

PRETENDING TO BE FREE: OLIVER WENDELL HOLMES AS A VICTORIAN REVOLUTIONARY

Christopher Vasilopoulos

Eastern Connecticut State University

ABSTRACT: *Certitude is not the test of certainty. We have been each sure of many things that were not so.... Property, friendship, and truth have a common root in time. One cannot be wrenched from the rocky crevices into which one has grown for many years without the feeling that one is attached in one's life. Oliver Wendell Holmes.*

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INTRODUCTION

The Enlightenment as Seen by its Romantic Enemies

Nothing so broad and variegated as the Enlightenment, taken either as a *Weltanschauung* or as epoch, should be treated roughly. Yet it seems indisputable that the Enlightenment as a philosophy, especially in its Lockean version, had an enormous impact on the American outlook.

Just as Newton had seemed to substitute a rational law of nature for unpredictable and often malevolent forces, Locke appeared to have disclosed the scientific laws of the human mind, which would allow men to reconstruct society on happier and more rational lines [Hampson, p. 39].

Arieli applies this logic to the political realm

Only America achieved a time synthesis of the philosophy of the Enlightenment. The belief in the perfectibility of man and the progressive nature of Voluntary social cooperation reconciled nature and history, individual rights and social justice [Arieli, p.124].

I simplify the Enlightenment for one reason: to illuminate the thought of three great men, Carlyle, Browning and Holmes, who in varying degrees found the Enlightenment an anathema. Understanding their version of the Enlightenment is not intended. Nor is an attack on Enlightenment thinking. (Reactions to the Enlightenment have been notorious. In Auden's words: "Many deplorable features of modern life, irrationalism, nationalism, idolization of mass-feeling and mass-opinion, may be traced to the Romantic reaction against the Enlightenment and its Polite learning [Auden, p.198]." My intent is rather to sketch an alternative to the Enlightenment based in the Romantic reaction to it, which need not lead to the deplorable features of modern life. I should like to suggest, on the contrary, that the Enlightenment, through its evisceration of political action, is as much to blame for Auden's horrors as the Romantic reaction. Furthermore, via its social scientific progenitors, the Enlightenment, in a version perilously close to its caricature, continues to block political action. My view parallels Mann's in *Mario the Magician*:

I know of no single work in which the predicament of the European liberal mind in the grip of the demagogue's will is so accurately portrayed as in this novella. The whole complex relationship between the demagogue and the masses is here. They are linked in a strange nexus of mutual fear and mutual need. For not only are the masses the mindless, will-less victims of his will, but his defective being is in bondage to their subjection and obedience; the moment his will gives out they will destroy Him. And the relationship that is here depicted embraces also the intellectuals and aesthetes who (to begin with, at any rate) are too bemused, too fascinated by the lurid spectacle to protect against it. The parallels with the Fascist situation, with the Germany of Hitler's mass meetings of the twenties, are left implied, the macabre cabaret is left to tell its own story, which is completed by an ending almost as convincing as it is horrifying [Stern, p.25].

As any world-view must, the Enlightenment gave "answers" to the problems that inhere in our multi-dimensional lives. At the physical level, it claimed that the perfect adaptation of the organism to its environment was in the natural order of things, ordained by a Deist God. At the level of society, inferring characteristically from the physical world, the perfect adaptation of the personal to its social world was also at hand, although how close at hand remained at issue:

If the medieval style of thinking affirmed that the attributes of the object could be subsumed under the categories of the subject, and if the Enlightenment Rationalist style believed the contrary, that the attributes of the subject could be subsumed under the categories of the object, the Romantic style assumed that both were...in an eternal interlocking tension... [Peckham, p. 271].

Epistemologically, the subjective world was subsumed into the objective

Once it is accepted that an all encompassing objective world exists, it followed for the Enlightenment thinker that objective knowledge is not only possible but attainable by the means of verifying physical events. The Enlightenment was then not a celebration of the empirical or natural in its own terms. It worshipped nature because nature provided the "data" for understanding man's relationship to his physical, social, and metaphysical being. And, if the world is subsumed by objective reality, then reason can do more than provide glimpses of reality. Reason discovers Truth. Traditional logic was not replaced by a raw empiricism, whatever that might be, it was imposed on and in turn validated by the physical world. Validating reason, nature implied man's sovereignty over the world. The assumption of an objective, knowable (causal) world, put in motion by a beneficent Clockmaker who has chosen man to rule via reason in His stead, gives the Enlightenment its rational flavor, despite its delight in the concrete. Thus conceived the enormous confidence and energy the Enlightenment generated becomes understandable, if not entirely logical. The world is knowable; we know how to know it; therefore, the world is Good. God may be cunning and subtle, but he cannot be cruel, as Einstein was to echo a century later.

Choosing different points of attack the Victorian Revolutionaries thought the Enlightenment was fallacious and vulgar and arrogant because it was simple-minded. Carlyle called it a "Pig philosophy" [Peckham, p.60]. As to be expected, Browning and Carlyle radically attack the Enlightenment's assumptions. The objective world is not knowable. It may not even exist. One cannot even get to the Enlightenment's assertion that the perfect adaptation of the organism to its environment is ordained, either in nature or by God. Without the assumption of an objective and knowable world, the adaptation of personality into a harmonious society

and the subsumption of the subject into the object cannot be asserted—at least not in a way logically acceptable to Enlightenment thinkers. So, too, for the assumption of a beneficent Deity: agnosticism is the most one can warrant. Reason itself ceases to exist as a neutral device for discovering truth by the apprehension of reality. No longer the sterile scalpel peeling back the tissues of reality, reason becomes an extension of the mind, imposing a coherence, not on the world, but on itself:

Cause is a word that connects statements about the world, not events in the world. Properly rewritten, a causal statement is a predictive statement about the outcome of non-verbal behavior, effective for someone who knows the cultural conventions for responding appropriately to that predictive statement [Peckham, p.271].

The measure of success is not truth but satisfaction. Reason no longer having the capacity to absorb the subjective into the objective world becomes instead the tool of the willful, irrational, personality, who determines, makes, fabricates, the truth. Yet even this sort of skepticism postulates too much certainty, admits the cogency of too many distinctions. It suggests that we do more than notice as it suits us to notice. In Browning's and Carlyle's world, everything is imbedded in everything else in a maddening simultaneity.

Browning discovered that men wore masks not merely to conceal their true characters from the world but for a better reason, to conceal their true characters from themselves.... It is a platitude that self-knowledge paralyzes; it should be a platitude that rationalization, and only rationalization, enables us to act [Peckham, p.91].

The trouble is that we seem to need more than symbolic order and a coherent set of symbols, if we are to act. The great confidence of the Enlightenment is due to the virtuosity of its thinkers to create justification for action out of the whole cloth of reason. If not reason, what? Having no rational basis for action Carlyle and Browning were forced to bring action of an "irrational conviction" that life is valuable. Action is justified because it is a sign of life. Neither Browning nor Carlyle could let the matter stand at that, although they acknowledged they had no more warrant for proceeding than for their conviction. Accepting the apparent reality of choice (it was as real as anything else), they saw it as a way of imputing meaning to action when there may be none. For Browning "choice" comes from an "impulse, an instinct perhaps, to ascribe value to existence [Peckham, p128]." For Carlyle "action requires choice: as life requires action" [Peckham, p.60].

But how does one choose in a world where the causal knot is severed? How does one choose to act in one way rather than another? Do not Browning and Carlyle postulate a degree of indeterminacy that makes choice itself the ultimate deception? Their answer is no better than an ambiguous, "perhaps." They offer no case, no argument, for acting wisely or well. They simply believed that acting meaningfully was possible and valuable. At most they seem to say that we cannot prove otherwise. Browning goes so far as to say direct action is impossible, a notion suggested by the metaphor of the masked ball. Only indirect action remained. A life of acting, rewarded by a partial self-knowledge, seems a slender justification for action. Only in our emotions could so powerful a force be found. However, if we are to avoid surrendering to our viscera, we need to interpose something between stimulus and response. Yet Browning and Carlyle saw nothing but an "abyss." That was something, however, for an abyss implies space, room for choice. If the abyss could not be filled with knowledge, it could be filled with choices. But why choose? Because to choose is to live, as Holmes was to echo [Cohen, p.206]. If living needed reasons it might lose a

debate with death. Browning and Carlyle respected the irrational because they respected life. Offering no reasons, they offered their work. "From Goethe he [Carlyle] took 'the end of man is not a thought but acting', and he denied that 'know thyself was a possible precept *till* it can be translated into this partially possible one, *Know what thou canst work at*" [Peckham, p.69]. By so doing they no longer needed the world of perfect knowledge or of perfected personality, and were content with the "world of modest failure, the necessary condition of man" [Peckham, p.28]

THE HOLMES VERSION

It is ironic and somewhat misleading that Holmes' greatest fame occurred in the twentieth century, as a justice of the Supreme Court for three decades, because, he was a nineteenth century man. Holmes makes this fact difficult to remember because, like Browning and Carlyle, he swam against the current of his time. Like them he was looking ahead to the twentieth century and, like them, too far ahead to be read accurately. Their most advanced thinking had been seen as their most reactionary. They were not progressives. They were pointing, in the full flow of progressive optimism, to a time when we would be able to see only the weeds. More than predict the inevitable disillusion to an impossibly optimistic and often wonderfully over-reaching age, they sketched a way to deal with the disillusion, to see the possibilities if not the beauty of weeds. Holmes was harder to understand because of his long association and friendship with an architect of the twentieth century enlightenment, Louis Brandeis. Largely on the basis of some beautifully written dissent, Holmes has been considered part of what has been called "The Legacy of Holmes and Brandeis" [Konefsky]. Progressives and their New Deal progeny have been trying to keep the prickly Holmes under their collective wings ever since they saw in him a way to sabre through the morass of substantive due process, a way to cut through the legal institutionalization of the dogma of laissez-faire. The trouble was Holmes' anti-dogmatism, his judicial modesty, and his consequent abiding by rules of the democratic game, could cut against the grain of New Deal values just as effectively as against grain of laissez-faire. How this could be is the burden of the section.

We begin with words. For Holmes thought of the judge what Eliot (another anti-Enlightenment thinker) thought of the poet: "his direct duty is to his language, first to preserve and second to extend and improve" [Eliot, p.9]. Only then can it convey meaning, or more accurately, only then can it be meaning. Justice Holmes' judicial formalism, "aloofness" or "callousness," in the views of his critics, was based on his attitudes about the relationship of will and words, as it found expression in our political life. Behind Holmes' astringency lay a philosophical skepticism that could impute only insignificance to man, yet could open the door to self-defined human meaning through an active life. Only a few words will be needed to show how consonant Holmes' attitudes were to Carlyle's and Browning's.

Lerner once said of Holmes that he was "exacting in construing a stature and latitudinarian in construing powers under the Constitution" [Lerner, p.222]. My own analysis of Holmes' opinions in the field of economic regulation supports this conclusion [Vasillopoulos]. Furthermore, it lays bare the nature of the fault even friendly and bright critics, like Lerner, were likely to place on Holmes. They could not adhere to Holmes' notion that words, statutory words, were policy. For these critics words should be bent to meet the exigencies of moment. That was the role of the Supreme Court [Lowry, p.390].²⁹ For Holmes' words

should be kept as free of interpretation as possible [Konefsky, p.60]. Legislatures can do what they will so long as they say what they mean, for what they say is what will be imputed to them by the High Court in the fulfillment of its duty. Holmes was willing to subordinate a supposedly beneficent outcome to the form of constitutional government. His critics in the main were not. Holmes said, "If my fellow citizens want to go to Hell, I will help them. It's my job." The only proviso being so long as they said so in legislation. Then the "hydraulic pressure" of political desire becomes legitimate and subject to judicial support.

The Non-enlightenment nature of Holmes' position is further suggested by his notions of the relationships of means and ends, form and substance, will and words. Holmes consistently was able to ignore the lure of "good" outcomes because he simply could not warrant the reasoning of their architects. To be sure we were blessed with outcomes however, the relationship between them and the logic of policies was plausible at best. We indisputably had change: that we did or could direct it was quite disputable. Thus, Holmes was unwilling to subordinate the coherence of the mind, based on common law interpretation of language, for a coherence based on the Enlightenment's assumptions of a knowable, objective world, to say nothing of man's harmonious and sovereign role in it. His wedge between the world of physical events and the world of coherence was not the "abyss" it was for Browning, but it must have seemed so to the "onward and upward crowd." At the same time Holmes allowed for political space, based on will, the Enlightenment would allow only for Truth. Legislatures were willful, often juvenile, certainly vulgar, and generally representative of their constituencies. To expect wisdom, impartiality, or even common sense, was folly. To intervene on the supposition of inducing improvements in legislation was inappropriate for a judge in our system, no matter that the system was established by equally benighted men.

Holmes' critics tend to agree with this characterization of legislatures but drew the precisely opposite inference. Intervention was the duty of the wise, judge or no.

In the end, it may be for Brandeis rather than Holmes, to provide guidance in problems of state and federal regulation... This does not contemplate, of course, an investigation into the actual motives of the... legislature. Nothing could be more futile. But it does contemplate that the court, *without intruding the personal opinions of the Justices*, shall accept only that legislation which has substantial, if mistaken, justification [Lowry, p.390].

Even more pointedly, "There is good ground for believing indeed, that he was so upset by the redirection of economic forces implicit in the Government's action...that he convinced himself that Congress could never have intended that policy [Konefsky, p.60]."

Konefsky concludes that the "good ground" is based on his inability to otherwise fathom Holmes: "How else can one explain his unsupported generalizations and his glib statements in which he equates such redirection with atomization of society and social anarchy" [Konefsky, p.60].

Lerner's interpretation of Holmes is more insightful and less angry than Konefsky's, however, the criticism remains the same:

What Holmes fails to take account of is that people wanted the trusts prevented, and sought the means most opportunely at hand... They did think of this huge holding company as a trust within the meaning of the Sherman Act and did regard it as a menace. Holmes should have known that the 'hydraulic pressure' of popular opinion could not in this instance be

ignored, on the same grounds that he had always used such data to indicate that a legislative position was not manifestly absurd.... Thus Holmes was caught. He did not wish to push his own theory of economic organization, and he must have known that his doctrines of judicial self-restraint were against him here. But he could not accept the theory of Congress, mainly because of his knowledge of common law and his notions of the inevitability of combination [Lerner, p.222].

For the Enlightenment thinkers of the New Deal, the service of the Truth was sacred, not to be sullied by profane men and their systems of compromise and historical accident. To Holmes the very willfulness of politics is what gave it life. The propensity to act in the face of unfathomable ignorance gave it a dignity surpassing any academic exercise. For Holmes truths, such as we know them, were created by political acts and were manifested in political language. For him facts were important as an index of social power not as scientific truth.³¹ Reason, itself, assumes a modest role. He said: "Lawyers like other men frequently see well enough how they ought to decide on a given set of facts without being very clear as to the *ratio decidendi*" [Shriver, p.63]. Satisfaction, not truth, is the end, and reason may only get one partly there. The stage is thus set for citizens to make political choices, with or without the help of experts, as it suits them.

This understanding unquestionably led Holmes to think of law as a means more than an end, which limited his willingness to expand constitutional prohibitions when reviewing legislation. Furthermore, it made him wary of pushing the concept "legal grounds" over the edge into logical sterility:

In form its (the laws) growth is logical. The official theory is that each new decision follows syllogistically from existing precedents. But just as the clavicle of the cat only tells of the existence of some earlier creature to which a collar bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view. On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very consideration which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but nonetheless traceable to views of public policy in the last analysis [Holmes, pp.35-6].

Laski acknowledged what Holmes granted that "judges do legislate" but do so in a limited way. "Because the legislative aspect of their task 'is confined from molar to molecular motions,' they are not entitled to replace legislative decisions with their own" [Laski, p.169]. Holmes believed in the law as an organic concept. While having rational underpinnings, at its core law, properly conceived, serves social forces which are best considered non-rational, if not irrational:

While Holmes was a philosopher and accordingly valued consistency and generality, he seldom let those considerations interfere with the life of the law. The truth is that law hitherto has been, and it would seem by the necessity of its being is always approaching and

never reaching consistency. It will become entirely consistent when it ceases to grow [Shriver, p.112].

Holmes' aloofness as a judge thus becomes understandable. Even if someone or some institution could in principle know enough of the truth to override the political expression of the relevant citizens, a possibility Holmes thought absurd, no judge could sanction such an act without subverting our system. And judges were the special guardians of the form of our system. For Holmes legislation could transform the most subjective standards into the most objective, that is, those upon which actions must be based. That is what a political system does. It sets rules of action and fills them with content. Having a legislature assert that the moon is made of cheese does not make it so, however, that is not the same thing as saying that no such legislation is legitimate. Moreover, it is not the same thing as saying that such legislation cannot legitimately control behavior. For Holmes standards could become legal standards by adhering to the rules of so becoming. The rules themselves were subject to rule-bound change, once the initial bootstrap operation of the founding was accomplished. To do otherwise was to prolong a revolutionary role and function for Supreme Court justices. In a sense this kind of job inheres in The Supreme Court, however, Holmes kept it to a minimum in the absence of legislation and to near zero in its presence. That was his reading of the rules of the American system of government.

The conventional, constructed, nature of the rules does not weaken them. Once one leaves the world of physical events everything is artificial, even property, even rights. For Holmes, if there were no natural or divine law or if we acted as such, everything would be permitted only in the absence of rules. Rules make us neither divine, nor natural, nor wise. They make us civilized. They may be the best of that "moment of rational sequence" called the universe. And Holmes thought that we had a right to delight in them. More than delight, Holmes could find in that moment an invitation to effort, to achieve. Out of insignificance, uncertainty, and contingency Holmes saw room for choice, for work, for value.

If Holmes was as much like Browning and Carlyle (or Peckham's interpretation of them) as I've suggested, then it would not be surprising Holmes would be as misunderstood and for the same reasons. He could not avoid being judged by a frame of reference alien to him; one he was inclined to reject. His rejection was more institutionally restrained than Carlyle's or Browning's, yet his skepticism found expression even in his judicial opinions. Formalism for Holmes was much more than simply the proper judicial posture in our system of government. It was a way to give effect to his more general orientation to life.

The frame of reference, the twentieth century enlightenment, is still with us and still controlling. Even its critics are trapped by its suppositions. If this resulted only in the failure to understand Holmes, one could enjoy the irony of Holmes being praised for the wrong reasons. Its effects, however, are much more practical. For the failure to appreciate Holmes is associated with the acceptance of a no longer appropriate and too limited spectrum of debate on a matter of the utmost importance: our capacity to govern ourselves within constitutional limits in the face of the unprecedented power of non-governmental associations. Further and worse, a failure to understand Holmes is associated with a desire to substitute expertise for political will, to make the necessarily coercive facet of government implicit, to make ends smother means, to sublimate the political. We need Holmesian attitudes for the same reason we need the likes of Browning and Carlyle: to get beyond our frames of reference, or at least to see the edges. Only then can we ask the right questions and get on with the business of

problem setting [Vickers, p.169]. There is no guarantee of correct legal decisions, much less, better public policies. What Holmes's approach, in accord with Browning and Carlisle and other anti-Enlightenment liberal thinkers, promises is that when dealing with human beings in the existential context of their lives, judges and policy makers will not treat them as objects to be manipulated as if they were mechanical objects to be altered for their own good. A reasonable person, like a reasonable conception of law and life in general will fully acknowledge and respect the irrational elements of existence. Lost in the process is the utopian vision of life. What is gained is a more modest understanding that the most we can aspire to is wisdom, itself illusive and subject to almost perpetual change.

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