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HOLMES'S LANGUAGE OF JUDGING — SOME PHILISTINE REMARKS

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Judges are public servants, whose job is to decide cases. They are good public servants if they decide well, and bad ones if they decide badly. It is the decisions that count, not how they are put. So the language of judging is not all that important.

I think Holmes would have agreed with me on this point, even though no judge took more pains over the language of opinions than he did. He once wrote that the display of authority judges put forward is “nothing but the evening dress which the newcomer puts on to make itself presentable according to conventional requirements. The important phenomenon is the man underneath it, not the coat; the justice and reasonableness of a decision, not its consistency with previously held views.”¹ If the reasoning is only the clothes, the language in which the reasoning is expressed is only the decoration pinned on the clothes. It just can not matter that much.

In fact, most judicial decisions are made without attention to the language of judging, simply because they are not expressed in written form. I am speaking here of the innumerable daily rulings of trial judges. When these judges do their work well, they command respect not by distinction of language, but by fairness and good sense.

Appellate judges, of course, not only make decisions but also

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¹ Book Notice, 14 AM. L. REV. 233, 234 (1880) (unsigned review). This statement is attributed to Oliver Wendell Holmes in MARK DEWOLFE HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882, at 156-57 (1963).

write opinions. So there seems to be more of a case at the appellate level that the language of judging matters. But the immediate practical point of accompanying appellate judgments with opinions is to provide guidance to lower court judges and to lawyers counseling clients. For an opinion to be a good one in these terms, it need only serve as a well-drafted instruction for the dispute-resolution bureaucracy. Yet this is not what the rhetorical critics have in mind when they speak of the language of judging.

We should also take into account the reality that appellate judges today generally do not write their own opinions, any more than Presidents or Senators write their own speeches. Law clerks often draft the opinions,² which judges then read over to see if they say anything the judge doesn't want said at the time. There are exceptions to this practice, but this was the norm 25 years ago when I was a law clerk, and my impression is that if anything the exceptions are fewer today.

This might be something we should deplore as a major degeneration in our system of justice. It might be thought, for instance, that *good* appellate judges write their own opinions, and indeed that they do so in distinguished language. But I want to deny that literary distinction is a necessary condition for judicial excellence. There have been good, even great judges, who wrote without distinction, or who let their law clerks do the writing, thus almost guaranteeing that the writing would be less than distinguished.

A clear example of this, in my mind, was Earl Warren, one of the great American judges but one whose opinions, regarded as texts, showed no particular distinction. Warren was a great judge for reasons unconnected to whatever literary capacities he had or lacked. He was a humane and just man to whom it mattered a lot that people should get fair treatment from their government. He was thoroughly engaged with and well understood the great public issues of his day. He was able to find principles for dealing with those issues which advanced the public welfare.

² See J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1171 (1994) (noting delegation of opinion writing to law clerks due to increasing demands on judges); Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant's Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CAL. L. REV. 765, 769-71 (1993) (noting law clerks' duties include drafting of opinions).

By way of contrast, consider the case of Holmes, perhaps the greatest master of English prose among our judges. Holmes was a fine judge, but I think Earl Warren was a better one. Still, I would burn all of Earl Warren's opinions—I stress *opinions*—to save any one of a hundred or more written by Holmes. In the same way, I would burn all the annual reports of the American Civil Liberties Union and the Anti-Defamation League of B'nai B'rith if I had to do so to save from the flames one of the vivid anti-semitic and anti-humanist novels of Louis-Ferdinand Céline.³ When the question is the pleasures of the text, as Mae West said in a different but related context, goodness has little to do with it.

I do not mean to say that Holmes was much like Céline. Holmes was closer to the Satan of *Paradise Lost*, the villain who has all the good lines, and who thoroughly upstages God the Father, the rather sententious fount of all that is good. Milton was a faithful Christian, of course, but he could not dramatize the Christian virtues as memorably as the forces that animated his fallen angel: self-assertion and self-realization, a conception of freedom that rested on skepticism, and a view of the world as an arena of power in which struggle was never-ending. Holmes resembled Milton's Satan in these qualities, as well as in his eloquence, and in the intriguing complexity of his character.

But Holmes's conception of the judge's role was more reminiscent of Milton's loyal angels than of Satan. He believed that his public duty was to subordinate his own views to the dominant opinion in his community, that of his masters, the people. He did not respect the substance of those views, but he respected their source.

Holmes also understood the virtues of Earl Warren's kind of judge, and he knew that he lacked those virtues. He said of Lemuel Shaw, the Chief Justice of Massachusetts who did so much to shape the 19th Century American common law, that though others had more subtle legal minds, Shaw was "the greatest *magistrate* which this country has produced" because he so well understood "the requirements of the community whose officer he was."⁴ Holmes said much the same of John Marshall,

³ See generally DAVID HAYMAN, LOUIS-FERDINAND CÉLINE (1965); *French Culture Ministry Honours Pro-Nazi Writer*, Reuters, Feb. 24, 1992, available in WESTLAW, Int-News database.

⁴ OLIVER WENDELL HOLMES, THE COMMON LAW 85 (Mark DeWolfe Howe ed.,

praising "his might, his justice, and his wisdom" while doubting that he stood in the first rank of writers or thinkers.⁵

Holmes knew he lacked what he praised in those judges, an instinctive understanding of what the community required. He did not read the newspapers and did not know the most basic facts concerning the society whose laws he was administering. When the only colleague whose mind he respected, Brandeis, told him he should read legislative reports on labor conditions in the mills of Massachusetts, he demurred and went back to his usual reading: Aristotle, Hegel, and the latest French novels.⁶

Listen to Holmes speaking of another judge who lacked both literary and jurisprudential distinction, his colleague, and for a decade his Chief Justice, Edward Douglass White:⁷

I often think not without sadness of the profound difference in the interest of my friend the Chief Justice and myself—so profound that I never talk about my half. He is always thinking what will be the practical effect of the decision (which of course is the ultimate justification or condemnation of the principle adopted). I think of its relation to the theory and philosophy of the law—if that isn't too pretentious a way of putting it. We generally come out the same way by very different paths. But we sometimes come head together with a whack.⁸

Little, Brown, & Co. 1963) (1881).

⁵ Oliver Wendell Holmes, *John Marshall*, in COLLECTED LEGAL PAPERS 266, 270 (1920).

⁶ Letter from Justice Oliver Wendell Holmes to Harold J. Laski (May 18, 1919), in HOLMES-LASKI LETTERS, 1916-1935, at 204-05 (Mark DeWolfe Howe ed., 1953); Letter from Justice Holmes to Sir Frederick Pollock (May 26, 1919), in 2 HOLMES-POLLOCK LETTERS, 1874-1932, at 13-14 (Mark DeWolfe Howe ed., 1961) (1941). Brandeis had also suggested that Holmes take a trip to Lawrence to see the conditions in the textile mills personally. 2 *id.* at 13.

Holmes's reaction:

I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties, but I shrink from the bore—or rather I hate to give up the chance to read this and that, that a gentleman should have read before he dies.

2 *id.* at 13-14.

⁷ Chief Justice Edward Douglass White was appointed by President Taft and served as Chief Justice of the United States Supreme Court from 1910-21. KENNETH BERNARD UMBREIT, OUR ELEVEN CHIEF JUSTICES 360 (1938).

⁸ Letter from Justice Oliver Wendell Holmes to Canon Patrick Augustine Sheehan (Jan. 31, 1913), in THE HOLMES-SHEEHAN CORRESPONDENCE, at 81-82 (David H. Burton ed., Kerrikat Press 1976) (1876).

Holmes really believed that the legislative dimension, the justice and reasonableness of the decision, was the most important consideration for the judge. But he also knew, most of the time, that a man as out of touch with his countrymen as himself was unlikely to be a good judicial legislator. On the whole we are better off that he realized this. When he did let his legislative instincts run free he tended to produce decisions like *Buck v. Bell*,⁹ which not only deferred to but endorsed eugenic sterilization, with the notorious tag: “[t]hree generations of imbeciles are enough.”¹⁰ And on a less grim note, there was the *Goodman* case,¹¹ in which the aging jurist who had never driven an automobile laid down the rule for his motoring fellow countrymen that they must not only stop, look, and listen, but also get out of the their cars and peer up the track when they came to a railroad crossing.¹² These decisions and a good many more like them must be weighed against the few famous triumphs, the great free speech and due process opinions.¹³

So we can be grateful that Holmes usually tried as hard as he could to find pre-existing law to control his decision. He almost always deferred to legislation, and in common law cases gave extraordinary scope to established precedent.¹⁴ We tend to remember his famous jurisprudential pronouncements in favor of judicial creativity, such as his statement that where the law does not settle the case, a judge must exercise “the sovereign prerogative of choice.”¹⁵ We are likely to forget that on the same

⁹ 274 U.S. 200 (1927).

¹⁰ *Id.* at 207.

¹¹ *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927).

¹² *Id.* at 70.

¹³ *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting); *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting); *Frank v. Magnum*, 237 U.S. 309 (1915).

¹⁴ *See, e.g.*, *Stack v. New York R.R. Co.*, 58 N.E. 686 (Mass. 1900). In this case, Justice Holmes, wrote:

We agree that ... it may be desirable that the courts should have the power in dispute. We appreciate the ease with which, if we were careless or ignorant of precedent, we might deem it enlightened to assume that power.... [b]ut the improvements made by the courts are made, almost invariably, by very slow degrees and by very short steps. Their general duty is not to change but to work out the principles already sanctioned by the practice of the past.

Id. at 687.

¹⁵ OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 239 (1920).

page he said he did "not expect or think it desirable that the judges should undertake to renovate the law. That is not their province."¹⁶ Judges were only to legislate in the interstices left by established law. To Holmes those interstices were narrow indeed.

Where he did find gaps, he imagined them as existing in the penumbras of principles, so that the judicial task was simply to make a practical judgment of degree—how far to push the principle beyond its central application. What mattered in such a case was not how the judge came out, but that the judge should recognize the nature of the task: to mark a line in doubtful ground, if possible stating a rule that would make the law more predictable. Sometimes Holmes's opinions suggest that he thought he might as well have flipped a coin. He believed that neither he nor anyone else knew which of the conflicting policies should predominate. What mattered was that a dispute, a potential source of social disruption, should be settled swiftly, in an orderly way, and without undue pretense.¹⁷

Holmes did care very much that the opinions he wrote in all these little cases should be written well. But he did not think it mattered to others whether they were or not. It was a matter of pride, of satisfying himself, and his own instincts of art and craft.

Those instincts were astonishingly good. Holmes wrote more than two thousand opinions in nearly fifty years as a judge, many of which I have been reading lately. I am always amazed at the excitement and drama he was able to inject into the most mundane lawsuit. We misunderstand him if we think of him primarily as a practitioner of the plain style. "One cannot be perfectly clear until the struggle of thought is over," he wrote.¹⁸ "Therefore I do not regard perfect luminosity as the highest praise."¹⁹ His models in English prose were Carlyle and Emer-

¹⁶ *Id.*

¹⁷ For a more full description of Holmes's conception of the judge's role, see Thomas C. Grey, *Molecular Motions: The Holmesian Judge in Theory and Practice*, 37 WM. & MARY L. REV. 19 (1995).

¹⁸ Letter from Justice Holmes to Lewis Einstein (Nov. 12, 1905), in THE HOLMES-EINSTEIN LETTERS, 1903-1935, at 21 (James Bishop Peabody ed., St. Martin's Press 1964). Holmes added: "Those who are perfectly clear are apt to be nearer the commonplace." *Id.*

¹⁹ *Id.*

son, neither one a plain stylist.²⁰ His compressed, tense, sometimes paradoxical opinions are notoriously hard to understand. Their stylistic virtues are more those of a Metaphysical Poet than of an English civil servant.

If he was a kind of judicial poet, he was, as I have said, not much of a judicial legislator, either in quantity or quality. Occasionally, though, he did come upon a gap in the law where he persuaded himself that something important was at stake, and his way of writing and his views of judging and of life came together to produce something remarkable. For example, in *Olmstead v. United States*,²¹ the Court held that wiretap evidence obtained in violation of state law could be admitted in a federal prosecution.²² Holmes dissented in these words:

I think ... that, apart from the constitution, the Government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds what to choose. It is desirable that criminals should be detected, and to that end all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained... . We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.²³

I will not try to analyze the qualities of this passage, but say only that I know of no opinions by other judges that are anything like that, as there have been no other judges like Holmes. I myself am glad there was one such judge, but one was probably enough. On the other hand, we have never had enough John Marshalls, Lemuel Shaws, or Earl Warrens. Art is one thing, and good art is a good thing wherever it turns up. But justice is something else.

²⁰ HOLMES-SHEEHAN CORRESPONDENCE, *supra* note 8, at 71-72.

²¹ 277 U.S. 438 (1927), *overruled in part* by *Katz v. United States*, 389 U.S. 347 (1967).

²² *Id.* at 466. The Court held that a wiretapping was not "an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house...." *Id.* Thus the wiretapping was not "a search or seizure within the meaning of the Fourth Amendment." *Id.*

²³ *Id.* at 469-70 (Holmes, J., dissenting).

