TRUTH AND THE LAW: A CRITICAL VIEW OF COMMUNITY

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I

Oliver Wendell Holmes, Jr. was masterful both as a judge and as a phrasemaker. The study of law inevitably includes acquaintance with his description of the common law: "The life of the law has not been logic: it has been experience."[1] A typical Holmes phrase, the description is striking, clear, memorable—and incapable of withstanding rigorous scrutiny.

Logic may not be all there is to law, but clearly logic is necessary to law. The justification for legal coercion is the proposition that like cases should be decided alike, and without logic we have no assurance that we can construct valid categories in terms of which to define like cases. How, then, can one understand what Holmes has written?

Holmes was wounded in a war which was fought to gain freedom for slaves, and which produced the political excesses of Reconstruction and the economic excesses of rapid industrialization. Experience taught Holmes to live with conflict and paradox, to accept the proposition that logic provides no easy answers to important questions. Experience sounds more flexible and organic than logic, but as a guide to the correct decision, it fares no better.

" '[Brandeis],' " said Holmes, " 'always desires to know all that can be known about a case whereas I am afraid that I wish to know as little as I can safely go on.' "[2] Holmes was certain that facts alone—the talisman which justified Brandeis's infatuation with the collection of statistics—would provide no basis on which to determine how little a judge "can safely go on." This divergence, on its face, is about techniques of judging. Brandeis would agree, however, that when the task is one's life rather than one's vocation, when the issue is that of mastering reality as opposed to measuring up to the historically defined standards of a given skill, then perfection is pointless even as an aspi-

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1 O.W. Holmes, The Common Law 5 (M. Howe ed. 1963).

2 A. Bickel, The Unpublished Opinions of Mr. Justice Brandeis 231 (1967) (quoting Letter from Oliver W. Holmes to Felix Frankfurter (Dec. 3, 1925) (copy in Holmes Papers, Harvard Law School Library)).

ration, and the relevant issue becomes how little one "can safely go on."

The divergence between Holmes and Brandeis, in other words, involves matters of process rather than substance, and objections to the Holmes position are at bottom objections to the validity of the Platonic search for essences, to the proposition that what matters are the forms of reality. The Platonic nature of Holmes's technique of decision is made clear by his own description of it: "I long have said there is no such thing as a hard case. I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath."[3]

Brandeis, like Aristotle, replaces the search for the essential with the techniques of categorization and analysis, and gains the certainty that what is being dealt with is objective rather than subjective truth. Such a shift has significant consequences. For example, if one seeks to define tragedy, Aristotle's analysis is where one begins, but whether Plato simply ignored the significance of art or was being ironic when he disparaged the work of artists is an unresolvable issue. The shift from Plato's search for underlying pattern to the Aristotelean description of the phenomenon itself comes at a price: the reduction of meaning to function. Thus, Aristotle "explains" tragedy as the construction of events that evoke the emotions pity and fear, whereas Plato (were he to deal specifically with tragedy rather than treating tragedy simply as an instance of art) would ask what it was about the given events that evoked precisely pity and fear.

The question I have attributed to Plato is, of course, the question Aristotle asks, but the latter's answer takes the form of a "how to" book for the writer of tragedies. Both Aristotle and Plato seek to order reality; they differ in what they accept as a satisfactory alternative to the possibility that life is the plaything of chance, a succession of random events.

Thus, the same events may evoke different emotions in different people; and, even in just one person, the same event may produce different emotions at different times, or conflicting emotions at the same time. Order, however, requires a stable correlation between the fact of occurrence and the fact of feeling, and tragedy as analyzed by Aristotle is an attempt to establish such a correlation. Such a stable correlation is rendered problematic by what we perceive as the serial nature of events, which includes the possibility of change.

A fixed concept of tragedy fits different contexts differently, and

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[3] O.W. Holmes, 1 Holmes-Pollack Letters 156 (M. Howe ed. 1941).

because time passes, any viable concept must be applicable to a variety of contexts. The question of the tragedy concept's "fit" is an example of the general problem of the relationship between the particular and the general, the instance and the rule. Aristotle and Plato lived in a society which, like ours, had ways to deal with this problem. One was law, a set of principles that regulated the reality with which humans dealt. Another was the supernatural, gods who were portrayed as aspects of that reality, as personifications of the states and drives that characterized the world in which humans lived.

Successful art orders reality without having to resort either to the law or the supernatural because it functions as metaphor, suggesting more than it states. This discrepancy was not a significant issue until the Renaissance, when a style of painting known as Mannerism emerged. "Mannerist" denotes craftspersons' self-conscious about the reality they are depicting: painters, for example, whose vistas, on close inspection, incorporate situations today's viewer would call "soft core" pornography; artists whose work makes clear that the focus is as much on the technique as on the reality that the technique portrays. Mannerism emphasizes how something has been portrayed rather than whether it should have been: the way it is portrayed rather than whether it reflects reality.

Mannerism is a style significant only in a world fundamentally different from the one Plato and Aristotle lived in. The Greece the Renaissance knew—the society which provided models for the art known as Classic—was not the Greece in which Plato and Aristotle lived, but rather something rediscovered by those for whom Mannerism was meaningful. The most significant difference between those two worlds is monotheism, the belief—the oversimplification of the supernatural—that God could be treated as a single entity present in the artist's life, rather than as a plethora of forces inaccessible to rational speculation, powers uncontrollable by human effort. Greek artists could be Mannerists, but they would not confuse the style of mannerism with the meaning of art, the truth of the reality they produced.

The reason for this shift in attitude toward technique was that monotheism was a revolutionary event—a change in the context of which humans visualized their existence. Thus, monotheism makes possible an iconoclastic objection to art, the certainty that the artist is attempting not to portray a portion of reality, but to demean the single key to existence. By the time of the Renaissance, however, the church—the human institution in which religion was embodied—had become sufficiently corrupted to render the issue of iconoclasm moot,

to permit discounting spiritual reality's significance, and treating the Second Commandment as anachronistic.

The historical consequence of ecclesiastical corruption was the Reformation, which once again made possible social acceptance of spirituality—the personal meaning conveyed to the individual by the events described in the Bible—as the basis for the Christian religion. Until Luther translated the Bible into the vernacular, Latin or Greek had served simultaneously to justify and to distance the institution in which the Divine was incorporated. As always, however, change came at a price. Acceptance of individual perception as a source of truth meant both that iconoclasm reappeared, and that religion developed functional competitors other than the law: sources of social truth concerning the ordering of reality known as art and politics.

To recapitulate, the art produced by Greek society was Classic, meaning that truth for the people addressed by Plato and Aristotle was coherent, that both the artist and the Platonic dialogue were portraying something accessible to rational scrutiny. Consequently, art was unnecessary for the Platonic philosopher-king, and *The Republic*[4]—the dialogue concerning politics—can be read as a statement of what humans should be, a metaphor either for the *polis* or for the individual, a statement both of spiritual and material truth.

For Plato politics is applied philosophy, whereas for the Renaissance—as Machiavelli made clear—politics can be viewed as an instrumental activity, a matter of technique, a search for power for its own sake. Once the normative propositions with which we justify our actions are perceived as separate from the behavior we call "political," Mannerism can be seen as a response to the dilemma presented by humans being social animals. Treating technique as substantive, as the point of the exercise, is a logical response to the perception that those in power seek power for its own sake, rather than to make themselves what they should be. For a Mannerist, in other words, the relevant question is not the nature of truth, but the attitude of the actor, not the general proposition that character is destiny—the correlation that underlies the Aristotelian view of tragedy—but the concrete motive of the specific lawgiver.

On the other hand, Plato and Aristotle addressed themselves to an audience for whom tragedy was paradigmatic because of the human ambivalence about heroism, the pity and fear that characterize our responses to the fate that has befallen aspirations. Tragedy makes us aware that prudence is as necessary as courage, that knowing what

[4] Plato, The Republic, in Plato: The Collected Dialogues 575 (E. Hamilton & H. Cairns eds. 1961).

we want to be involves a danger: forgetting that social animals are being themselves when they accommodate each other, when they surrender control of their fate to forces other than themselves. It remains, however, to apply these perspectives to our reality, to the society in which we live.

II

Politics as used here is the process humans use to deal with a future they cannot control. Politics is tragic because we are all creatures of the injustices to which we are accustomed, but politics can be meaningful because humans are capable of imagining alternatives.

Realizing the possibility that things can be better involves change, and the process of implementing social change requires a delegation to political agents of the power required to make the change applicable to those who disagree either with the goal or the process through which the goal is realized. We live in a republic established on the assumption that individuals known as "monarchs" could not be trusted with such power, and the system created by the founding fathers is characterized by checks and balances designed to prevent abuse of authority. It is remarkable that a system created to produce deadlocks rather than results has operated successfully for two centuries.

The functions envisioned for the legislative and executive branches are made clear when they are viewed from the perspective of corporate structure. Thus, the Senate was intended to serve the function of a board of directors, entrusted with protecting the enterprise's long-term interests. The President combines the functions of chief executive and chief operating officer; and the House of Representatives performs middle-management functions, bringing to management's attention various constituencies' desires. This analysis makes clear the crucial importance of the "lower" House. Like noncommissioned officers in the armed forces, representatives are the people who operate the system, translating management's goals into directives applicable to those performing the work, modifying management's long-range plans to make them operational in terms of the short-term desires of those whose lives are being planned. Representatives, in short, are people who are charged with conducting political dialogue in its purest and most intense form.

Recent developments in campaign finance law seriously threaten the responsiveness of that dialogue. Thus, limits placed on the contributions individuals can make to a political campaign resulted in a shift to entities known as political action committees, and limits

placed on the activities of such committees led to their specialization. The result has been lobbying activity increasingly focused on matters of technical detail inaccessible to the general public, including (in many cases) the very people who contributed to the committee. The relevant dialogue, in other words, has become so specialized that it fails utterly in its task of providing a link between powerholders and constituents. Today's dialogue in the House of Representatives is a conversation between an incumbent and the lobbyists whose funds render utopian the prospect of a successful electoral challenge.

The society depicted in *The Republic* was different not because it was a republic rather than a democracy, but because all those involved in the political process were equals—a situation made possible by the small size of the *polis* and the economic system's institution of slavery. Once the identity of those holding economic and political power diverges, the distinction between a republic and democracy necessarily begins to blur, and the social purpose shifts. The social purpose of Plato's Republic was that of fostering a meaningful existence.

In our society, the purpose of the political structure is to maintain a viable balance between individual liberty and the need for access to economic goods greater than those required for nonpolitical purposes if one is to have the freedom to engage in the political process. The means adopted by the United States to maintain a viable balance is enforcement of the guarantees of individual liberty contained in the Bill of Rights, and that solution impacts directly upon the political process by means of judicial interpretation of the free speech guarantees contained in the first amendment.

III

The nature of the judiciary's participation in politics was most clearly set forth in the proceedings resulting in the rejection of the Supreme Court nomination of Robert H. Bork. The artistic style of the Counter-Reformation—the church's response to the success of the Reformation—was known as "Baroque," and it reflects the return to classical principles in a context that includes awareness of Mannerism. The Counter-Reformation produced a resurgence of institutional power within the church, made manifest by the emergence of the Society of Jesus, which utilized military experience to construct an order whose function was spiritual imperialism. The Jesuit order's tools were intellectual, meaning that the end of converting the world to the true faith justified use of dialogue in which both the constraints of logic and the lessons of experience were treated as technical means.

Consequently, Jesuitical arguments were perceived as insufficient by those who did not share Jesuit beliefs. What mattered was not the validity of the argument, but one's attitude toward the end sought by the Jesuit speaker. Thus, if one desired not to be converted, the validity of the argument being made was simply one of the factors to be considered.

Bork's hearing is thus explicable primarily as a Baroque phenomenon, where what was being judged was the "conservative" nature of the principles from which his arguments derived. Such a judgment underlines the extent to which what matters is the judge's personal beliefs. In this context, it must be remembered that both Holmes and Brandeis were the two who made the dissent respectable, who persuaded the profession and the country that the individual judge, rather than the court majority, might propound the more valid law. The consequence for court and country in terms of first amendment law is made clear by analysis of a concrete decision.

Perry Education Association v. Perry Local Educators' Association[5] was decided by five members of the Court; the remaining four dissented. The question decided concerned the validity of a collective bargaining agreement which permitted the Perry Education Association ("PEA"), but no other union, to have access to the interschool mail system and teacher mailboxes. Before 1977, both PEA and the Perry Local Educators' Association ("PLEA") represented teachers within the school system, but that year PLEA challenged PEA's status as a representative under the provisions of the act which established the Indiana Education Employment Relations Board. PEA won the resulting election, was certified as the exclusive representative, and negotiated the contract in question.

Both PEA and PLEA moved for summary judgment on PLEA's claim that the contract provisions violated the first amendment. The district court entered judgment for PEA, the court of appeals reversed, and the Supreme Court postponed its decision on whether it had jurisdiction until after it heard the case on the merits. The jurisdictional question arose because the court of appeals had held invalid the contract as opposed to the state statute which governed the terms of the contract. Had the statute been held invalid on constitutional grounds, PEA would have had an appeal as of right. Since the question presented involved only the particular provisions of the contract, however, jurisdiction lay in the Supreme Court only by means of the discretionary writ of certiorari.

[5] 460 U.S. 37 (1983).

The Court, in other words, decided that it wanted to express its views on the first amendment issue presented, rather than treating the case as one involving issues of a single state's labor law. Moreover, it so decided even though the majority and dissent positions had almost nothing to do with each other. Thus, the majority saw the question before it as one involving the location in which the claim to free speech is made. In its view, what was crucial was that a school mail system was neither a location in which free speech had normally taken place, nor public property opened for that use. Its conclusion, therefore, was that neither PLEA's access to the mail system before the elections, nor the school authorities' periodically permitting private, non-school-connected groups to use the system justified treating the school mails as a "limited public forum."[6]

Contrariwise, the dissent in effect treated the contract as indicative of official preference for the views espoused by PEA, and consequently held that the contract violated the first amendment's guarantee of governmental neutrality. Such a reading required disregard of the court of appeals' explicit refusal to designate PEA's communications "official business" and holding that the school district did not "endorse" the content of the communications.[7]

In terms of law, moreover, both the majority and the dissent read as narrowly as possible the precedents on which the opposing argument is based. The judges in both the majority and the dissent treated what they are doing as a science rather than an art, as the search for a truth rather than an attempt to demonstrate that their view of reality is the one most suited to resolve the dispute at hand. The *Perry Education Association* judges did not connect the experience contained in precedents to the case being heard, but rather attempted to produce a more effective theory than the opposition, accounting for as many precedents as possible, and hopefully not transgressing professional standards in terms of the violence they did to those precedents which did not fit their theory.

The decision in *Perry Education Association* raises the question of the propriety of judicial regulation of speech. The distinction between thought and action on which the right to free speech rests is viable only if dialogue works, if the listener is engaged for such a sufficiently long time that the contradictions in dialogue are accepted or resolved, the symbolic meanings understood, and the temptations to action analyzed. Viable dialogue, however, requires a manageable number of

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[6] Id. at 47.

[7] Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286 (7th Cir. 1981), rev'd, 460 U.S. 37 (1983).

voices supported by roughly equal resources available to each. Such dialogue is made possible only by the interaction of the social, economic, and political spheres—interaction which determines the size of the population and the extent to which delegation of political power occurs in elections controlled by interests with access to economic power. If economic power controls delegation, then the political dialogue which justifies delegation (and the first amendment) ceases to be responsive, and the judiciary interpreting the first amendment becomes part of the problem rather than the solution.

Bork's "conservative" principles consisted of economic conservatism—opposition to the regulation of economic activity—and the willingness to testify to a personal hierarchy of values, an expression of the belief that a judge must justify the value preferences on which he bases his decisions. The theory is that we must behave consistently if we are to be trusted with power, and that only a coherent theory justifies the belief that like cases will be decided alike. Such a view, however, takes us full circle to the founders' refusal to entrust political power to an individual.

The question remains, therefore, the one with which we began: why should a given individual—whatever his beliefs—have the power to make law; what is it in a society governed by law that justifies those making the law in the belief that a citizen should do what the law says?

IV

Sir Karl Popper developed the epistemology most consistently based on logic, the view that all we can learn is the concrete basis on which we disprove theories. The political implications he suggests in *The Open Society and Its Enemies*[8] are that the only governments that can be trusted are ones operated by nonideological political parties under a rule of law—in short, democratic capitalist societies. The enemies against which Popper was defending society were totalitarian political parties, parties which validated their position by imposing their truth upon the society they governed.

The connection between Popper's epistemology and politics is his view that totalitarian ideology is the concrete realization of the Platonic form. It is the Platonic ideal, in other words, which is responsible for a situation in which persons with political power refuse to abide by the rules of competition embodied in laws, treating the question of legality as one involving means rather than ends. The issue

[8] K. Popper, The Open Society and Its Enemies (5th ed. rev. 1966).

Popper raises, therefore, is whether it is possible to make the Platonic view of the truth as a matter involving substantive rather than technical considerations compatible with a society in which possession of political power is kept separate from a claim to possession of the truth.

That issue is the one with which we have been struggling. A hierarchy of value preferences, a ranking of goals, is necessary if an individual is to behave consistently; but if politics is not a matter of choosing the individual one wishes to follow, if society is not to be structured on monarchical or authoritative lines, then how can one reconcile the need for consistency with the separation of that claim to power and to truth? Thus, an ideological party can be seen, in instrumental terms, as the political expression of a social group engaged in a self-conscious attempt to create a *polis*, to structure a community sufficiently coherent to permit rational social and economic change. Seen from this perspective, insistence on the rule of law is insistence on the status quo, denial of the political function of legal activity, and expression of the view that neither of the possible functions of law—neither the understanding nor the requiring of a given correlation—is capable of producing effective personal or social changes. Law's nonpolitical function, in other words, is that of providing a structure for whatever is going on.

A nonideological political party, therefore, if it is to be responsive to the need for change, requires a *polis* governed by law, a society in which political competition is constrained by rules subject to judicial interpretation. Delegation in such a society must be perceived by constituents as an effective political process, a process not manipulable by economic power. Such a process requires separation of the economic and political spheres, and this is possible only if the relevant political parties are required to derive all of their revenues from economic as opposed to political activities. This could be accomplished in the United States by condemning (in the sense of a public taking) two of the three television networks and transferring them to the two major political parties. Such a proceeding would involve the retaking of the "public" spectrum whose use by broadcasters justified a licensing system that would have violated the first amendment had it been applied to printed material.

The transfer of networks, moreover, would permit the parties to present competing visions of both news and entertainment, pictures of both where we are and where we want to be. Some might object that development of cable technology will make the network system superfluous. In broadcasting, however, as in other industries in a capitalist

system, economic power is derived not solely from possession of technology, but also from the ability and willingness to commit sufficient capital to do better than the competition. There are theories which argue that capital must produce either better services or better products, but the concrete decision to transfer two of the networks to political parties would not be undertaken to test the validity of the theoretical propositions that, in the long run, economic activity produces value as well as efficiency, that competition is a real as well as theoretical force, that people and institutions in possession of power identify and attempt to defeat competitors rather than recognizing and working with peers, subordinates, and superiors. Rather, imperative need is that of separating two closely intertwined aspects of the human condition, the political and the economic.

That the third network remains in private hands would no doubt be used to justify the proposed transfer on the basis that competition by persons outside the established parties has not been totally eliminated. The insistence upon the possibility of competitive activity is the economic manifestation of our distrust of delegations of power, our insistence on the autonomy of the individual; but if political activity is to take place, some delegation must occur. The proposal, therefore, is that we view politics as competing versions of the truth and rely on the checks and balances in our political system to prevent the government from becoming a "front" for the party in power, to preserve the multiple facets of our political process: the responsive nature of the dialogue between a political party and its members; the coercive nature of the dialogue between a government and its citizens; and the instrumental nature of the dialogue between the parties and the government.

The final question is whether this is the best we can do, whether no more effective or comprehensive solution to the problems presented by political authority is possible. To summarize, law, like religion, is a human attempt to account for the nature of the world in which we live, and monotheism was a social fact which fundamentally changed our perception of the *polis*, the political aspect of that world. Once divine reality could be perceived as embodied in a single entity, an element of ambiguity—of uncertainty about the nature of the truth—was introduced into the human scheme of things, and the presence of that element is most clearly apparent in our response to the phenomenon we call "art."

If my argument is valid, the parable of the prodigal son—the story of the reconciliation of the sinner with the community—should display such an element of ambiguity. The parable, after all, consti-

tutes the religious definition of community, and the complaint of the elder son is economic in nature, that father "never gavest me a kid, that I might make merry with my friends: But as soon as this thy son was come, which hath devoured thy living with harlots, thou hast killed for him the fatted calf."[9]

The father's reply justifies expansion of the community: "It was meet that we should make merry, and be glad: for this thy brother was dead, and is alive again; and was lost, and is found."[10] First, however, the father does the political, the mannerist thing, saying: "Son, thou art ever with me, and all that I have is thine."[11]

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9 Luke 15:29-30.
10 Luke 15:32.
11 Luke 15:31.