THE JURISPRUDENCE OF THE BURGER COURT: A READING OF *MICHIGAN v. LONG*

JAN G. DEUTSCH*

I. THE OPINION

Law is currently perceived by many as a set of technicalities used to keep criminals out of jail. Even those lawyers opposed to the Warren Court expansion of constitutional rights see such a view as an oversimplification, a shibboleth — a shibboleth, however, to which the facts in *Michigan v. Long*[1] seem tailor-made.

One night, in a rural area, a car was travelling erratically and at excessive speed. It swerved into a ditch. Police officers stopped to investigate. The car's occupant, who was at the rear of the car, and "appeared to be under the influence of something," failed to respond to a request for registration and license. He turned and began walking to the open door of the car. The officers, who were following, saw a knife on the floorboard, whereupon they stopped the occupant and subjected him to a patdown search.

The personal search revealed no weapons. One of the officer's flashlights, however, revealed something protruding from under an arm rest. Inspection produced an open pouch containing what appeared to be marihuana, and although nothing was revealed by a further search of the car's interior, the officers, following an arrest for possession of marihuana, decided to impound the vehicle. More marihuana was subsequently found in the trunk.

The trial court, holding that the personal search was valid under *Terry v. Ohio*,[2] denied a motion by defendant to suppress the marihuana taken from the car's interior. *Terry* upheld a patdown search for weapons in the absence of probable cause to arrest on the ground that police officers must be afforded a reasonable opportunity to protect themselves from threatened harm. The court also admitted the contents of the trunk as the product of a valid inventory search on the authority of *South Dakota v. Opperman*.[3]

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* Professor of Law, Yale Law School.

[1] U.S. , 103 S. Ct. 3469 (1983).

[2] 392 U.S. 1 (1968).

[3] 428 U.S. 364 (1976).

The Michigan Court of Appeals affirmed. The Michigan Supreme Court, however, reversed, holding that *Terry* did not cover the search of the car's interior. As to the marihuana found in the trunk, without considering the applicability of *Opperman*, the Michigan Supreme Court barred evidentiary use of the marihuana on the grounds that it was the "fruit" of that search. Michigan precedents had historically been interpreted to provide broader protection against searches and seizures than that guaranteed by the Fourth Amendment, and there were two references to the Michigan Constitution in the State Supreme Court's opinion.

Holding that the Michigan Supreme Court's interpretation of *Terry* was in error, the Supreme Court of the United States remanded the case of *Michigan v. Long* for a decision on whether or not the trial court's interpretation of *Opperman* was correct, whether the marihuana found in the trunk was validly admitted into evidence. Justices Brennan and Marshall, in dissent, argued that Justice O'Connor, writing for the court, was making of *Terry* a precedent involving searches incident to a valid arrest, which they characterized as a misreading of that decision.

Their argument, in simplest terms, is that patdown searches must be distinguished from searches incident to arrest, and thus that the Michigan Supreme Court had been correct in refusing to treat *Terry* as requiring admission of the marihuana into evidence. The resolution of the issues raised by this argument depends, of course, on the choice of policy in terms of which *Terry* is applied to the facts before the Court, on the question whether, in light of those facts, it is more important to protect police officers from potential harm or to effectuate a constitutional guarantee: on the question, in other words, whether *Terry* should be read broadly or restrictively.

A. *The Law.*

The federal structure of our society means that the United States Supreme Court is supreme only on matters of federal law: that state law, whether pronounced by the judiciary, the executive, or the legislature, must be taken as authoritative by the federal tribunal insofar as the question being resolved is a matter

governed by state rather than federal law. Thus, *Michigan v. Long* was remanded to ascertain the views of the Michigan judiciary on the question governed, for purposes of federal law, by the *Opperman* precedent. In resolving a controversy, in other words, the United States Supreme Court may be bound by propositions of law enunciated by state authorities, and it is this situation that underlies the divergence of views in *Michigan v. Long*.

Justice O'Connor, speaking for the Court, holds that:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. . . . Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.[4]

Justice O'Connor is making explicit how the federal Supreme Court decides whether or not to review the decision arrived at by state authorities in a matter where both state and federal law are arguably relevant, and where the state tribunal cites to both.

It is this holding that provokes Justice Stevens' dissent. His opinion concludes:

> I am thoroughly baffled by the Court's suggestion that it must stretch its jurisdiction and reverse the judgment of the Michigan Supreme Court in order to show [r]espect for the independence of state courts. . . . Would we show respect for the Republic of Finland by convening a special sitting for the sole purpose of declaring that its decision to release an American citizen was based upon a misunderstanding of American law?[5]

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[4] 103 S. Ct. 3469, 3475-3476 (1983).

[5] *Id.*, at 3492.

Justice Stevens' argument rests on the proposition "that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to *vindicate* federal rights have been fairly heard."[6] Until recently," his argument goes, "we had virtually no interest in cases [where it was the State complaining about the judicial interpretation of the meaning of the constitutional guarantee]."[7] What he is arguing, in other words, is that the relevant question is not how *Terry* should be read, but the proper distribution of power between state and federal courts. That this is in fact the argument being made is underlined by the opening words of the dissent:

> The jurisprudential questions presented in this case are far more important than the question whether the Michigan police officer's search of respondent's care violated the Fourth Amendment. The case raises profoundly significant questions concerning the relationship between two sovereigns the State of Michigan and the United States of America.[8]

The question raised is whether, in the situation presented by *Michigan v. Long*, the United States Supreme Court should focus its energies on ascertaining the meaning of precedents or on ensuring that political realities be fully taken into account. Only if the latter focus is entitled to priority does it seem proper to treat as decisive the fact that federal courts were established to *vindicate* rather than to define federal rights. The question, however, is one that inevitably arises in connection with the work of the judiciary in any federal structure and it ultimately forces consideration of the extent to which political considerations provide a sufficient basis for analysis of a legal system.

II. The Doctrine

A. *Precedents.*

The Supreme Court of the United States held the Fourth Amendment applicable to the states in *Mapp v. Ohio*.[9] In *Mapp*, the Warren Court reversed, by a vote of 6 to 3, a decision by the Supreme Court of Ohio which had upheld a conviction for

[6] *Id.*, at 3490.
[7] *Id.*, at 3491.
[8] *Id.*, at 3489.
[9] 367 U.S. 643 (1961).

knowing possession of obscene materials, despite the fact that the materials were the product of an unlawful search.

The *Mapp* facts can, without exaggeration, be described as "aggravated." The police doing the searching claimed that a warrant existed but refused to show it, they applied force to recover the document claimed to be the warrant from the person whose house was being searched, and who had taken the document from the policeman who had refused to show it, and the information on the basis of which the search was undertaken did not relate to obscenity.[10]

The Ohio Supreme Court acknowledged that a "reasonable argument" could be made that "the 'methods' employed to obtain the [evidence]. . . . were such as to offend "a sense of justice,"'" but it found determinative that the evidence had not been taken "from defendant's person by the use of brutal or offensive physical force against defendant."[11] On the question of law, the State of Ohio argued in the Supreme Court of the United States that *Wolf v. Colorado*,[12] stood for the proposition that a state was not prevented from using unconstitutionally seized evidence in its courts.

The *Mapp* opinion did not dispute the conclusion found determinative by the Ohio Supreme Court about the nature of the force used. Nor did it deny that *Wolf v. Colorado* had held "that in a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."[13]

The United States Supreme Court *Mapp* opinion began, instead, by noting that:

> Seventy-five years ago, in *Boyd v. United States*, 116 U.S. 616, 630 (1886), considering the Fourth and Fifth Amendments as running 'almost into each other' on the facts before it, this Court held that the doctrines of those Amendments' apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. . . .[14]

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[10] *Id.*, at 644.
[11] *See Id.*, at 645.
[12] *338 U.S. 25 (1949).*
[13] 367 U.S. 643. 645-646 (1961).
[14] *Id.*, at 646 (footnotes omitted).

Having thus read *Boyd* as a precedent establishing a right to privacy, Justice Clark, writing for the Court, had no difficulty in overruling *Wolf* on the basis that a right was violated when unconstitutionally seized evidence was used at trial.

Justice Harlan, writing for himself and Justices Frankfurter and Whitaker, dissented on the basis that the Fourth Amendment, "by penalizing past official misconduct, is aimed at deterring such conduct in the future,"[15] and that "I [therefore] do not see how it can be said that a trial becomes unfair simply because a State determines that evidence may be considered by the trier of fact, regardless of how it was obtained, if it is relevant to the one issue with which the trial is concerned, the guilt or innocence of the accused."[16] Justice Clark justified his focus on the enforcement of the constitutional guarantee rather than the purpose of the criminal trial by surveying the difficulties experienced by states in attempting to develop effective remedies against officers who violated the rules governing searches and seizures.[17] Since only three other Justices joined Justice Clark's opinion, however, *Mapp* did not itself hold that the Fourth Amendment could validly be interpreted as affording an effective remedy. It held only that the Fourteenth Amendment applied the Fourth Amendment to the states.

The Harlan dissent noted "that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions."[18] Justice Harlan's complaint was that the argument heard by the Court had centered, not on the Fourth Amendment, but on the First, on the constitutionality of a statute punishing knowing possession or control of obscene material, and Justice Stewart:

> Agreeing . . . with . . . Mr. Justice Harlan . . . express[ed] no view as to the constitutional issue which the Court today decides [but] would . . . reverse . . . because I am persuaded that the [statutory] provision . . . upon which the petitioner's conviction was based is, in the words of Mr. Justice Harlan,

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[15] *Id.*, at 680.
[16] *Id.*, at 683.
[17] *Id.*, at 652-653.
[18] *Id.*, at 672, 677.

> not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.'[19]

The Court rendering the *Mapp* opinion, therefore, had it only been willing to rule on the issue to which argument had been directed, might well have produced a majority for reversal of the conviction it was reviewing, although a decision holding unconstitutional the statute on which the conviction was based would produce a majority or plurality different from the one that agreed on the Court's opinion in *Mapp*. How is one to account for this situation, how explain the fact that, as Justice Harlan noted, what the *Mapp* Court did was to "choose [to] answer [the more difficult and less appropriate of the two questions] presented by the facts"?[20]

B. *The Meaning of the Precedents.*

Questions about Warren Court decisions are now of historical interest. They are valuable to the extent that their answers shed light on the activities of the Justices currently making law. From this perspective, the important question raised by *Michigan v. Long* is not whether, on the facts presented, the Fourth Amendment applied, but rather why Justice Stevens refused to accept the Court's definition of the question presented, why he regarded the issue of federalism as more significant than the issue of law.

One answer to this question is that Justice Stevens is "realistic" about judicial power, and fears that, under the guise of offering a formula for determining the adequacy of the state ground, *Michigan v. Long* ensures that federal constitutional guarantees will not be read broadly by state courts. Such an interpretation accounts for Justice Stevens' stress on the fact that federal courts were created to *vindicate* rights.

This answer, however, by focusing on the impact of the particular decision, overlooks the fact that the Court is a continuing body, whose composition necessarily changes over time. Even an accurate reading of the future, of the positions new justices would take, would not provide a sufficient basis on which to

[19] *Id.*, at 672.
[20] *Id.*, at 672, 675.

arrive at a conclusion about the meaning of either the constitutional text or the judicial precedent. Thus, if *Michigan v. Long*, as a restrictive reading of *Terry*, is accounted for by the conservative nature of the Burger Court, then *Mapp* can be read as a refusal to follow the precedent of *Wolf v. Colorado*, accounted for by the liberal nature of the Warren Court.

The question in cases involving the Bill of Rights is whether citizens may or may not perform certain actions under certain circumstances, and how a court resolves that issue depends on its choice of policy. That choice can be analyzed in terms of the attitude that underlies the *Mapp* result or the vision that informs the *Long* decision, but it is not realistic to treat that attitude and vision either as equivalents or as substitutes for law. A realism that treats the conclusion "It's the law" as equivalent to the statement "It's the liberal thing to do" or "It's the conservative way of doing things" has defined law as a branch of politics, and, in so doing, disregards the special nature both of American federalism and United States law.

C. *The Dissent in* Michigan v. Long.

To attribute motive, moreover, is a slippery business. Justice Stevens filed a dissent, it could be said, because Justices Holmes and Brandeis made of the dissent a respectable institution, and they did so in the name of realism about the Court's attempted use of its power to halt needed economic and social reforms. As Justice Holmes put it, in typically memorable language: "This case is decided upon an economic theory which a large part of the country does not entertain. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[21]

The "realism" embodied in the Holmes and Brandeis dissents portrayed the Court as an entity wedded to an outmoded set of economic and social theories, and it was in this context, the context of an era in which economic processes long taken for granted were no longer producing benefits, that a Brandeis dissent in *New State Ice Co. v. Liebmann*[22] identified the values inherent in a federal structure: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[23]

[21] Lochner v. New York, 198 U.S. 45, 75 (1905).
[22] 285 U.S. 262 (1932).
[23] *Id.*, at 311.

Justice Brandeis' *New State Ice* rationale, however, ignored a good deal of history. Thus, in the years following the Civil War, the Supreme Court interpreted the Constitution's commerce clause to prevent local and state communities from imposing restrictions on the national market opened by the processes of industrialization. The Constitution, in other words, once the Civil War had ensured that the society it established was governed from Washington, was a document whose interpretation became consonant with the provision of economic benefits. The Court discovered, during the New Deal, that its success at denying state and local governments the right to regulate economic activity did not give it sufficient power to prevent other branches of the federal government from undertaking that role.

The New Deal created a set of federal administrative agencies that joined the judiciary in prescribing boundaries for permissible state economic experimentation. The Supreme Court's response to this situation was to shift the thrust of its activity to an unoccupied area. The focus of the decisions produced by the Warren Court was on social rather than economic activity, the pursuit of individual expression rather than economic benefits; and it is the meaning of those precedents that must be elucidated by the Burger Court.

If we frame the issue raised for the Court in *Michigan v. Long* by Justice Brandeis' *New State Ice* dissent as the proper attitude towards state experimentation, it is important to note that Holmes took a strikingly different view. What Justice Holmes said, also in dissent, was:

> 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.[24]

Justice Holmes justified his less optimistic approach to Justice Brandeis: "Generally speaking, I agree with you in liking to see social experiments tried but I do so without enthusiasm because I

[24] Truax v. Corrigan, 257 U.S. 312, 344 (1921).

believe it is merely shifting the pressure and that so long as we have free propagation Malthus is right in his general view."[25]

This pessimism underlay the approach Holmes' took, not only to federalism and experimentation, but also in defining the nature of law. The basis on which Justice Holmes concluded, in 1897, that "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law," is as follows:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside it, in the vaguer sanction of conscience."[26]

In terms of *Michigan v. Long*, if Justice Holmes is correct about the nature of the human being the law can realistically hope to govern, it is clear that *Terry* should not be read broadly, that the rights of criminal defendants should not, except when the text compels it, be given priority over the rights of the police. It remains to establish the connection between Holmes' view of the law and the dissent filed by Justice Stevens.

III. THE MEANING OF *MICHIGAN V. LONG*

A. *The Law of the Precedents.*

If there was an ideology that underlay the work of the Warren Court, it was that of Justice Hugo Black, an ideology of plain meaning, of words that mean what they say, of a Protestant fundamentalism applied to the words of the Bill of Rights. Given that ideology, Justice Black was uncomfortable with the court arrogating to itself the power to promulgate constitutional guarantees, and he concurred in *Wolf v. Colorado* explicitly on the basis that the exclusionary rule derived from the Fourth Amendment functioned solely as a judicially created rule of evidence reversible by Congress. He joined the *Mapp* Court solely on the basis that reflection had persuaded him of the correctness of the *Boyd* amalgamation of the Fourth and Fifth amendments, which

[25] Holmes to Brandeis, April 20, 1919. Manuscript in the Library of the Law School of the University of Louisville.

[26] *The Path of the Law*, 10 HARV. L. REV. 457, 461, 459 (1897).

Justice Clark cited as establishing a constitutional right not to have evidence used against one.

Two cases adjudicated by the Supreme Court after *Wolf*, one involving the admission of testimony gathered by concealed microphones and state use of information obtained by federal taxing authorities,[27] and the other involving evidence obtained by use of a stomach pump,[28] constituted the basis for Justice Black's reconsideration of *Wolf*. In both cases, he had relied solely on the Fifth Amendment's self-incrimination clause to reverse the convictions. In terms of the precedents created by the two cases, however, the only doctrine one could extract from the multiple opinions filed was that convictions which "shocked the conscience" of five Justices would be reversed. In order to end the uncertainty created by these cases, to restore plain meaning to constitutional guarantees, Justice Black in *Mapp* "depart[ed] from my prior views . . . accept[ed] the *Boyd* doctrine as controlling in this state case and . . . join[ed] the Court's judgment and opinion which are in accordance with that constitutional doctrine."[29]

Justice Black's "reconsideration" of *Wolf v. Colorado*, the basis for the proposition of law established by *Mapp*, can be seen, then, as an expansion, in the service of an ideology of plain meaning, of federal constitutional guarantees against the actions of state authorities, an attempt to make the law more certain, to clarify the meaning of opinions rendered by the federal Supreme Court. Justice Holmes might have approved Black's attempt, since he believed that "the chief end of man is to form general propositions;" but Holmes also thought the effort fruitless, since he believed that "no general proposition is worth a damn."[30]

The basis for this "realistic" pessimism is the artificiality of using words as guides to conduct. Examination of the "clear and present danger" test Justice Holmes coined in *Schenck v. United States*[31] provides an opportunity to test the validity of this pessimism. In dissent in *Abrams v. United States*,[32] joined by Justice

[27] Irvine v. California, 347 U.S. 128 (1954).
[28] Rochin v. California, 342 U.S. 165 (1952).
[29] 367 U.S. 643. 661. 666.
[30] *See* 2 HOLMES-POLLACK LETTERS 13.
[31] 249 U.S. 47, 52-53 (1919).
[32] 250 U.S. 616 (1919).

Brandeis, Justice Holmes sets out the theory that for him justifies adoption of the "clear and present danger" formula: "time has upset many fighting faiths"[33] and it therefore follows that "the best test of truth is the power of thought to get itself accepted in the competition of the market."[34]

Let us accept the implicit propositions that a broad reading of the First Amendment is justified in that it promotes the promulgation of truths and that history is a reliable guide to action. It nevertheless remains unclear how, if at all, Holmes' "competitive market" theory, even if valid, makes the "clear and present danger" test either possible or reliable. Indeed, Justice Homes in *Abrams* was careful to distance himself from his argument. He sets out his theory, and then says: "That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment."[35]

The ideology of "plain meaning" inheres in the approach of the Warren Court to the problem of obscenity and the First Amendment. Rather than coin a phrase analogous to "clear and present danger," *Roth v. United States,*[36] held simply that obscenity was not speech. Subsequent opinions struggled to identify obscene material, and the result was a situation remarkably similar to the one which underlay Justice Black's reconsideration of *Wolf v. Colorado*. Indeed, in 1964, a Justice Stewart concurrence made clear that what "shocked the conscience," in obscenity cases, was a purely personal matter: "I shall not attempt . . . to define the kinds of material I understand to be obscene; and perhaps I shall never succeed in intelligibly doing so. But I know it when I see it and the motion picture involved in this case is not that."[37]

Justice Stewart's opinion is effective but troubling. It demonstrates the inadequacy of the approach taken by Justice Black, and raises the question whether the impact of a judicial opinion is the product of an effective literary style.

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[33] *Id.*, at 630.
[34] *Ibid.*
[35] *Ibid.*
[36] 354 U.S. 476 (1957).
[37] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

Justice Stewart is not the only master of literary style to serve on the Supreme Court. The analysis set out in the *Schenck* opinion ultimately rests on the reference to the false cry of "Fire!" in a theater.[38] As this example illustrates, it was Justice Holmes' style to persuade, not by detailing the facts or the law of the case before him, but by sketching the striking vignette. His opinions worked like all good stories, not by retailing the murky and confusing truth of how things are, but by confirming our felt certainties about how we know they should be.

The argument equating persuasive law with effective literary style gains force from the magnitude of Holmes' reputation. The difficulty with the argument, which became clear in 1897, when Justice Holmes defined his task as "know[ing] the law, *and nothing else* . . ."[39] can be seen as a technical one. The view of the law propounded by Holmes derived from opinions seen in isolation, decisions without precedential effect. Holmes demonstrates that judges can be persuasive about their resolution of the controversy being adjudicated, but he explains no more.

We are left, therefore, with the question how legal decisions can justifiably be treated as having precedential effect.

B. *The Meaning of that Law.*

Acceptance of the federal Supreme Court as authoritative interpreter of the constitutional text was produced by the readings it gave to the commerce clause. Those readings were produced by an era of rapid industrialization, and such periods of history are usually marked by systems of corruption. The scandals accompanying the building of railroads are the most striking example in American history of this interplay between politics and eocnomics — an interplay that gives to the concept of competition its ideological power in American thought.

In economic terms, corruption is undertaken to produce prices above what the market will bear, but such a situation must necessarily produce a new entrant into the market. It is the threat of competition that keeps a free market operating freely. This guarantee against corruption offered by the market operates only in the long run: the promise projected by the concept of a market is

[38] Schenck v. United States, 249 U.S. 47, 52 (1919).
[39] *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) [italics added].

nevertheless compelling, because of the relative freedom from constraints it offers to the individual.

A child, once it becomes aware that it is not alone in the world, could wish for no better universe than an omnipotent mechanism that automatically registers the shifts in its attention. The free market offers precisely that, a world in which other people have, over you, only that power attributable to their own participation in the mechanism of the market — a universe which provides exactly what everyone desires except that (at least periodically) other people attend to matters other than your particular desires. What this image projected by the concept of the market omits is structure, the ransom exacted by the passage of time, the ineluctable fact experienced by most children as the (arbitrarily) superior power of their parents; what the twentieth century knows as capital, the concept Marx created to serve as the moral scapegoat for injuries inflicted on individuals by the processes of economic development.

John Maynard Keynes makes plain why, for any given individual, the threat of competition is not a satisfactory solution to the problems raised by the existence of structure, the possibilities of corruption entailed by the possession of power: "In the long run, we are all dead."[40] In legal terms, nonetheless, the appeal of the concept of competition can be seen in antitrust doctrine, a body of law incoherent in economic terms precisely because its message is the political truth that power corrupts, and that monopoly, absolute power in economic terms, corrupts absolutely.

C. *The Meaning of* Michigan v. Long.

The impact of Justice Holmes' pessimism on the act of judging was outlined by him in a 1930 letter to Harold J. Laski, where Holmes says of Justice Brandeis that "his interests are noble, and as you say his insights profound," but adds: "I told him long ago that he really was an advocate rather than a Judge. He is affected by his interest in a cause and if he feels it he is not detached. . . ."[41]

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[40] *See* Morrow's International Dictionary of Contemporary Quotations 49 (1982).

[41] Holmes to Laski, December 11, 1930. Holmes Papers, Library of Harvard Law School.

The contrast between judge and advocate highlights the issue of detachment from the situation being considered, a point central to an understanding of the story of Solomon's judgment. Solomon the judge ordered that an infant, an innocent guilty of no transgression, be cut in half.[42] The wisdom of Solomon, that a mother would not allow her child to be torn asunder, derived from the political reality that Solomon ruled over a small and cohesive tribe.

The knowledge that permitted Solomon to act with relative assurance about the accuracy of his predictions is unfortunately denied to those who attempt to exercise authority over larger and more diverse groups. Justice Holmes' "bad man," in other words, results from a restricted view of human nature. It is unclear, however, whether, in a society as large and diverse as ours, a judge can act on the basis of any richer conception of the people for whom he is making law than that common denominator.

To the problems raised by the existence of equally important but potentially contradictory human needs, such as individuality and solidarity or diversity and unity, the dispersion of power made possible by a federal system can be seen as a solution. A federal system makes it possible for persons living in a mobile society to treat state citizenship as an easily changeable formality. So long as daily activities are either unregulated by law, or regulated only by state law, such a society permits its citizens to feel in control of their lives. Subsequent to the Brandeis and Holmes dissents from decisions invalidating state economic and social legislation, however, a combination of federal legislative and administrative law-making in the economic area, combined with judicial expansion of constitutional guarantees in the social area, has made law pervasive. Consequently, a determination that federal activity had not preempted the field would be required today before Justice Brandeis would be in a position to treat "a single courageous state['s]. . . novel social and economic experiment . . . [as] without risk to the rest of the country."[43]

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[42] 1 Kings 3:16.

[43] New England Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932).

We could accept these changes as verifying Holmes' pessimism about the meaning of experiments in the federal system and the nature of law. If we do so, however, we must ask whether the "realistic" detachment of a judge uninterested in the case he is deciding, a detachment consistent with opinions having no precedential effect, describes a legal system that society would support. Law, after all, is a process whose costs are paid by the people subject to the decisions arrived at, and those costs have presumably been borne because judicial opinions were perceived to be functioning as precedents, were regarded as pronouncements that could serve as reliable guides to action.

Justice Holmes' pessimism can thus be seen as a denigration of the activity in which he was engaged. The commitment to the concept of the "market" found in *Schenck* signifies an adherence to the competitive ideal, a recognition of the overriding importance of testing every attempt to exercise power, of refusing to accept any formulation as more than an experiment. A focus on the judicial opinion as an exercise of power, moreover, runs the risk of ignoring the social function performed by the words contained in the opinion.

Once monarchies give way to republics, political reality becomes a matter of the will of the people rather than the monarch, and is therefore as much a matter of words as of persons. It is this truth that is embodied in the aphorism concerning a government of laws rather than men; and in the context of this truth laws can be one set of the abstractions in terms of which humans realize their social being by entering into communities. A judge, making law in this context, should be aware that some stories persuade because they distort rather than illuminate reality, and that the proper definition of such an effect is not persuasion but seduction. A court, aware of its responsibility when it undertakes to make law in such a context, should be sensitive to the significance of the propriety of dissent — to the fact that every decision not to join the opinion of the Court and every decision not to follow precedent puts at risk the future of the law.