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Charles E. Wyzanski Jr.

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THE DEMOCRACY OF JUSTICE OLIVER WENDELL HOLMES*

CHARLES E. WYZANSKI, JR.†

Oliver Wendell Holmes is everywhere recognized as a great American. His life story has been depicted on the stage, fictionalized in a popular biography,[1] and majestically summarized in the *Dictionary of American Biography* by his successor and disciple.[2] Every undergraduate knows of Holmes' wounds in three Civil War battles, his seminal lectures on *The Common Law* delivered at the Lowell Institute, his pioneer decisions in labor cases in the Supreme Judicial Court of Massachusetts and his long and distinguished tenure as Associate Justice of the Supreme Court of the United States. But the recital of his public offices does not disclose Holmes' contribution to the fundamental need of our society. For he was not in title or in fact the commander-in-chief of his own generation. He sought the joy of the thinker "who knows that . . . men who never heard of him will be moving to the measure of his thought — the subtile rapture of a postponed power, which . . . is more real than that which commands an army."[3]

Instead of reviewing here the details of his biography or analysing the precise contours of the cases he decided, I propose to concentrate on the democratic ideas which Mr. Justice Holmes embodies in three fields — the powers of popular government, the civil liberties of the citizen and the dignity of man. These will be admittedly mere strands plucked from a pattern. I should not want anyone to suppose that I am attempting an essay on the man as a whole. All I seek is to assay certain of his ideas which, though they will be, nay have been, to some extent superseded, seem to me to have eternal relevance to democracy and therefore to be of constant interest to every American.

* This essay is based on a lecture given by the author at Brown University in the fall of 1950. It was one of the Marshall Woods lectures delivered by various speakers depicting five outstanding exponents of American democracy and analyzing their contributions. The subjects included four presidents — Thomas Jefferson, Abraham Lincoln, Woodrow Wilson and Franklin D. Roosevelt — and one judge — Oliver Wendell Holmes.

† United States District Judge, District of Massachusetts.

1. BOWEN, YANKEE FROM OLYMPUS (1944).
2. *Frankfurter, Oliver Wendell Holmes,* 21 DICT. AM. BIOG. 417 (1944).
3. Lecture delivered to undergraduates of Harvard University, Feb. 17, 1886, reprinted in THE MIND AND FAITH OF JUSTICE HOLMES 31, 33 (Lerner ed. 1943).

I come first to Mr. Justice Holmes' views of the powers of popular government. Etymologically this clearly belongs at the forefront of any discussion of democracy. For from the Greek days when the word was coined, democracy has at the least embraced the idea of that form of state in which the people as a whole share public authority.

In the United States "democracy" has sometimes been defined with its original literal significance — the classic example being the triad in Lincoln's Gettysburg Address. Yet during the first century of the history of the United States — the period during which we were most often described as a "republic" — the actual role of the people diverged sharply from that in a Greek democracy.

Our orthodox eighteenth and nineteenth century view of popular government turned for philosophical justification not to Plato or Aristotle but to Locke and Montesquieu, and for practical techniques not to the colonies on the Eastern Aegean founded by Athens but to those on the Western Atlantic founded by England. The essence of the traditional American theory is that democratic government is limited in its methods and its objects, that the division of powers amongst the executive, legislative and judicial branches is the core of Anglo-American liberty, that the federal balance between the nation and the states is the secret of strength without tyranny and of self-government without provincialism, that the people express their wisdom not in determining policies but in choosing representatives and that the maximum goal of the state is to prevent force or fraud from interfering with the self-development of the individual man.

Whether this theory be labelled constitutionalism or the system of checks and balances or representative government or *laissez-faire*, it is the one set forth in most high school courses in civics. It is the picture of American government drawn by as serene and sophisticated observers as the omniscient historian Lord Acton and the knowledgeable ambassador Lord Bryce. More important, it was the view of popular government which nineteenth century Justices of the Supreme Court proclaimed not only from the bench but also from the platform, as the published lectures of Justices Miller, Brewer and Harlan reveal.

How far did Holmes subscribe to this theory?

Before I try to answer the main question I must not avoid a preliminary hurdle. Does a judge in his official capacity ever have a theory of government — or, to put it less in psychological terms and more in philosophical form — should a judge in his official capacity have a theory of government?

No informed observer supposes that a judge is a variety of impersonal calculating machine who merely applies the law. He does not automatically render an answer mechanically derived from learning first the facts from the litigants and second rules of law from books

in a library. His judgments are not predictable by lawyers as eclipses are predictable by astronomers. He does not, Mr. Justice Roberts to the contrary notwithstanding,[4] decide a case by laying the text of a statute against the text of the Constitution to see whether it squares. Every constitutional judge to some degree, and self-conscious judges like Holmes to a large degree, applies in his judgments the policies which he believes represent the sober second-thought of the community and are suited to its inarticulate needs. Of course, I have not meant to indicate that a judge is always free to rule according to his discernment of the long-term public interest. The area of his freedom is limited — perhaps the boundaries have never been better described than by Judge Cardozo in *The Nature of the Judicial Process* — but nonetheless, as the multitude of dissents in the Supreme Court have incontrovertibly proved to our citizenry, there are some cases where there is an area of choice and, when he is within it, the judge consciously or unconsciously reveals his theory of government. Even an abstention from decision is a revelation of choice — a choice to entrust power to other hands more competent, more flexible or more responsive to popular will.

Before Holmes came to the Court and during most of his tenure the majority of the Justices were enforcing with full vigor and without abdicating much to the judgment of others what I have called the orthodox theory of American democracy. The majority held that the national government was severely circumscribed in its fields of interest. It had no right without an amendment to the Constitution to lay an income tax on individuals, or to prevent the shipment in interstate commerce of child-made goods, or to control monopolistic practices in manufacturing industries. The majority also held that both the national and the local governments must move warily where they trench on property rights. They could not in time of peace fix minimum wages or regulate maximum prices or preclude an employer from discriminating against union labor. And courts, if they were to be faithful to the Anglo-American tradition, must not allow the legislature to give administrative agencies a judicial power to find the ultimate facts in controversy and to enunciate and apply the governing rules of law.

The familiar decisions to which I have somewhat eliptically referred were, it is hardly necessary to say, superficially cast in terms of legal rather than political, economic or philosophical doctrines. The judges who wrote the majority opinions purported to find their reasons in the fundamental law of the land — in the scope of the taxing power conferred on Congress by Article I, Section 8, Clause 1 of the Constitution or in the scope of the commerce power conferred on Congress

4. United States v. Butler, 297 U.S. 1, 62, 56 Sup. Ct. 312, 80 L. Ed. 477 (1936).

by Article I, Section 8, Clause 3 of the Constitution or in the limits imposed by the "due process" clauses of the Fifth and Fourteenth Amendments to the Constitution or in the implications of Article III that judicial power can be reposed only in what are formally designated as courts of the United States. But there were no precise words in the test of the constitutional provisions which compelled this logic. And, as Holmes' opinions illustrated, a quite opposite course of reasoning was possible for one who started with a more enlarged view of constitutional democracy.

The starting point with Holmes was his awareness that "the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."[5]

Our charter of government was intended to endure for ages and to be adaptable to a changing world and to the growth of men's experience and enlargement of their vision. It did not, as Holmes said, "enact Mr. Herbert Spencer's *Social Statics*"[6] or for that matter Locke's *Civil Government*. The provisions of the United States Constitution are not to be read as a petrification of past practice. They are set in a context calculated to remind us of the historical forces which originated, and of the contemporary allegiances which preserve, a balance between national and state governments. They are phrased in terms not of subject matters to be regulated by government but in terms of powers available to government. This is because just as individuals use their powers to create new forms of organization and to embark on new lines of activity to serve their own interests, so the people as a whole through their government are free to create new forms of regulation and to embark on new fields of welfare with the object of keeping all groups of private interests adjusted to each other. They are couched in language of utmost generality. For the Constitution excludes from the area of permissible regulation only a few topics, and those for the most part the so-called civil liberties. And even on the excluded topics the Constitution offers less an inflexible rule of limitation than a broad counsel of moderation — a constant appeal to the only half-articulated spiritual traditions that give substance to the promise of American life.

Applying these principles in litigation where the national government and the state governments conflicted, Holmes was one of the foremost in recognizing the overriding rights of the nation. Some may see in this the deeper impact upon his mind of his services as a soldier

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

6. Lockner v. New York, 198 U.S. 45, 75, 25 Sup. Ct. 539, 49 L. Ed. 937 (1904).

in the Union cause than of his services as a state judge. In any event he was alert to invalidate state tax or police action that revealed discrimination against, or even much theoretical interference with, the commerce among the several states. He said in an oft-quoted passage —

> "I do not think that the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several States."[7]

And as a corollary to that observation, he was more willing than most of his contemporaries to allow the national Congress to reach its regulatory arm into what were once thought to be local business concerns. His opinion in the first child labor case and his extension of the Sherman anti-trust statute to cover the packers' operations will serve as illustrations.

Of perhaps greater significance as an example of Holmes' democracy was the constancy with which as a judge he voted to allow governments both local and national to experiment with novel forms of regulation, of which as a voter or legislator he might have disapproved. The Supreme Court reports are replete with his explanations of these judicial votes, perhaps the most familiar being the statement in *Truax v. Corrigan:*[8]

> "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect."

The temper of that quotation explains how Holmes voted to sustain minimum wage and maximum hour legislation, state laws which imposed compulsory insurance for banking deposits, public regulations of employment contracts and many other measures which in his private correspondence the Justice would have characterized as socialistic humbug.

Holmes' willingness to tolerate change, variety and experimentation accounts for his attitude toward another facet of orthodox democratic theory. He was as familiar as any statesman with the oft-proclaimed virtues of the separation of powers, and he was aware how many interpreters of our Constitution have found these virtues enshrined not merely in certain constitutional clauses but in the very textual structure of the document — Article I dealing with the legislative power of Congress, Article II dealing with the executive power of the Presi-

7. *Law and the Court (1913),* in COLLECTED LEGAL PAPERS 295-96 (1921).
8. 257 U.S. 312, 344, 42 Sup. Ct. 124, 66 L. Ed. 254 (1921).

dent, Article III dealing with the judicial power of the Courts. Yet Holmes was receptive to the needs of modern society to establish agencies of government which mingled these supposedly separate powers. He showed this in his votes in cases involving the Interstate Commerce Commission, the Federal Trade Commission and the government of the territories we acquired after the Spanish-American War. In many of these cases, however, he was less the pioneer than the second to Mr. Justice Brandeis, the chief judicial expositor of the most original affirmative powers of our twentieth century democracy — administrative agencies, governmental corporations and public authorities of mixed functions.

So far we have been considering Holmes' attitude toward the affirmative aspects of popular government — the powers which may be exercised by nation and state. But in a democracy limitations upon governmental power are equally significant. "The wise restraints that make men free" are restraints upon public authority as well as restraints upon private persons. And it is, therefore, appropriate to consider now Mr. Justice Holmes' attitude toward civil liberties.

Even before we adopted our Constitution we announced in the Declaration of Independence our belief in the inalienable rights of man — a doctrine whose genesis has been so admirably studied in Professor Carl Becker's famous historical monographs.[9] And this stress upon individual rights and civil liberties was carried further in the habeas corpus provision in the Constitution of 1789 and the first ten amendments of 1791. The safeguards of these amendments, as Ambassador Thomas Jefferson's letter of March 15, 1789 to Congressman James Madison reminds us, were inserted because of "the legal check which it puts into the hands of the judiciary." Thus in the Jeffersonian and Madisonian no less than in the Hamiltonian and Marshall view the judges of our courts were specifically authorized to invalidate such public action as was repugnant to those particular civil liberties which are guaranteed by the Constitution.

But when Holmes ascended the bench in Washington in 1902 this authority had been sparingly exercised in the fields which most concerned Jefferson and Madison. A 1902 catalog of cases in which civil liberties had been successfully invoked would be surprisingly short. Property rights, to be sure, had been protected in the nineteenth century by invoking first the "obligations of contract" clause of Article I, Section 10 and later the "due process" clauses of the Fifth and Fourteenth Amendments. But what we ordinarily embrace within the concept of civil liberties or human rights had hardly been appreciated as constitutional rights subject to vindication by the Courts, as is convincingly shown in Professor Commager's slender though exhaustive

9. BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS (2d ed. 1942).

volume on *Majority Rule and Minority Rights.* Indeed Holmes himself applying constitutional principles as a Massachusetts state judge had not been disturbed at a New Bedford police rule which denied a policeman the right to discuss political issues, or at the Boston ordinance which denied citizens the right to make a speech on the Boston Common without a permit from the Mayor.

The twentieth century, however, brought great changes in Holmes' viewpoint and later in that of the majority of the Court.

To my mind the most important change 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,*[10] where the defendant had been convicted by a Georgia state jury which was terrorized by a mob surrounding the courtroom, only Justices Holmes and Hughes thought that the Federal Supreme Court was warranted in invoking 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 outside 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 undeniable gravity. Indeed Holmes' dissents go further than the law has yet gone in precluding the conviction of defendants upon the basis of evidence which had been procured by wire-tapping or other methods which he described as "dirty business."[11]

A second and much more widely known phase of Holmes' work in the field of civil liberties concerned freedom of speech. Here his influence not only on the law but on political theory and philosophy has perhaps been unmatched by any single American, although as I shall say in a minute it is not clear that this country now accepts his doctrines without qualification as adequate to meet the changed circumstances of the contemporary world.

10. 237 U.S. 309, 35 Sup. Ct. 582, 59 L. Ed. 969 (1914).
11. Olmstead v. United States, 277 U.S. 438, 470, 48 Sup. Ct. 564, 72 L. Ed. 944 (1928).

It was in the aftermath of World War I that Holmes first faced a large volume of cases in which the free speech issue was predominant. In one of these, the *Schenck* case, he stated in a sentence familiar to every newspaper reader that "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 they will bring about the substantive evils that Congress has a right to prevent."[12]

This is not the occasion to trace the origin of that doctrine, to show how much it owed to Holmes' youthful studies of the common law of criminal attempts and how much it owed to his reading of Milton's *Areopagitica,* to his knowledge of the history of John Adams' administration and to his personal friendship with John Stuart Mill, Frederick W. Maitland, Sir Frederick Pollock and Leslie Stephen. Yet without drawing that genealogical tree, we must recognize that Holmes' doctrine of the limits of free speech is the final crystallization of Nineteenth Century Liberalism. The doctrine is an admirably consistent series of deductions from two initial premises—that man is a reasoning animal and that, given time and space, reason will dissipate not merely error but danger as well. These deductions have captured countless readers partly because of the undeniably superb logic with which they move from the assumed premises, but even more because of the haunting poetry in which Holmes enshrined them. Let us stand in the back of the courtroom and hear him read his immortal opinion in the *Abrams* case:[13]

> ". . . 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 the lawful and pressing purposes of the law that an immediate check is required to save the country."

Who can doubt the practical wisdom, the noble philosophy and the enduring strength of that passage—the most eloquent in all our court reports? Does it not belong with the two great memorial

12. Schenck v. United States, 249 U.S. 47, 52, 39 Sup. Ct. 247, 63 L. Ed. 470 (1919).

13. Abrams v. United States, 250 U.S. 616, 630, 40 Sup. Ct. 17, 63 L. Ed. 1173 (1919).

speeches of the democratic tradition—the one of 431 B.C. and the other of 1863 A.D.?

I am not prepared to deny the implication of these questions. Yet I want to invite you before applauding to consider carefully whether you agree not with Holmes' deductions but with his premises? Is man a reasoning animal and, given time and space, will reason dissipate not merely error but danger as well?

Holmes wrote before the world had fully appreciated the wickedness of which civilized man is capable. He knew not the Nazi concentration camps, nor the Goebbels propaganda for circulating the big lie, nor the Communist disciplined subordination of man's interest in truth to man's interest in material progress, nor the use of domestic dissidents as auxiliaries of a foreign state, nor the speed with which in our modern technological society forces of evil purpose may overwhelm the majority of peaceful men. Holmes wrote without reading Kierkegaard and Niebuhr and without hearing of Fuchs and Eisler.

If Holmes knew what we know would he ask the right to reconsider his premises and would he invoke as an avenue of retreat his most famous epigram, "the life of the law has not been logic; it has been experience"?

It is plain that some who have oft repeated their allegiance to Holmes' creed would do so. Consider the impressive opinion of Judge Learned Hand given in affirming the conviction of the eleven Communist leaders[14] and the action of the Supreme Court in affirming that decision[15] or the decision of the Supreme Court upholding that provision of the Taft-Hartley Act which denies the privileges of the National Labor Relations Act to unions which have Communist leaders;[16] or the action of the Congress in enacting the Internal Security Act of 1950[17] over a presidential veto.

For one who has my other duties it would be inappropriate to make a personal comment upon those recent manifestations of our democracy. But I may without impropriety observe that it is only by rewriting Holmes' premises, recasting his criteria of judgment and adding uncanonical qualifications to his formulas that judges and legislators of contemporary times have reached the results which the overwhelming majority of our contemporaries seem, at least in the pressure of the moment, to endorse.

We do not live in an era which looks with placid self-assurance upon nonconformity. We have not the civil courage, the confidence in other men's capacities, the consciousness of ultimate victory to

14. United States v. Dennis, 183 F.2d 201 (2d Cir. 1950).
15. Dennis v. United States, 341 U.S. 494, 71 Sup. Ct. 157, 95 L. Ed. 1137 (1951).
16. American Communications Ass'n v. Douds, 339 U.S. 382, 70 Sup. Ct. 674, 94 L. Ed. 925 (1950).
17. 64 STAT. 987 (1950).

admit as full partners in our society those who will not take without reservation the oaths we set before them. This is not the place to say whether we shall be justified before the bar of history. But those who subscribe to the dissents of Holmes in the *Schwimmer*[18] and *Macintosh*[19] cases must recognize that in the circumstances of his day he was prepared to allow a broader liberty to dissenters, malcontents and radicals than are our statesmen in the circumstances of our day, a day in which this country has reached a new high in physical resources, in armament, in productive facilities, in employment and in liquid capital, if not in spiritual leadership.

I turn now to the final point, Mr. Justice Holmes' attitude toward what some would regard as the central belief of the true democrat—the dignity of the individual man.

It is worth emphasizing at the outset what have been the sources of that belief—for, as we shall see, they include some currents in which Holmes was never caught up. One of the main sources has been natural law; another the Judaic-Christian religious tradition; and a third the classical influence of Greece and Rome on England and her offspring.

Holmes in letters, essays and legal opinions often attacked natural law concepts as a mere attempt to dress up as eternal verities our own limited experiences and hopes. He had no use for absolutes, legal or philosophic. Man did well to form generalizations of what was good and true and beautiful but the generalizations had no claim to be ultimate standards or to be final criteria of judgment. "The best that has been thought and said in the world" was of profound interest, but it was no copy of a Platonic set of universal ideas good *semper ubique*, marketable as coinage of the heavenly realm. Man could never find a pure gold fit for a universal standard. For him it was enough to learn how to mine, to refine, to use the alloyed metals of this earth. These mundane minerals were to be tested pragmatically. They were to be fitted into some workable and passable currency for our daily needs—on the understanding, of course, that the system of values was purely artificial, devised for convenience and subject to devaluation or revaluation whenever experience dictated.

To the Christian or any other formal religious discipline the mature Holmes never professed to be an adherent. He would not have denied that there was a power bigger than himself—he wrote that he knew he was in the belly of the cosmos and not the cosmos in him. But he irreverently referred to the deity as the Great Panjandrum who had not disclosed the plan of campaign, if indeed there is one. While he admired his father's friend, Ralph Waldo Emerson, and imbibed from

18. United States v. Schwimmer, 279 U.S. 644, 49 Sup. Ct. 448, 73 L. Ed. 889 (1927).

19. United States v. Macintosh, 283 U.S. 605, 51 Sup. Ct. 570, 75 L. Ed. 1302 (1931).

him and older New England divines a sense of obligation and of Puritanical duty, he did not share their faith in God which gave New England its distinctive Transcendentalism.

Intellectually he was a skeptic. His ideas were not far different from those of the early Santayana — the author of *The Life of Reason.* And at times, as on his ninetieth birthday, Holmes could summarize in severely physical terms the insignificance of man's existence; "To live is to function. That is all there is in living."[20] But this rigorous separation of what he knew from what he did not know was never uttered in arrogance or pride. Indeed he disdained the impetuous defiance of our modern Prometheus, Bertrand Russell, who as Pollock said thought himself "a valiant fellow for throwing stones at God Almighty's windows."[21]

Yet this intellectual skepticism was to some extent balanced by a desire to plunge himself into the full tide of emotional forces in a way that would have astonished a complete Pyrrhonist like Montaigne. There was something far deeper than an imperturbable materialism in the judge who told a Harvard graduating class that a soldier's faith was "true and adorable" even "in a cause which he little understands,"[22] in the Civil War veteran who told his former comrades in arms that "it is required of a man that he should share the passion and the action of his time at peril of being judged not to have lived,"[23] and in the American citizen who saw mere belittling innuendo in Charles Beard's portrait of the framers of the American Constitution as businessmen motivated by concern for their own investments.[24] Holmes fully acknowledged the power of things of the spirit. He could never have enthroned as an ultimate trinity Freud, Marx and Darwin and said that the combination of their psychological, economic and biological theories explained the totality of life. For Holmes' rejection of the theological system was a rejection of all systems on the ground that life was too big, too multifarious, nay too mysterious to be comprehended. He rejected the parson for his certitude and his narrowness — but he did not delude himself with any lesser substitute of cocksureness.

Was then Holmes' attitude toward man classical in its origin? Some have persuasively argued that Holmes was an incurable romantic leading the younger generations to a wasteland where agnosticism, violence and force hold sway. But Holmes had none of the optimistic

20. Radio address on occasion of his ninetieth birthday, reprinted in UNCOLLECTED PAPERS 142 (Shriver ed. 1936), also in THE MIND AND FAITH OF JUSTICE HOLMES 451 (Lerner ed. 1943).
21. 2 HOLMES-POLLOCK LETTERS 159 (Howe ed. 1944).
22. *Memorial Day Address, 1895,* reprinted in THE MIND AND FAITH OF JUSTICE HOLMES 18, 20 (Lerner ed. 1943).
23. *Memorial Day Address, 1884,* reprinted in THE MIND AND FAITH OF JUSTICE HOLMES 9, 10 (Lerner ed. 1943).
24. 1 HOLMES-POLLOCK LETTERS 237 (Howe ed. 1944).

exuberance, love of the wildness of nature or the admiration for the varieties of eccentricity which characterized his two great contemporaries in literature and philosophy, Walt Whitman and William James. The latter he regarded as a sentimental Irishman; the former's poetry is never quoted and never pulls at his vitals like Sophocles' *Philoctetes* or Dante's *Divine Comedy.*

If by the classical tradition in the Anglo-American world we mean the emphasis on the rounded man who conscious of the ideal of excellence disciplines himself to perform competently and unobtrusively and without being diverted whatever task falls to his hand, confident that every detail has significance and that every task greatly done makes the world more meaningful to the doer, then Holmes was a classicist. For Holmes, though he did not proclaim that human goals were eternal goals, never doubted that man could rise above the particulars of a sordid existence. If he could not discover God's purposes, he could nonetheless live a purposeful life of his own designing.

For himself, Holmes, at least after his Civil War years, chose as his design what may seem an austerely solitary life — first that of a scholar and then of an appellate judge. He never participated in the struggles of the market place nor of the political hustings nor even, to any substantial extent, of the trial court. He did not follow with reasonable closeness the diurnal conflict of other men's existences—going so far as often to avoid reading the daily newspaper. He never sought the spotlight of public attention and contemned those who advertised their own distinction. Cloistered in the library of his home he read voluminously mostly philosophical, historical, classical and juristic literature, interspersed with occasional French novels and current humorous books. He talked to and corresponded exclusively with the intellectual elite. His public appearances were virtually confined to four or five hundred hours a year on the bench in the former Senate Chamber in the Capitol. There he seldom spoke, but when he put one of his rare questions, it cut like a stingray to the heart of the case he was hearing. And then he went home to Eye Street to stand erect behind a tall bookkeeper's desk to write with a deft and sparkling pen opinions that "with a singing variety" epigramatically crystallized his profound insights.

In reading this description of Holmes you may have asked yourself whether I have shown the democracy of Holmes or his aristocracy. Quite plainly if democracy is the apotheosis of the lowest common denominator and if, to use Holmes' phraseology, every "great swell" is by definition an aristocrat, then the Holmes view of man was not democratic. But does democracy imply that the ideal man is the average man? Historically surely it does not, as Pericles would be the

first and Franklin Roosevelt the latest to teach us. Democracy no less than aristocracy has always stressed the dignity or, if you please, the nobility of man. The difference between the aristocratic and the democratic philosophies is that in an aristocracy the terms dignity and nobility connote titles founded on the accident of birth or principles of invidious selection from an artificially restricted field. In a democratic society the same terms are reserved for those who have so disciplined themselves that their countenances, their conduct, their code command respect. And it is in this sense that Holmes is a supreme instance of one democratic ideal of the dignity of man.

He has not, no man born in 1841 could have, given the answers suitable to our modern technological economy, to our new world order, to the rising tide of collectivism and, above all, to our crisis of faith. But like the Winged Victory of Samothrace he is the summit of hundreds of years of civilization, the inspiration of ages yet to come without being the foundation stone of any new school. He is the final authentic representative of the period of English democracy in America — the period that spans from 1607 to World War II.

But some of you may not be quite content to give Holmes that role unless I meet head-on a point now often pressed by detractors of the Justice. Despite the grandeur of the man and the style with which he carried off his life, was Holmes a believer in any durable values, democratic or otherwise? In his refusal of allegiance to any church, in his pervasive intellectual skepticism, in his praise of the soldier's faith apart from the soldier's cause, in his emphasis on adventure and on power, would he not have been as much at home in the world of Hobbes or of Hitler as of Jefferson or of Lincoln? Was he only a glorious specimen of Nietzsche's life force, a superman who but for the accident of birth into a Brahmin Beacon Hill family might have turned his theories and his talents to support an evil, destructive power?

One can make a superficial collation of Holmes' epigrams to fortify this sort of critical question. And there are some writers who have recently done so in theological pamphlets and bar journals. Holmes is himself not without blame for this criticism because he delighted to arouse his audience and stamp their memories with a witty or poetic phrase. He never spoke with cautious pedantic exactitude, qualifying every "bully generalization" with the express proviso that it was a mere apercu, understandable only as one of a series of partial visions. He invited the reader to cull his brocades out of context.

Yet we shall make a fundamental mistake if we assume that because Holmes was so happy a phrase-maker, because he was so disdainful of all absolutes and because he refused to accept or announce a systematic approach to the universe, his philosophy can be reduced

to the two principles that "whatsoever thy hand findeth to do, do it with thy might"[25] and let thy neighbor go in peace.

Rigorous standards for himself and tolerance of his neighbor were, to be sure, two important articles of his creed. Yet each of these derived from this more basic postulate: although absolute truth, undiminished beauty, unalloyed good are not to be found by man, the never-ending quest for the true, the good and the beautiful is the activity most satisfying to man. Even if the quest serves no cosmic end, even if when the earth has made its last revolution round the sun not a trace of man's long journey will be left in any heaven or hell, nonetheless the search for truth and beauty and goodness seemed as desirable to Holmes as it was inevitable for him. And the final glory of the democratic life, as Holmes exemplified it and extended it, is that democracy keeps every door open to searchers for ultimate values and demolishes every irrelevant barrier standing athwart the oncoming adventures in ideas.

25. *Life as Joy, Duty, End,* reprinted in THE MIND AND FAITH OF JUSTICE HOLMES 42 (Lerner ed. 1943).