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Oliver Wendell Holmes and His Imbeciles

Attorneys tend to be good at telling stories -- or, at least they should be. So, being an attorney, I am glad to tell you a story. If you can bear with me -- if you can take it slowly and digest it, without taking offense -- you may find it interesting. I hope I tell it well for you. This is a true story of a journey, but, it is not necessarily a pleasant story. The burrowing truth does hurt.

I should make something clear, even though I have already stated it. I am an attorney. My degree says, *Juris Doctorate*, a Doctor of Law, if you prefer. Yet, I am not necessarily judging my story's circumstances, I am assessing the circumstances, so that I can think about them, with you.

I am admitted member of multiple courts throughout these United States, so I mean no disrespect or offense to the courts, as such. And I, myself, have family members and friends with special needs for whom I have deep and complete love, so I do not possess any hardness of heart. If the truth itself is hard, that is a distinct point of assessment. Such as a medical doctor, I suppose, I do not take joy in assessing the unfortunate cause for disease, but I do take some joy in finding a cure.

I will work backwards, just a bit. After practicing law for more than 23 years, I now tell clients that an excellent judge is a "Gift from God." A "Gift from God," truly. In my now first-hand seasoned opinion, it is quite rare to receive an excellent judge. Maybe it is a scary thought -- although formulaic -- that excellence is relative and exceptional. A judge must be smarter than some attorneys who are laying tricks and traps, and we know that there are some very smart attorneys. I suppose it is the same for doctors of medicine for the disease that is infecting the body, or the injury that cripples the body.

In law school, I had the cause to study [Oliver Wendell Holmes, Jr.](#) somewhat closely. Holmes is on a United States postage stamp for a reason. Holmes is recognized -- albeit from many less competent persons who are not capable of judging him -- as being an excellent judge. Holmes was a philosopher, a legal philosopher. You may not know it, but that great quotation by John F. Kennedy is paraphrased Holmes. Holmes said:

It is now the moment...to recall what our country has done for each of us, and to ask ourselves what we can do for our country in return.

Holmes, Memorial Day address in Keene, New Hampshire, on May 30, 1884.

Now, a few years ago, after practicing law for about 20 years, I had experienced some excellent judging; yet, I experienced enough of not-so-excellent judging (so I think) to cause me to start to consider that a judge, as a mere human being, could do just about anything and rationalize it. So, I started to research some cases to see how justice plays out in the hands of judges. This was not about Socrates, Jesus, Gandhi or Martin Luther King, Jr. -- different, but something more in line with Abraham

Lincoln.

The first case I found was [Plessy v. Ferguson](#) (1896). You might not recall the case, but you may recall the situation.

Mr. Plessy was 7/8ths Caucasian, and 1/8th African American. Plessy sat in the railroad car allocated for Caucasians, and he was arrested for doing so. The reason he was arrested was because he was a man of color, being 1/8 African American. He refused to sit in the railroad car allocated specifically for people of color.

The United States Supreme Court heard the case and voted unanimously, except for one Justice, that, yes, 1/8 African American Plessy must effectively "go to the back of the bus." "All men are created equal," as the Declaration of Independence assures, but the law permits "separate but equal" based upon race.

Only one Supreme Court Justice, [Justice John Harlan](#), dissented from all other Justices, opining:

[T]he Fourteenth Amendment, [added] greatly to the dignity and glory of American citizenship... If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other?... [Or, then,] why may not the State require the separation ... of Protestants and Roman Catholics? ...

But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

The humblest is the peer of the most powerful.

The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. ... The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.

...

"The law regards a man as a man." Wow. I want to cry every time I read this passage. And, this was the one-justice dissent, fighting for the obvious, if you will, with all the other Supreme Court "Justices."

As if I needed to become degreed with a Doctorate of Law to know that a **"man is a man."** Somewhere, all those important degrees confused those important men on the Supreme Court. Maybe too much knowledge just makes us stupid. It brings to mind the carpenter Jesus asserting the yoke is easy, just love. And, my non-doctor father asserting just not to eat as much and exercise.

But, back to the point about judges can rationalize anything. I kept researching. So, the next line of my thinking transcended, maybe descended, to the [Nuremburg Trials](#). You may recall that the Nuremburg Trials regarded the sentencing of Nazi officials, including trained judges with doctorates of law, for crimes against humanity: including persecution, sterilization and extermination. German Judge Schlegelberger, a Doctor of Law, rationalized for the sterilization of people of Jewish faith. Of course,

as it always is, there are many excuses for the rationalization, or reasons for the rationalization, if you will. Certainly, some might argue that the separation of some people is not the same as extermination of some people, but the point may be more an element of the solution, rather than the underpinning philosophy of causation: indeed, both societal final solutions -- separation and extermination -- grow from the same seed of racial prejudice, separation just comes first. That said, I dismissed use of the Nuremberg Trials because they were not based upon the United States Constitution.

From the point of thought of Nazi sterilization, the next case I reviewed was the United States sterilization case of Buck v. Bell, 274 U.S. 200 (1927). You might not recall this case, as it was a bit less socially pervasive than Plessy. In this case, the United States Supreme Court ruled that compulsory sterilization of the mentally ill is constitutionally permitted. In Buck, in an 8 to 1 decision, the United States Supreme Court held:

It would be strange if [the government] could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.

Three generations of imbeciles are enough.

Again, this was the exact language of Supreme Court. Initially, when I read "three generations of imbeciles are enough," I felt I hit my mark: a judge can rationalize anything, and, say anything, and do anything: separate but equal, racial genocide and sterilization of mentally ill: and all the rulings from judges, all Doctors of Law.

But, wait! At this point, the research took a twist for me.

Buck had something different. The opinion was written by Holmes! Respected, postage stamp, Holmes. My friend, Oliver Wendell Holmes. Should it, instead, be mean-spirited and rude Holmes?

On one level, the author of a judicial opinion is immaterial, but, on another level, it was my boy, Holmes. Something was wrong.

So, maybe I now rationalize, or I am not excellent enough to judge the excellence of the greater Holmes, but I believe that Holmes' power to analyze conditions was superior. For me, there is always something to learn with Holmes. So, I pressed my thinking to see if there was some distinction with the ruling in Plessy, which offends my sense of justice. Does this mean that my boy Holmes would have ruled with the majority in Plessy, if he were on the Supreme Court at that time?

But, aha! I found the difference, and I am chagrined that it took a while -- maybe too long. Here it is:

The ruling of the Supreme Court in Plessy "separate but equal by racial prejudice" violated a fundamental rule of Thomas Jefferson's Divine Providence: to wit, that all men are created equal. The color of a man's skin cannot foretell the man's social contribution; that is, skin color does not divine or drive deeds, skin color is or should be irrelevant. But, let us see a difference in the Buck case.

Hold fast and remember the paraphrased Holmes and Kennedy:

Ask not what your country can do for you, ask what you can do for your country.

All in, every person who does not pull his or her own weight in society, however measured, burdens society. It is formulaic. Society will properly endure some general social weight for the overall good of the society, but, such as it is, there are constraints and limitations. Patriotism: To give to your countrymen, and try not to take from your countrymen.

So, is Oliver Wendell Holmes, a philosopher, author of tender poetry, respected as one of the greatest jurists of American Jurisprudence, and a respected face on a United States postage stamp, just being mean, or was he necessarily stating some truth?

Let us look closer:

It would be strange if [the government] could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world... Three generations of imbeciles are enough.

Now, the back story. It was 1927. It was post-World War I, pre-Great Depression, pre-New Deal, pre-World War II. Holmes was a 1861 graduate of Harvard University. During his senior year of college, at the outset of the American Civil War, Holmes enlisted in the militia. He was appointed to the Supreme Court by none other than "every man must pull his own weight" Theodore Roosevelt.

Oliver Wendell Holmes loved his country. He was trained to battle for America, to be wounded, to endure pain for the cause. He would sacrifice his life for the good of the greater body and greater cause. Indeed, he volunteered to die for his country. We are all going to die anyway. Two oaths by Holmes: one to the militia, and one to the courts; both to serve and to protect America and Americans. Holmes was a soldier, a warrior, blessed for duty to serve in both pen and sword. Not everyone gets both blessings, and some do not get either.

The concept of duty was so deeply engrained into Holmes, that he thought "it would be strange" that the state that "calls upon" soldiers to die for the greater good could not also call upon the mentally ill to painlessly stop procreating for the common good. Effectively, if incompetent persons could understand their duty for the greater good, they would understand to perform the sacrifice of stopping their procreation for the common good. Sterilization is the "lesser sacrifice" because it is not death, and, I suppose, unlike the horrors endured by soldiers in war, the procedure is painless and probably without the mentally ill person knowing what happened, as "not felt to be such by those concerned." I am not endorsing the comment, mind you, I am studying the American historical philosophy of it, by a great thinker (so I think), as of 1927.

And, let us not rhetorically confuse Holmes. Holmes was not scapegoating social problems. Holmes loved his country, he was performing corrective surgery on the body. The ruling is not about the superficial judgment of a person by incidental race, religion or skin color. Though subtle, the ruling is the exact philosophical opposite: the judgment is based upon the presumed social conduct and contribution of the mentally ill person. Certainly, based upon the circumstances of the time, there may be a prejudice in Holmes of what a mentally ill person can contribute to society or will draw from society, but that is a different analytical point. What is important is to perceive the subtlety of his thought-process.

The American philosophy of the day was to "pull your own weight." There was no social security, no job security. If an employee did not pull for the employer, the employee did not feed his or her family. There were few governmental safety nets, each person had to produce. We simply had to pull our own weight. There are, of course, extremes to, and flaws within, all systems, but doctors must be careful to

cure the disease without killing the patient.

The "lesser sacrifice" by Holmes was merely the acknowledgment of a warrior that each individual in society must do his or her respective duty for the common weal. Holmes was wired for duty. For Holmes, the duty of every citizen, although different in implementation, is no less the duty of every soldier. Social responsibility begins with duty and self-actualization. For that philosophy, it is simply not fair that someone should not pull their own weight. It is quite un-American, in 1927.

Pleasure without pain is Utopia. To the 1927 mind of a great legal philosopher, tender poet and respected face of America on a postage stamp. Holmes was not just being mean. He was exposing the subtlety of American Duty, as he understood it.

If we care to take the lesson, there is always something to learn from the greater Holmes.

It is now the moment to recall what our Forefathers and Countrymen have done for each of us, and to ask ourselves what we can do for our country in return.

How you interpret the above journey and how you reconcile it is for you alone. In a capitalist system, freedom is tied directly to the economy. Maybe it is as simple as considering to buy American. You should know that I traded-in my BMW, and I love my Ford. It didn't hurt a bit.

It would be strange if the government could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence.

-- [*Gregg Zegarelli*](#)

* The purpose of this publication is to provide a reflection upon the intersection of character, values, wisdom and traditional patriotism in the United States of America. Did you miss an issue? [Click here](#).

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