was very alien to any of these schools of thought.

Holmes' conception of the state flowed out of the three constituent elements of his political philosophy already examined. Because Holmes reacted against the German idealist and rationalist tradition of an earlier period, he naturally found it difficult to conceive the state as merely an idea, a conception or—to use d'Entreves' term[76]—a "notion". Life, for Holmes, was a matter of dealing with reality—or, at least, with Holmes' idea of reality. And an eternal struggle for power constituted that reality. The stronger social and political forces would eventually dominate in that struggle. The state, therefore, was neither a social contract entered into by primitive man, nor was the state a mechanism which functioned so as to fulfill some ideal. Rather state sovereignty was a "question of fact", a simple response to the fact of life that the politically stronger interest in society would inevitably prevail. As a consequence, the state and its legal institutions constituted the mechanism whereby the wishes of the dominant group(s) were articulated and enforced.

Given his perspective of human nature and his presupposition that the stronger forces would inevitably dominate the political process, it was only logical that Holmes should believe force to be the basis of the state. As he wrote to Laski on September 15, 1916:

> But if the government of England . . . does see fit to order them [*i.e.*, the citizens to do something], I conceive that order is as much law as any other—not merely from the point of view of the Court, which of course will obey it—but from any other rational point of view—if as would be the case, the government had the physical power to enforce its command. Law also as well as sovereignty is a fact. If in fact Catholics or atheists are proscribed and the screws are put on, it seems to me idle to say that it is not law because by a theory that you and I happen to hold (though I think it very disputable) it ought not to be.[76.1]

But why did Holmes think that citizens would obey such a governmental order based as it was on force? Holmes explained in his essay *Natural Law* that individuals were driven by a desire to live. They could not live, however, without food and drink. And the latter could only be obtained through social relations. Because it was in man's nature to seek power over others and because the stronger inevitably prevailed in conflict, the weaker would *naturally* respect the laws of the politically stronger interest groups out of fear. In Holmes' own words,

> If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights.[77]

Holmes' "Right"

A legal right, therefore, was a claim which represented the will of the dominant political groups in society. In American society, a right was directly related to the interests of the legislative majority. The legislature alone could create, condition the scope, and destroy one's rights because the legislature—not the

court—represented the dominant social and political forces in American society. Whether an injured party possessed a right depended entirely upon whether his conduct coincided with public policy and the public policy, in turn, was directed by the legislature. During an emergency, for example, the ordinary rights of the individual would have to yield "to what he [*i.e.*, the government leader] deems the necessities of the moment".[78]

What role did the judge play? The judge clearly did not possess a role of enforcing fundamental rights for, in Holmes' scheme, there were no such phenomena as fundamental rights. Rather, the judge's function was *to predict* whether public policy supported an injured party. This was what Holmes meant when he wrote in *Natural Law* that—

> But for legal purposes a right is only *the hypostasis of a prophecy*—the imagination of a substance supporting the fact that *the public force* will be brought to bear upon those who do things said to contravene it ... No doubt behind these legal rights is the fighting will of the subject to maintain them ... but that does not seem to me the same thing as the supposed "a priori" discernment of a duty or the assertion of a pre-existing right. A dog will fight for his bone. [79]

Ten years later Holmes explained to Laski that this specific passage

> starts from my definition of law ... as a statement of the circumstances in which the public force will be brought to bear upon men through the courts: that is the prophecy in general terms. [80]

In this light one can better understand why Holmes would have no hesitation in writing to his friends that

> I utterly disbelieve all postulates of human rights in general [81] [and that] the rights of a given crowd are what they will fight for. [82]

He wrote on another occasion that a legal right could vary from religion to the price of a glass of beer.[83] And on several occasions he declared that the "morally tinted" word "legal right" was nothing more than an "empty substratum" to which we had become accustomed.[84]

It must be emphasized that Holmes' political theory called for restrictions upon liberty and equality whenever those restrictions were reasonably accurate reflections of the will of the dominant political forces in society. This point is reflected, for example, in Holmes' academic treatment of the principle that ignorance of the law is no defence. He explained in The Common Law:

> The true explanation of the rule is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. *Public policy sacrifices the individual to the general good.* It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance *where the law-maker* has determined to make men know and obey, and justice to the individual is rightly outweighed by *the larger interests on the other side of the scales.* [85]

Equality as much as liberty were conditioned by Holmes' priority of the public welfare or, when in his political frame of mind, the interests of the dominant groups in society. He wrote to Laski that just as he had rejected abstract rights, so also did he fail to respect the passions for equality.[86] The "dogma of equality" only contemplated the relations between one individual and another. It failed to acknowledge the relations of the individual to the community. "No society has ever admitted", he wrote in the Common Law, "that it could not sacrifice individual welfare to its own existence".[87] Liberty and equality had a very small place, indeed, in the political theory of Mr. Justice Holmes.

CONCLUSION

This essay has attempted to expose the political presuppositions underlying the judicial decisions and academic writings of Mr. Justice Holmes. I have tried to argue that throughout his life he displayed a strong scepticism of both idealism and rationalism. He replaced idealism with a Hobbesian view of human nature in which man was an infinite appropriator of the powers of others. Holmes accepted in a somewhat deterministic fashion that, in the end, the imminently stronger forces would win out in the interminable conflict of power. Those forces might represent good ends as well as evil ones. Holmes' conception of the state flowed from these constituent elements of his political theory. The state, for Holmes, was a mechanism in which the power conflicts took place. The basis of the state was power and force. In American society the power conflicts were fought primarily in the legislatures. The judge's job was to predict which social desires represented the interests of the dominant forces or, to use Holmes' legal dressing, the "public policy".

The political theory of Mr. Justice Holmes provides an important background for an understanding of Holmes' legal doctrines as well as his decisions. It helps us to comprehend what he meant in his classic introduction to The Common Law. It explains why he believed so fervently that judges ought generally to defer to the legislature. Most importantly, his political theory helps to explain the consistency between otherwise irreconcilable positions, and I am referring here to his judicial deference to the legislature in *Lochner* on the

one hand and his judicial protection of free speech in *Adams*, *Gitlow*, and *Schwimmer* on the other. Holmes' political theory, finally, helps us to understand why Holmes himself would see fit to protect liberty of political speech but not the other constituent elements of liberty involved with respect to legislation prohibiting the teaching of foreign languages or requiring the sterilization of mental patients.

What this tells us is that despite Holmes' intense plea that morality be removed from the law, Holmes himself did not quite succeed. Indeed, he imposed his own moral conceptions upon the law, conceptions whose political presuppositions may no longer be accepted by the dominant political interests in the United States today. No clearer does this *quaere* arise than in Mr. Justice Holmes' elaboration of a philosophy which, except for "freedom" of political speech, seemed to have little room for liberty or social justice. ■

FOOTNOTES

1. *See generally*, M.G. White Social Thought In America—The Revolt Against Formalism (London: Oxford Univ. Press, 1976).
2. F.E. Lucey, *Holmes—Liberal—Humanitarian—Believer in Democracy?* 39 Geo. L.J. 523, 527 (1951).
3. M.D. Howe stresses this point in his *Introduction* to Holmes' The Common Law xvi *et seq.* (Cambridge: Harvard Univ. Press, 1963).
4. W. Barrett, *The Twentieth Century In Its Philosophy* in Philosophy in the Twentieth Century 37, vol. 1, (eds.) W. Barret and H.D. Aiken (New York: Harper & Row, 1962).
5. Holmes, *Natural Law* in Holmes, Collected Legal Papers 312 (New York: Peter Smith, 1952).
6. Holmes - Pollock Letters 139, vol. 1 (ed.) Mark de Wolfe Howe (Cambridge: Harvard Univ. Press, 1941).
7. Holmes, The Common Law 38 (Cambridge: Harvard Univ. Press, 1963).
8. *Id.* at 36, 38.
9. H.D. Aiken, *Introduction* to Philosophy In The Twentieth Century, *supra* note 4, at 80.
10. Holmes, The Common Law, *supra* note 7, at 38.
11. Holmes - Laski Letters: 1916-1935, at 202-3, dated July 23rd, 1925, (ed.) M.D. Howe (Cambridge: Harvard U. Press, 1953).
12. Holmes, Speeches (1934) at 58, as quoted in Lucey, *supra* note 2, at 538 note 45.
13. Holmes - Laski Letters, *supra* note 11, vol. 1, at 431.
14. Holmes, as cited in M. Lerner, The Mind And Faith Of Justice Holmes 42 (Little Brown, 1943).
15. Holmes, *The Gas-Stokers' Strike*, 44 Harv. L. Rev. 795 (1931).
16. *Id.* at 795.
17. *Supra* note 7, at 38. My emphasis.
18. *Supra* note 5, at 311.
19. *Id.*
20. Holmes, *Ideals and Doubts* in Collected Legal Papers, *supra* note 5, at 304. Reprinted from 109 Ill. L. Rev. (1915).
21. Quoted from Shiver, Holmes, Book Notices, Uncollected Letters And Papers 187-8 (1936), as cited in Lucey, *supra* note 2, note 32.
22. *Supra* note 6, vol. 2 at 230.
23. *Supra* note 5, at 311.
24. Holmes - Pollock Letters, *supra* note 6, at 230.
25. I. Berstein, *The Conservative Mr. J. Holmes*, 23 New England Q. 436 (1950).
26. Howe, *supra* note 3 at xxvi *et seq.*; Aiken, *Introduction*, *supra* note 9, at 56 *et seq.* and 77 *et seq.* See generally, Hofstadter, Social Darwinism in American Thought.
27. *Supra* note 7, at 8. Also see *The Path of the Law*, 10 Harv. L. Rev. 465.
28. *Gompers v. U.S.*, 233 U.S. 604, 610 (1914). Also note Holmes' dicta in *Missouri v. Holland*, 252 U.S. 416 (1920):

> . . . when we are dealing with words that are a constitutent 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. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago . . . We must consider what this country has become in deciding what that Amendment [the Tenth] has reserved.

29. Holmes, The Common Law, *supra* note 7, at 32. Holmes' belief that one ought to perceive ideas from an historical context was a common assumption amongst pragmetists generally. See Barrett and Aiken, *supra* note 4, at 55 *et seq.*
30. Holmes, The Common Law, *supra* note 7, at 35-6.
31. Holmes, *Law in Science and Science in Law* (1899), in Collected Legal Papers, *supra* note 5, at 235-6.
32. *Id.* at 239.
33. Holmes - Pollock Letters, vol. 2, *supra* note 6, at 200.
34. Holmes, *The Path of the Law*, Collected Legal Papers, 167, 179 (1920).
35. Holmes, The Common Law, *supra* note 7, at 38.
36. *Id.* at 40.
37. See *infra* text between notes 38-43.
38. Y. Rogat, *The Judge as Spectator*, 31 U. Chi. L. Rev. 213, 220 *et seq.*
39. *Schenck v. U.S.*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

40. *Frohwerk v. U.S.*, 249 U.S. 204, 39 S. Ct. 249, 63 L. Ed. 561 (1919).
41. *Debs v. U.S.*, 249 U.S. 211, 39 S. Ct. 252, 63 L. Ed. 566 (1919).
42. *Abrams v. U.S.*, 250 U.S. 616 (1919).
43. Holmes, *Natural Law*, *supra* note 5, at 314.
44. Holmes, in 7 Am. L. Rev. 582, 583 (1873) as quoted by S.J. Konefsky, The Legacy Of Holmes And Brandeis 46 (Macmillan, 1956).
45. Holmes - Laski Letters, *supra* note 11, at 202-3, dated July 23rd, 1925.
46. *Id.* at 75, dated March 31st, 1917.
47. Holmes as reprinted in Lerner, *supra* note 14, at 50.
48. See text *supra* between notes 29 and 33.
49. *Lochner v. N.Y.*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).
50. My emphasis.
51. This qualification of Holmes' makes more sense when one considers his rationale for freedom of political speech. See generally text *infra* between notes 54 and 66.
52. *Buck v. Bell*, 274 U.S. 200 (1927), 47 S. Ct. 584, 71 L.E. 1042.
53. *Id.* at 207.
54. *Id.* at 206.
55. G. Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 Stan. L. Rev. 719 (1975).
56. Holmes - Laski Letters, *supra* note 11, at 190.
57. *Id.* at 203.
58. *Id.* at 160-1.
59. *Id.* at 218-9.
60. Holmes, *supra* note 5, at 310.
61. See text *supra* between notes 31 and 43.
62. *Supra* note 39.
63. *Gitlow v. N.Y.*, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925).
64. My emphasis.
65. *Supra* note 42.
66. *U.S. v. Schwimmer*, 279 U.S. 644 (1929), 49 S. Ct. 448, 73 L. Ed. 889.
67. *U.S. v. Mackintosh*, 283 U.S. 605 (1931), 51 S. Ct. 578, 75 L. Ed. 1302.
68. *U.S. v. Schwimmer*, *supra* note 66, at 650.
69. *Id.* at 653.
70. *Id.* at 655.
71. *Meyer v. Nebraska*, 262 U.S. 390 (1923), 43 S. Ct. 625, 67 L. Ed. 1042.
72. *Bartels v. State of Iowa*, 262 U.S. 400 (1923), 43 S. Ct. 628.
73. C.A.W. Manning, The Nature of International Society (London: Bell & Sons, 1962).
74. J.J. Rousseau, A Discourse on the Origin of Inequality and The Social Contract (London: Everyman's Lib., Dent, 1913).
75. John Rawls, A Theory of Justice (Harv. Univ. Press, 1971).
76. A.P. d'Entrèves, The Notion Of The State (Oxford: Clarendon Press, 1967).
76.1 *Supra* note 11, at 91.
77. Holmes, *Natural Law*, *supra* note 5, at 313.
78. *Moyer v. Peabody*, 212 U.S. 78, 84-5 (1909).
79. Holmes, *Natural Law*, *supra* note 5, at 313. Also see Holmes, *The Path of the Law*, *supra* note 34.
80. Holmes - Laski Letters, *supra* note 11, vol. 2. at 212, dated January 19th, 1928.
81. *Id.* at 888, dated October 23rd, 1926.
82. *Id.* at 762, dated July 23rd, 1925, and at 8.
83. *Id.* at 948, dated June 1st, 1927.
84. Holmes - Pollock Letters, *supra* note 6, vol. 2 at 212, dated January 19th, 1928.
85. Holmes, The Common Law, *supra* note 7, at 41. My emphasis.
86. Holmes - Laski Letters, *supra* note 11, at 768-9, dated August 1st, 1925.
87. Holmes, The Common Law, *supra* note 7, at 37.

ERRATA

In the article by David Cheifetz, *Contribution Between Tortfeasors Revisited: Giffels Associates Limited v. Eastern Const. Company*, (1978) 26 Chitty's L.J. 109, 113, in footnote number 12, left hand column, third line from the bottom should read as follows:

The intriguing aspect is that the point was not argued before the Court of Appeal but was added, upon motion by G and with the leave of the Court of Appeal, *nunc pro tunc* to G's notice of appeal after the Court rendered its judgment.

● ● ●

In the headnote and on page 143, (1978) 26 Chitty's L.J., in *Mancao v. Casino et al.*, the correct name for one of the cases cited is *Strass v. Goldsack*.