Relationship of Natural Law to Experimental Jurisprudence*

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During the last few years there has been a verbal battle of rising crescendo over the philosophical doctrines of the late Mr. Justice Holmes.[1] It is not particularly important here either to attack or defend the great justice's place in history. Even in death he can pretty well take care of himself. However, it might be instructive to call attention to certain aspects of this debate which are indicative of some of the startling defects in modern judicial and juridical thinking, and to a means of curing these defects.

WORD MONGERING

The process of the argument against Holmes is to use words extracted from speeches, letters, and judicial decisions, cleverly woven together indiscriminately and out of context, in an attempt to give a slant to his philosophy of life. Just as the Devil can quote scripture, it seems that these theologians and their cohorts can quote this devil for their purposes. The trend of the reasoning is to imply that Holmes' philosophy is totalitarian.

One of the more recent detractors of Holmes in an article in the American Bar Association Journal has summed up his argument under the title, "The Totalitarianism of Mr. Justice Holmes," as follows:[2] "Here is the nub of the whole controversy. Many liberals admired Holmes because they did not know of or consider the totalitarian implications of his philosophy . . . there is encouragement in his doctrine, that the test of truth is its ability to get itself accepted in the market place, or that truth is 'the majority view of that nation which can lick all others.' If Stalin conquers, then in the philosophy of Mr. Justice Holmes, atheistic communism will become the truth." So if Stalin wins, Mr. Justice Holmes is a totalitarian. By like argument if the democracies win, he is a democrat.[3] How silly can we get?

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1 See Lucey, *Holmes - Liberal - Humanitarian - Believer in Democracy?* 39 GEO. L. J. 523 (1951) and articles there cited. See also, CHARTEL, OUR LEGAL SYSTEM AND HOW IT OPERATES §7-45 (1951).

2 Palmer, 37 A. B. A. J. 811 (1951).

3 "Holmes, of course, was a Republican," BOWEN, YANKEE FROM OLYMPUS 411 (1944).

It must be said in fairness to this recent school of natural lawyers that they did not invent this process of thinking; but skillfully adopted it as a type of persuasion in good standing with the legal profession who constantly twist words by lifting them out of context for use in briefs, arguments and judicial decisions.

With apologies to Mr. Vishinsky, it should be noted that this type of word mongering has also been equally indulged in by the followers of Mr. Justice Holmes. In a recent case, *United States v. Dennis*,[4] Chief Justice Vinson, borrowing from Holmes, makes the following statement:[5] "Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which give birth to the nomenclature. To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straight jacket we must reply that all concepts are relative." He then proceeds to hold in accordance with great popular demand that the Smith Act[6] may interfere with freedom of speech when that freedom results in advocacy of revolution against the government.[7] The trouble with Mr. Justice Vinson's argument is that the founding fathers, being disciples of the natural law, believed in absolutes, and the First Amendment to the Constitution states such an absolute as follows: "Congress shall make no law . . . abridging the freedom of speech." The Smith Act abridges the freedom of speech by punishing the teaching of revolution and is therefore plainly, within the dictionary and historical meaning of words, unconstitutional. The advocates of natural law, are, of course, correct in their criticism of this type of technique. When Holmes, speaking as a philosopher, stated that there were no absolutes, his words should never have been lifted out of context to destroy the plain meaning of a Constitutional provision stated in absolutistic terms. To encourage this type of thinking by word mongering, in any legal system, simply leads to legal anarchy whether it be done in support of, or in opposition to popular demands.

It is essential to clear thinking that a sharp distinction be drawn between a pragmatic or scientific concept, that there are not in human behavior, or should not be in the laws governing it, any absolutes, and the problem of deciding a case under a written law which, perhaps, wrongly in the belief of Mr. Justice Holmes, has been stated in terms

4 341 U. S. 494 (1951).

5 *Id.* at 508.

6 54 STAT. 671 §§ 2 and 3 (1940).

7 Even more reprehensible is Mr. Justice Frankfurter's sophistry, 341 U. S. at 519 ff., by which he attempts to demonstrate that advocacy of revolution was not within the meaning of freedom of speech protected by the First Amendment, when any American school boy educated before 1918 should know better. The only sound argument in support of the decision is Mr. Justice Jackson's, at p. 561 ff., that the defendents are punished for conspiracy, not speech.

of an absolute. Whether one likes it or not, the natural law theories of absolute truth have exerted a tremendous influence upon our law makers and the drafters of our Constitution. Natural law absolutes have found their way into the very structure and fabric of our legal system and cannot be disposed of by a philosophical expression which is itself absolutely stated—"there are no absolutes." Anyone who believes that Mr. Justice Holmes himself would have fallen into this sort of a fallacy does discredit to his memory whether he be a follower or an opponent of his basic philosophy.

We may not like absolutes but one cannot simply, by denying their existence, get rid of them wherever they exist in our system of written law and still make any pretext of administering government by law. If one wants to be free of natural law absolutes he should dispose of them by due process of amendment and not by sophistry and word mongering.

THE SCIENTIFIC FUNCTION OF ABSOLUTES

The question, of course, still remains whether it is wise, proper, or useful to attempt to state either scientific laws or man made government laws in terms of the absolute. The former should be left to the physical scientists. The latter is a problem which the jurists will have to solve. It should be noted in passing that even in the field of physical sciences, the leaders no longer confidently speak in terms of absolute knowledge. Here in the realm of the so-called exact sciences Einstein's relativity, Hisenberg's principal of uncertainty,[8] Planck's statements that we cannot discover reality but that we can see only shadows of the shadows[9] are the popular order of the day. The chemists who once had a well worked out chart of indestructible atoms as the building blocks of the universe now frankly admit that they lack even an integrated theory to explain the nature of matter.[10] But in spite of this absence of absolute knowledge, never in history has man been able to exert the control over physical matter which he now possesses.

In the field of social or juridical science we are just emerging from the era of dogmatic truth. In the past there has been a great reliance on absolutes. The talk about fundamental values, social ends, moral

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8 Jeans, *Exploring the Atom* in READINGS IN THE PHYSICAL AND SOCIAL SCIENCES 337 (Shapley Wright and Rapported 1948); see also SULLIVAN, LIMITATIONS OF SCIENCE 72 (Mentor ed. 1949).

9 PLANCK, THE UNIVERSE IN THE LIGHT OF MODERN PHYSICS (Johnsons Trans. 1931); BRIDGMAN, THE LOGIC OF MODERN PHYSICS 33 (1927).

10 Marshak, *The Multiplicity of Participles,* 186 SCIENTIFIC AMERICAN 23 (Jan. 1952).

concepts, basic theories of human relations which can be solved only by return to the true church, the family, the marriage concept, by development of democracy, the rule of the proletariat or government by law and not of men, has dominated our social sciences and our juridical thinking. Only recently have we begun to emerge from the shadows of mysticisms and dogmatism in matters effecting social and legal concepts. It would be a brave social scientist today who would say that the list of fundamentals mentioned above are unsupported pseudo-scientific wives tales with no experimental verification. Holmes great intellectual stature was partly due to the fact that he fearlessly was willing to question these so called absolutes.

In the social field natural law has long been willing to provide absolute answers. As is well known, the natural law theorists for centuries have claimed that there exists in the nature of things an absolutely perfect rule of law for each given situation which can be written into man made government law. One may not only be willing, but anxious to go along with this natural law philosophy. There may be absolutes; there is comfort in believing that there are. Life would be much more simple if there were. It is easy to grant that the universe is so constituted that there is, in the relations of man to man, among all the possible rules of law which might be applied, one which is best fitted for governing each relationship. The only question is how can it be found?

The Basis of Natural Law Absolutes

The natural law theories of the past and present seem to offer two ways of discovering this higher or perfect law. One is reason; the other divine guidance or revelation.

Taking the theory of divine guidance first, if there is a Diety who propounds such rules, and one may be perfectly willing and happy to admit that there is, to whom does He reveal His messages? Granting that He by hypothesis has a perfect sending set, there seems to be slight difficulty with the human receiving apparatus. Among those who purport to have been in contact with the Source of all wisdom, as for example, Christ, Buddha, Mohammed, Confucius, to name only a few, different results seem to have been reached for the perfect rule governing almost every problem that comes under the ken of law. For example, the conflict on the legality of plural marriages under the various systems is well known.

In a primitive society having only one basic religion, laws grounded on its revealed precepts might work fairly successfully; but in a polyglot world such as the one in which we live, whether it be the United States or the world at large, these absolutes come into basic

conflict. Even in our own country we have the Protestants, Catholics, Christian Scientists and Mormons, to name only a few, who would reach conflicting decisions on the absolute truth behind the law of plural marriage and its correlary, legal divorce. If each is to follow his own conscience and, according to classical natural law theory, obey only the law which corresponds to his revealed absolutes, anarchy is assured.

Now turning to reason as a source of the absolutes. Natural law in the United States alone has been used to justify revolution,[11] confiscation of property,[12] maintenance of the status quo,[13] the sanctity of property rights over human rights[14] and vice-versa.[15] Logic, rhetoric, disputation and word mongering on both sides seem equally potent.

In the broader fields of government structure and international relationships, reason can be, and has been brought to bear to support democracy, dictatorship, altruism and might makes right. Our current international impasse is based on natural law approaches grounded on reason on both sides. The communists and the free world equally appeal to reason. Both systems from the point of view of logic, rhetoric, appeals to history and just common sense are equally attractive to large bodies of converts. On appeal to reason alone, Karl Marx seems to be able to convince as many people as the capitalistic democrats. The result, of course, is war and international chaos. In the past we fought many religious wars and revolutions in which each side was positive of the truth of its absolutes. We are now talking in terms of similar wars based upon absolutes of political and economic beliefs. This has been the result of two thousand years of natural law thinking on both sides, and nothing new seems to be involved in the present cry to return to natural law.

Of course, this is all old stuff in the field of philosophy and one should apologize for offering it again here, if it were not for the fact that there are among us, lawyers, jurists, and a substantial group of people who, in despair of obtaining any results from shallow realism, are returning to the simple faith of Aquinas and Aristotle. Like Hitler, they seem to believe that a statement can be made true simply by repeating it and building up a structure of reasoning about it. It is submitted that it is time to move on to other procedures for testing the validity of legal concepts and the usefulness of particular rules of law.

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11 The Declaration of Independence.

12 Royce, *The Squatter Riot of 1850 in Sacramento* in HALL, READINGS IN JURISPRUDENCE 314 (1938).

13 Rutherford as quoted by Hall *supra* note 12, at 68 ff.

14 Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 94 N. E. 431 (1911).

15 See Notes 12 and 13 *supra*, and collection of material Hall, note 12 *supra* Ch. 8.

THE PROOF OF NATURAL LAW HYPOTHESES BY EXPERIMENTAL JURISPRUDENCE

So far as this discussion is concerned, natural law thinking and methods offer excellent initial hypotheses, but not necessarily absolute conclusions. The apparatus of proof for an hypothesis based on natural law can be found in experimental jurisprudence.[16] If someone offers a rule of law which seems to be sound in logic and reason, why not take it, try it out, and see how it works in society. (I am speaking here as a jurist, not as a judge. The judge under our doctrine of separation of powers as we are presently experimenting with it, is, of course, within the limits of meaning of words, bound to follow the rule of law as stated in the statute or constitution).

In the past it was objected that we could not test rules of law by experiments because methods of observation had not been developed.[17] This is no longer true. Social science, psychology and many other sciences have given us means for measuring and testing human reactions to law.

It would take a treatise of monumental proportions compiled by a team of scientists from every field to name all the modern scientific devices and methods available to study the efficiency of a given rule of law as an instrument of social control. Space allows only an indication of a few which have been successfully applied.

The questionnaire and statistical method was used at Johns Hopkins Institute to study divorce and court procedure. The volume and thoroughness of that even incomplete experiment[18] shows beyond a doubt that in the area of judicial activity cases are so numerous as to be subject to mathematical classification and comparative statistical treatment which will eliminate objections of variations of personal bias or lack of repetition of the phenomena studied, and so yield data which can be subjected to true scientific analysis.

Kinsey[19] has applied interview technique and statistics to demonstrate conclusively that the effectiveness of laws governing sex activity is open to scientific scrutiny, which when applied to human activity in the mass should yield valid suggestions for change in the laws[20]

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16 See Beutel, *An Outline of the Nature and Methods of Experimental Jurisprudence,* 51 COL. L. REV. 415 (1951).

17 Among others see COHEN, THE SOCIAL SCIENCES AND THE NATURAL SCIENCES (1927).

18 For a good example of such technique see MARSHALL AND MAY, THE DIVORCE COURT. Maryland (1932); *id.* Ohio (1933). These are only two of about twenty similar studies published by the Institute.

19 KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

20 *Cf.* PLOSCOWE, SEX AND THE LAW 136, 155, 206, 271 ff. (1951).

and procedures governing sex activity. His work also indicates that if this most intimate of human activities can be effectively reached by such methods, they are even more likely to succeed in many other places where law touches human conduct of a more observable nature.

The Gluecks[21] have combined teams of experts in psychology, medicine, anthropology, statistics, counseling, law and others to delve into the effect of criminal laws and juvenile delinquency. Under this combined attack there are beginning to emerge mass pictures of human reactions to laws which make it possible to set up predictions of individual reactions to laws,[22] governing juvenile delinquency, which in turn when verified will throw light on the effectiveness of the laws themselves.

Similar techniques based upon the history of numerous cases and the environment of individual criminals have been used in the Illinois Penitentiary to study the parole of criminals.[23] Out of their research based upon mathematics and advanced methods of observation of social data and behavior, there is emerging a method for advising parole boards as to which criminals are good risks for parole and which should remain incarcerated.[24] In this field social science has already reached the stage where it is able not only to predict the main effect of laws; but also to provide helpful advice in determining which individual cases are good risks for executive clemency.

It has also been demonstrated that whole programs of youth counseling can be subjected to experimental methods to test their effectiveness.[25] By proper matching of individuals subjected to a certain program and careful study of their careers as the young persons develop under the guidance or lack of it, a measure of the success of the method is available. In one study just completed it was demonstrated that a carefully derived counseling system had no apparent effect upon the delinquency of its subjects.[26] On the other hand, a similar study applied to progressive education showed that its program uses more efficient methods for training students for college than does the more conservative curricula.[27]

The success of combining a host of sciences for law enforcement

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21 FIVE HUNDRED CRIMINAL CAREERS (1930); FIVE HUNDRED DELINQUENT WOMEN (1934); LATER CRIMINAL CAREERS (1937); ONE THOUSAND JUVENILE DELINQUENTS (1939); CRIMINAL CARREERS IN RETROSPECT (1943); UNRAVELING JUVENILE DELINQUENCY (1950).

22 See GLUECK, UNRAVELING JUVENILE DELINQUENCY Ch. 20 (1950).

23 OHLIN, SELECTION FOR PAROLE (1951).

24 *Id.* at 68 ff.

25 POWERS AND WILMER, AN EXPERIMENT IN PREVENTION OF DELINQUENCY (1951).

26 *Ibid.*

27 THIRTY SCHOOLS TELL THEIR STORY 68 (1943).

in the Federal Bureau of Investigation Laboratory is known to all.[28] The Federal Budget[29] shows that this organization uses over fifty high grade technical specialists and as many assistant technicians covering professions including physicist, chemist, metallurgist, petrographer, spectrologist, dermatologist, agronomist and many others[30] all directing their cooperative efforts to the identification of criminals by scientific rather than by logical methods.

The reader can probably add many more examples from his own experience of how numerous scientific methods and devices are used to study the efficiency in operation of rules of law.

Experimental Jurisprudence in Action

As a matter of fact, there are now functioning in our society many examples of complete systems of scientific law making and testing. Two of the best follow.

In the field of traffic law it had long been thought by law makers that twenty miles an hour was a proper speed for city traffic and that stop lights on all dangerous corners could prevent accidents. During the last two or three decades traffic engineers with delegated powers of lawmaking have begun to investigate these "obvious natural law theories" with startling results. A single example will suffice.[31] It was observed that at a certain cross-road an unusual number of accidents were occurring. The city fathers immediately concluded that the obvious thing to do was to put in stop lights; but when these were installed, to their consternation, accidents increased. They then called in a traffic engineer. After studying the situation with radar speed recorders, automatic counting machines, statistical correlations and other devices of modern science, and relying on previous experiments, he changed the rule of law from a traffic signal to two psychologically tested stop signs on one of the intersecting roads. The town fathers were certain that the traffic engineer was obviously wrong; but a further study revealed that the new device reduced accidents over similar periods of time in a ratio of from fourteen to one, while at the same time speeding up the traffic.

Through this process of passing laws, observing their effect on society and changing them accordingly, the field of traffic engineering

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28 For many of the myriad scientific techniques used see O'Hara & Osterburg, Criminalistics (1949).

29 The Budget of the United States 705 (1951-52); *Id.* Appendix 281.

30 Personal Services in the F. B. I. Laboratory, F. B. I. Law Enforcement Bulletin (Oct. 1947).

31 This is taken from an actual traffic study by engineers of the Nebraska Bureau of Roads and Irrigation.

has now developed into such a complete science[32] that most enlightened communities have delegated the entire structure of traffic laws to traffic engineers, who take past rules of law suggested by reason and subject them to scientific verification. Strange to say, speed limits under this system operate better from fifteen to fifty miles an hour within cities, and the most successful rules seldom correspond either with those indicated by reason or by a majority vote.

The development, enforcement and amendment of laws governing public health constitute a second example of the use of the methods of experimental jurisprudence to improve law making and enforcement. The manner in which the United States Public Health Service has studied and developed laws governing the production and distribution of milk are indicative of methods used in other fields as well. Since the Public Health Service is primarily a scientific body, it does not, in approaching its problem of regulating health by law, rely solely upon the natural law methods of reason or inspiration.

Since the turn of the century this organization has been studying the effect upon public health of the production and distribution of milk.[33] From these studies there have emerged a series of advances recommended for adoption at both city and state level. The results of the adoption of such statutes upon public health and milk-born epidemics in various localities were studied over a period of years,[34] and as a product of the research there has emerged a model Milk Ordinance and Code recommended by the Public Health Service[35] which has been adopted with only slight variations in over two thousand communities in thirty-four states ranging in population from one thousand to over three million.[36]

After the model ordinance is passed there follows a series of studies to determine the effectiveness of enforcement, including ratings of the various producers and distributors to determine the extent to which they are complying with the new code.[37] The effect of the code upon

32 A description of this science in terms of experimental jurisprudence appears in Beutel, *Traffic Control as Experimental Jurisprudence in Action,* 31 NEB. L. REV. 349 (1952).

33 See excellent summary of this history, Moss, *Milk Investigation of the U. S. Public Health Service,* 3 JOUR. OF MILK TECHNOLOGY 145 (1940).

34 For example see, Fuchs and Kroeze, *Results of the Operation of Standard Milk Ordinance in Mississippi,* 45 PUB. HEALTH. REP. 1412 (1930); Clark and Johnson, *Results of the Operation of the Standard Milk Ordinance in Missouri,* 46 PUB. HEALTH REP. 1413 (1931).

35 Milk Ordinance and Code, (Fed. Sec. Agency 1939) P. H. Bul. No. 220.

36 List of Communities in Which Milk Ordinance Recommended by the Public Health Service is in effect, Fed. Sec. Agency, Division of Sanitation (Nov. 1950); note 33 *supra.*

37 For example see, *Report of Milk Sanitation Statutes,* F. S. A. Form P. A. S. 842 (SE) Rex 3-50; *Milk Sanitation Ratings* 66. PUB. HEALTH REP. 1086 (1951).

the communities involved is also the subject of careful scrutiny by staff experts of the Public Health Service. The findings of their research is then channeled back into amendments to the Model Code, and the process of study is again repeated.[38]

At the present time the National Research Council is cooperating with the Public Health Service to study the effectiveness of sanitary milk and ice cream legislation throughout the entire country.[39] When this study is completed there will undoubtedly follow further suggested amendments to the laws in question.

Thus, even where laws are based upon a scientific fact finding process in aid of the reason which lies behind them, and where the best devices of modern science are brought to bear to aid the law maker in his initial attempt to draw the legislation for the public health, it is found to be useful and profitable to make objective studies to find out the extent to which the statute actually accomplishes its purpose.

In like manner experimental jurisprudence is being applied in the field of city planning, airplane traffic control and in many other places. In each of these areas it has been shown that the best rule of law to fit a particular situation can be reached, first by the natural law process of reason; but the rule so obtained must be checked by a team of scientists who experimentally measure the results of the law in operation against actual conditions as they exist in society. When this is done the validity of the law to fit the nature of things can be verified or improvement suggested.

In the larger fields reliance can also be placed upon scientific experimental methods to discover the best law to be used in a particular situation and the jural law or reason which lies behind its successful application. One can in the outset, if he desires, use divine inspiration or reason to determine what a law ought to be if only he will check it against the facts of life. When it is so checked it often develops that the experimental jural scientist seems to have a better receiving set from the source of all wisdom about law than does either the cleric or the philosopher. This experimental process may be long and complicated in some cases; but is no more expensive than other fields of science. Recently the Air Force has planned to spend over a billion dollars to build a wind tunnel to test super-sonic full sized

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38 Fuchs, *Recent Amendments to the U. S. Public Health Service Milk Code,* 11 JOUR. OF MILK TECHNOLOGY 149 (June, 1948); Black, *Effect of Contemplated Changes in Standard Methods,* 11 *id.* No. 4. (Aug. 1948); Thomas, Levine and Black, *Studies Showing the Effect of Changes in the (9th) Edition of Standard Methods in Relation to the Bacteriological Analysis of Milk,* 38 AM. JOUR. OF PUB. HEALTH 233 (Feb. 1948).

39 See preliminary Report, Dahlberg and Adams, *Sanitary Milk and Ice Cream Legislation,* Nat. Research Coun., Bul. No. 121 (July 1950).

planes and missles. Think what a real experimental juridical science could do with a fraction of this amount of money applied to the testing of the validity of public laws.

The devices and machinery are available or can be created. It is no longer necessary to return to Aristotle and Aquinas or to rely alone upon reason, rhetoric, word mongering, popular vote or revolution, to determine the validity or efficiency of a law.