Portrait of the New Supreme Court

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Portrait of the New Supreme Court

Cover Page Footnote
Acting Dean and Professor of Law, Fordham University, School of Law. Because of lack of time, it has not been possible to document fully some of the statements made in this paper. But it is believed that all of the argument is subject to proof and that much of it has been developed in other articles. A list of these articles is appended and the writer asks permission to incorporate them, by reference, subject to later expansion on the next installment of this paper.
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PORTRAIT OF THE NEW SUPREME COURT

WALTER B. KENNEDY†

Twenty years ago Professor Walter B. Kennedy warned against the impending break- 
down of constitutional and common law, the erosion of the doctrine of stare decisis, and 
the skepticism regarding legal principles. Pragmatism As a Philosophy of Law (1925) 9 
Marquette L. Rev. 63. Since then his writing has been devoted principally to the thesis 
that the above stated evils have been increasing down the years.

In the present article Professor Kennedy deals with the latest and most startling phase of 
the crumbling of legal precedents and case-law—the frank disclosure by members of the 
Supreme Court of their departure from principles and precedents, a confusion and dissent 
in decisions unparalleled in Supreme Court history.

His paper is timely and provocative; it attempts to make articulate the feelings of lawyer 
and layman regarding the present situation; it is also constructive. The FORDHAM LAW 
REVIEW believes that the subject matter opens up a problem of gravest importance and 
invites comment to the end that ours may continue to be a government of laws and not 
of men.—Editorial note.

THe people and press of America have suddenly discovered that there is 
dissension and division among the Justices of the United States 
Supreme Court.† The new Court, reconstructed a few years ago and
"duly mindful of the necessary demands of continuity in civilized society," has produced more dissents and vigorous cross-court criticisms than any other Supreme Court in the same brief span of time.

Here is a Court that was carefully selected under a formula that not only permitted but even defended the Presidential right to probe into each appointee's social, economic and political leaning and considered that such matters were proper subjects of inquiry—all for the purpose of manning the Court with Justices ready to carry into effect the "applied politics" of the administration in the noblest sense of the word. No wonder that the people are disturbed and confused by the present picture of judicial disunity and resultant uncertainty of law that provoked Justice Roberts to exclaim:

"The tendency to disregard precedents in the decision of cases like the present has become so strong in this court of late as, in my view, to shake confidence in defended the Supreme Court against external interference by the Chief Executive in 1937, they now petition the Supreme Court to get rid of the internal dissension which will produce the deplorable consequence, in the words of Justice Roberts, "that the administration of justice will fall into disrepute." Note 24 infra.

The comment in the daily press and journals of public opinion ranges from the moderate plea of AMERICA that the Supreme Court return to the doctrine of stare decisis which is called "one of the oldest rules of law" [70 AMERICA 534 (1944)] to the severe indictment that "we are drifting from constitutional government by laws to unconstitutional government by men." N. Y. Journal-American, February 17, 1944 at p. 18. An interesting observation by a careful commentator, Mark Sullivan, warns that the divided condition of the Supreme Court is more serious than the breach recently exposed between the President and Congress. N. Y. Herald Tribune, Feb. 25, 1944 at p. 19. See Editorial, An Unstable Court, N. Y. Times, Feb. 4, 1944 at p. 14.


3. "The statistics show, in fact, that from a quantitative point of view at least, the reorganized Supreme Court has become by far the most badly divided body in the history of that institution. President Roosevelt's first appointees to the Court took their seats during the 1937-38 term. For the six terms preceding (i.e., from the 1931-32 term through the 1936-37 term), there were dissents to 16 per cent of all the full opinions written by the Court. During the six terms of the reorganized Court (1937-38 through 1942-43), the figure on dissents was 33 per cent—over twice as great." Pritchett, The Coming of the New Dissent: The Supreme Court, 1942-43 (1943) 11 U. of Chi. L. Rev. 49-50.

4. The most famous disclosure of the stated executive policy of reviewing the political and economic inclinations of a candidate for the Supreme Court is found in the so-called President Theodore Roosevelt-Senator Lodge correspondence which preceded the appointment of Justice Oliver Wendell Holmes to the Supreme Court of the United States. The pertinent part of President Theodore Roosevelt's letters to Senator Lodge is found in FRANKFURTER, LAW AND POLITICS (1933) 66-67, where Professor (now Justice) Frankfurter approves of the right of the President to inquire about the political and economic background of judicial candidates.
the consistency of decision and leave the courts below on an uncharted sea of doubt and difficulty without any confidence that what was said yesterday will hold good tomorrow. . . . 5

It is the purpose of this paper to attempt the appraisal of the current criticisms of the Supreme Court by laymen and lawyers and to consider the causal factors which have brought about the discord in the national judiciary.

The argument will move through three stages:

(1) Contrary to the popular (and some professional) opinion, the present division in the Supreme Court is not of recent origin. True, two recent cases, both decided in 1944,6 have become front page news and expose to the public eye a breakdown which had been long in the making. The new Court has never been a closely united body; its disunity has merely been made more objective in recent decisions of the Court.

(2) The cause of this confusion in judicial minds is not simply stated or easily explained. It is rather a mixture of a number of factors of varying weights and influence, some visible and known for many years, some concealed beneath the surface—all ignored or dismissed as inconsequential when constructive critics have directed attention to them. In the light of the full sweep of extreme jurisprudential isms parading the American scene, the wonder is that this copia verborum current in the law has so long escaped the chambers of the United States Supreme Court.

(3) The cure for the present disorder is a return to order; a revival of constitutional and common law techniques and traditional values presently in eclipse; a recognition of the importance of the doctrine of stare decisis; a revival of legal principles; a critical examination of the direful consequences of pseudo-science, functional nonsense, surrealism and other fringe-propagandism which have penetrated into the law in the past twenty-five years.

A favorite aphorism of a few years ago was: “The law must be stable, but it cannot stand still.”7 It would seem that the Supreme Court has been functioning of late under another formula which emphasizes the mobility rather than the stability of decisions. But all is not dark and

6. Notes 8 and 12 infra.
7. POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 1; CARDozo, THE GROWTH OF LAW (1924) 143.
dreary. It may be a healthy and helpful sign to observe the public disclosure by the members of the Supreme Court of the submersion of judicial precedents and the infiltration of the personal viewpoints of the Justices in the decision of particular cases. This open and pronounced criticism of departure from precedents may well be followed by a determined effort to stabilize constitutional law. Let us hope that this attitude of mea culpa in the judicial ranks may be followed by the recognition that motion and change in the legal order may spell chaos and confusion rather than progress and improvement.

Two Recent Opinions

The two cases which focused attention upon the Supreme Court's internal disputes were both decided in the month of January in the year 1944. They at once attracted public interest because of their disclosure of the juristic quarrels in the Supreme Court. In the first case, Mercoid Corporation v. Mid-Continental Investment Company, decided January 3, 1944, there was involved a suit for contributory infringement of patents. The intra-court aspects of the Mercoid case are found in the separate opinion of Justice Black in which Justice Murphy concurred and in the dissenting opinion of Justice Frankfurter. Justice Black and Justice Murphy are objecting that the dissenting opinion of Justice Frankfurter rests upon no pertinent precedents but is the product of the

9. In this case, which involved the alleged "contributory infringement" of a patent, the Supreme Court reversed the Circuit Court and held that the doctrine of contributory infringement should be sharply and substantially limited. Since the patentee sought to extend the use of the patent to unpatented devices, equity would refuse the patentee or its licensee relief even if contributory infringement were proven.
10. Justice Black, concurring with the majority, wrote a separate opinion directed largely against the dissenting opinion of Justice Frankfurter. Justice Black charged that the dissenting Justice had rejected the customary methods of statutory construction and erected the doctrine of contributory infringement out of his own ideas of ethics and morals. Continuing, he said: "And for judges to erect their interpretation of statutes on nothing but their own conceptions of 'morals' and 'ethics' is, to say the least, dangerous business.”
11. Justice Frankfurter in his dissenting opinion [Mercoid Corp. v. Mid-Continental Ins. Co., — U. S. —, 64 Sup. Ct. 268, 274-275 (1944)] strikes back sharply and contends that "The idea of contributory infringement was woven into the fabric of our law and has been part of it for now more than seventy years.” He replies that the personal judge-made law is not of his making but is found in the opinion of the majority in the Mercoid case who are charged with framing "gratuitous innuendoes against a principle of law which, within its proper bounds, is accredited by legal history as well as ethics.”
dissenting. Justice's own original formula devoid of all reference to statutory language and legislative history.

A few weeks later, on January 30, 1944, the Supreme Court decided *Mahnich v. Southern Steamship Company* involving the liability of the defendant for injuries to a seaman while at sea caused by a fall from a staging which gave way because of a defect in the rope supporting it. The important point of present interest is found in the dissenting opinion of Mr. Justice Roberts, this time Justice Frankfurter joining in the dissent. It contains a severe indictment of the current inclination of the Supreme Court to engage in decision-hopping and precedent-hurdling:

"The evil resulting from overruling earlier considered decisions must be evident. In the present case, the court below naturally felt bound to follow and apply the law as clearly announced by this court. If litigants and lower federal courts are not to do so, the law becomes not a chart to govern conduct but a game of chance; instead of settling rights and liabilities it unsettles them. Counsel and parties will bring and prosecute actions in the teeth of the decisions that such actions are not maintainable on the not improbable chance that the asserted rule will be thrown overboard. Defendants will not know whether to litigate or to settle for they will have no assurance that a declared rule will be followed. But the more deplorable consequence will inevitably be that the administration of justice will fall into disrepute. Respect for tribunals must fall when the bar and the public come to understand that nothing that has been said in prior adjudication has force in a current controversy."

These two cases expressly disclose the growing dissension in the Supreme Court of the United States. But they were preceded by other violations of *stare decisis* since the reformed Court came into being. The other evidences of departure were more concealed, less sensational but sufficiently frequent to cause concern among the critics of the New Constitutionalism.

13. The majority held that the libellant was entitled to indemnity for injuries suffered, as well as for maintenance and cure. The Trial Court denied indemnity and the Circuit Court of Appeals, by a divided Court, affirmed. The Supreme Court reversed the lower courts and found that the vessel was unseaworthy because of the defective rope, even though there was sound rope on board.

The dissenting opinion of Justice Roberts was based largely upon an analysis of the same legal authorities and argued that under *stare decisis*, the past decisions of the Supreme Court clearly prevented such a reversal. For an analysis of the *Mahnich* case, see Obiter Dicta, infra pp. 132-135.
"What of Stare Decisis?"15

The judgment of the public and the press that the Court is abandoning case-law for a succession of single decisions eked out by the Justices on the basis of the particular circumstances of each case is strongly supported by other detours from the juristic highway of stare decisis. The doctrine was crumbling long before the Justices publicly proclaimed the fact in the Mahnich and Mercoid cases. The recent case of the United States v. Schneiderman,16 involving the right of the United States to denaturalize a Communist, is another decision wherein the Supreme Court rode through contrary precedents to reach a desired result.17 The history of the Flag Salute cases discloses judicial shifts that are startlingly rapid.18 In 1936 Chief Justice Stone warned his brothers on the old Court that the "only check upon our own [judicial] exercise of power is our own sense of self restraint."19 He deemed it necessary in 1943 to repeat this warning to the majority in the Schneiderman case when he charged that they were departing from the settled line of cases, and added a biting comment directed against the separate concurring opinion of Justice Douglas stating that it rested upon a novel statutory construction, was framed "to meet the exigencies of the case" and resulted in the "emasculating of the statute."20 The Mahnich case was not the first occasion for Justice Roberts to become aroused at the departure of the

15. Pound, What of Stare Decisis (1941) 10 FORDHAM L. REV. 1. Three years ago, Dean Pound asked the question: "What of Stare Decisis?" and with remarkable prevision of coming events forecast the present situation in the Supreme Court! "As things are today, I cannot but think that much of the attack on stare decisis is a part of the revival of absolutism which is so prominent in political and juristic thought throughout the world. It goes with the agitation for abrogation of the bills of rights, making the legislature the sole judge of its own powers, and freeing administrative agencies from judicial review, of which we have been hearing so much in recent years. While we are doing away with checks and balances and putting other forms of official action at large, why not turn the judiciary loose also? Why not set up a regime of free decision that is to allow courts to decide cases as unique with no obligation to a uniform, predictable course of decision?" Italics added.


reformed Court from the path of settled precedents. Additional instances are at hand to lend further support to the judgment of the public and press that the Supreme Court, as presently operating, has gone far afield in the fabrication of new constitutional law and the overruling of settled precedents.

Of course dissents were not infrequent in other periods of the history of the Supreme Court; divided viewpoints have often prevailed. Indeed, only a few years ago, prior to the reconstruction of the Court the members were divided into two groups, the Conservatives and the Liberals. Yet the dividing line separating the two factions was clearly marked out; their ideas and opinions followed a certain pattern and it was frequently possible to venture a prediction of the exact division of the Justices in a particular case based upon their past pronouncements.

21. The strong language of Justice Roberts in the Mahnich case deploring the departure of the Supreme Court from precedents was but the last of many similar expressions used in recent years by Justice Roberts directed to earlier cases which manifest the same disregard for judicial authorities by the reconstructed court. At least twice in 1939 and again in 1940, Justice Roberts warns against the breakdown of stare decisis. In Neirbo v. Bethlehem Corporation, 308 U.S. 165, 179, 60 Sup. Ct. 153 (1939) he says: "I see no reason at this late day to attribute a new effect to the statute when Congress has not seen fit to express a view contrary to that embodied in this court's construction of the law; though this might at any time be done. The principle of stare decisis seems to me to make against such a change." And again in Higgins v. Smith, 308 U.S. 473, 487, 60 Sup. Ct. 355 Justice Roberts declares in his dissenting opinion: "The action taken in this case seems to me to make it impossible for a citizen safely to conduct his affairs in reliance upon any settled body of court decisions." (Cf. page 5, supra). See also Roberts, J., dissenting in Helvering v. Hallock, 309 U.S. 106, 60 Sup. Ct. 444 (1940). It is interesting to note that in the Neirbo case as well as in Helvering v. Hallock, supra, Justice Roberts is criticizing the opinion of Justice Frankfurter who now joins Justice Roberts in his dissent in the Mahnich case.

22. It should be noted that Justice Roberts does not contend that constitutional law must remain frozen. He says: "Of course the law may grow to meet changing conditions. I do not advocate slavish adherence to authority where new conditions require new rules of conduct." Mahnich v. Southern Steamship Co., — U.S. —, —, 64 Sup. Ct. 455, 463-464 (1944). It must be conceded that the new Supreme Court has with justification overthrown many cases that had become fossilized under the Old Court. The "shift in constitutional doctrine" has brought many beneficial changes in constitutional law. But the difficulty of late is that the "shift" has become a "swing-shift." The Court has forgotten the qualifications that changes in constitutional law "should not derive from mere private judgment" and that the justices "must be duly mindful of the necessary demands of continuity in civilized society." (Graves v. O'Keefe, 306 U.S. 466, 59 Sup. Ct. 595 (1939). Helvering v. Griffiths, 318 U.S. 371, 401, 63 Sup. Ct. 636 (1942) lists recent cases wherein the Supreme Court has re-examined and reversed earlier cases.

23. "I remember very well the day—the United States Supreme Court published its decision in the Minnesota Mortgage Moratorium Case. A professor who had come into my office had inquired of me whether the decision had yet been published. I did not know.
But no more. The present innovation in the matter of the divergencies of opinion in the Supreme Court is the discovery that intra-court controversies are not subject to definite alignment; the complaint is general among the members of the Court that individual justices are guilty of departing from the paths of precedents in particular cases. It is therefore impossible to label definitely and finally the conservative, center and liberal groups, for they are varying their affiliations from case to case.24

What are the influences and factors which may explain—in part at least25—the apparently sudden (but in fact gradual) departure of the Supreme Court from *stare decisis*, from constitutional principles and static precedents?

*The Influence of Holmes*

The influence of Justice Oliver Wendell Holmes looms large in the reconstructed Supreme Court. Someone has truly said that back of every great institution is the shadow of a man, whose life and philosophy have shaped and molded the form and substance of the institution. Certain it is that the influence of Oliver Wendell Holmes in directing the course of current Supreme Court decisions is of paramount importance. Here is an intellectual giant acclaimed in superlatives by his myriad of

'Well,' he said, 'I will tell you what it will be. The decision will be against the statute, and the vote will be unanimous.' While he was speaking, another professor entered my office, just in time to hear this prophecy. 'You are wrong,' said the other professor, 'it will be a five to four decision.' And he named the five judges who would vote for affirmance. His forecast was absolutely accurate. Both these professors knew the rules of law. One of them, apparently, knew more about the judges than the other.” Pyne, Book Review (1935) 4 FORDHAM L. REV. 153.

24. Justice Roberts has clearly stated in the *Mahnich* decision (note 5 supra) that with the decrease of certainty in the law it is inevitable that there will come an increase in the take-a-chance attitude toward litigation. Any litigant has a chance to win. Why not try it? The hunch-process and the "hat-pin" approach, rather than the study of case law in precedents, decide the question of the feasibility of an appeal to the Supreme Court. Incidentally, it should be noted that the hunch process is defended in high places. Hutcheson, *The Judgment Intuitive: The Function of The "Hunch" in Judicial Decisions* (1929) 14 CORN. L. Q. 274.

25. The reader will kindly note the reservation incident to the statement in the text. The influences and factors to be noted may explain the departure of the Supreme Court and in part; or again they may not. But it is submitted that the named factors and personalities move in the same direction as the Court; and they point more conclusively to a departure from *stare decisis* than they do to its enforcement. Whether these influences may have reached the individual justices of the Supreme Court is not known or knowable. But one way to recapture *stare decisis* is for the court to avoid the danger of possible contamination with all matters hostile to the doctrine.
friends and followers, a judge whose dissents in a long life on the Bench have been lifted after his death to the status of prevailing opinions.\textsuperscript{26} Chesterton reminds us that the most important thing about a man is his philosophy; Justice Frankfurter nods assent and points to the fact that Holmes "was essentially a philosopher who turned to the law."\textsuperscript{27}

How stands his philosophy of life and law? What are his views regarding the solidarity of precedents, the importance of principles, the doctrine of \textit{stare decisis}? The answer is readily obtained from a review of his writings and decisions. Reverting to his philosophical papers, it is clear that dominant traits of Holmes' character were skepticism, cynicism of eternal values, dismissal of natural law and abhorrence of principles. Logic and the syllogism were of no enduring value;\textsuperscript{28} an ounce of experience was worth a pound of logic. Yet paradoxically Holmes closed his eyes to the records of experience in daily life by refusing to read the daily newspapers; rejected all scientific data even when tendered by his close friend and associate Justice Brandeis and despised fact-research.\textsuperscript{29} Truth to him was merely "the majority vote of that nation that could lick all the others."\textsuperscript{30} He did not permit legislative experiments because he had confidence in the ability of man to improve himself. Even here the pessimism of Holmes beclouds his juristic thinking, his attitude seems to be: Let 'em have what they want—and suffer the consequences. Man is a "cosmic ganglion" whose bowels are rated as important as his brains.\textsuperscript{31}

This is not the time or the place to exhaust the appraisal of Holmes, philosopher, jurist, man. Our only purpose is to point to the fact that the Holmesian influence in the Supreme Court does not make for soli-

\textsuperscript{26.} From \textit{Graves} v. \textit{O'Keefe}, 306 U. S. 466, 59 Sup. Ct. 595 (1939), decided shortly after the reconstruction of the Supreme Court down to the present time, Justice Holmes' former dissents have frequently been changed to majority opinions. Shriver, \textit{Great Dissenter—Whose Dissents Now Prevail} (1941) 47 CASE & COMM. 6.

\textsuperscript{27.} \textit{FRA xKF RTER, LAW AND POLITICS} (1939) 68.

\textsuperscript{28.} 2 \textit{HOLMES-POLOCK LETTERS} (1941) 17.

Harold Laski sums up Holmes' attitude toward principles in the following words: "The keynote of Mr. Justice Holmes' political outlook is a rejection of absolutist concepts. All principles are true in merely a relative way. The individual is not a subject of rights which the state is not entitled to invade. Men are social animals; and what they are entitled to do is a matter of degree, born of experience in some particular time and place." Laski, \textit{The Political Philosophy of Mr. Justice Holmes} (1931) 40 \textit{YALE L. J.} 683.

\textsuperscript{29.} 2 \textit{HOLMES-POLOCK LETTERS} (1941) 13, 17, 18.

\textsuperscript{30.} \textit{HOLMES, COLLECTED LEGAL PAPERS} (1920) 310.

\textsuperscript{31.} 2 \textit{HOLMES-POLOCK LETTERS} (1941) 22.
darity of law or permanency of precedents; nor does it make for the enlargement or enforcement of such doctrines among his followers.

Today there are two diametrically antagonistic views about Oliver Wendell Holmes. Superlatives of praise are common. There are reasons for this general adoration of Holmes, the man; adequate but more tentative justification for the wide acclaim of Justice Holmes, the jurist. But the doubtful question which is already under examination is the validity and permanency of his contribution to legal philosophy and jurisprudence, his off-bench viewpoint of life and philosophy.

The encomiums of praise piling up during the many years of his life and in the few years since his death, are now offset by a growing dissent which is subjecting the philosophy of Holmes to a severe and convincing criticism.32

The question might be asked: How could two violently contrasted estimates come forth from scholars motivated only by a search for the philosopher's real contribution to the law? Perhaps it is because we are too close to Holmes, the man.33 His friends, his succession of youthful secretaries, his devoted followers are still alive and walk in his footsteps. They are like the a priori men whom he so strongly condemned for their ceaseless devotion to natural law. Holmes must also be rated the "best" or they are ready to fight like the poor fellow in Holmes' Essay on Natural Law.34

An inspection of the philosophic fields in which he labored discloses that the seeds of skepticism, cynicism and "can't-helps" which he planted are now producing a bumper crop of current doubts, despair and pessimism, tilled, cultivated and harvested by his devoted followers. Archibald MacLeish, a friendly critic, truly sets forth the dangers of leading our young men into a legal wilderness and then daring them to find their way home: "The skepticism and the philosophic detachment which sat so easily with Mr. Justice Holmes himself, giving flavor and taste to his strong humanity as salt gives flavor and taste to fresh meat, had a caustic and pickling effect on lesser vitalities, so that many of the great

33. So states Attorney-General Biddle: "It is too early to determine what Mr. Justice Holmes will mean to future generations of Americans." BIDDLE, MR. JUSTICE HOLMES (1942) 1; Max Lerner says that Holmes' lasting contribution will be to English style rather than to constitutional law. Lerner, The Mind and Faith of Justice Holmes (1943) xlix.
34. Holmes, Collected Legal Papers (1920) 310.
Justice's disciples were left only with the skepticism and the detachment and without the human and believing force. If the plight of the Supreme Court today is due to the breakdown of precedents and the refusal to adhere to principles, this failure may be attributed in no small degree to the devotion, implicit or explicit, of the members of the Supreme Court to the memory and juristic philosophy of Justice Oliver Wendell Holmes.

Arrival of Pragmatic Philosophy

"... A pragmatist turns his back resolutely and once for all upon a lot of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and towards power. That means the empiricist temper regnant and the rationalist temper sincerely given up. It means the open air and possibilities of nature, as against dogma, artificiality, and the pretense of finality in truth."

About the time that Holmes was sowing the seeds of skepticism and doubt regarding the permanency, validity or utility of principles and concepts of the law, a philosophic movement strongly supporting the Holmesian jurisprudence was developing in America under the leader-

35. FRANKFURTER, LAW AND POLITICS (1939) xvii.

A striking example of Holmes' skepticism directed against a young disciple is found in the correspondence which passed between him and Dr. Wu, the Chinese philosopher. A few sentences from this correspondence and other writings reinforce the point that MacLeish made. "I do not believe or know anything about absolute truth. . . . I noticed once that you treated it as a joke when I asked you if you weren't dreaming me. . . . you never can prove that you were awake. . . ." HOLMES, HIS BOOK NOTICES AND UNCOLLECTED PAPERS (Shrivers' ed. 1939) 166. "It seems to me clear that the ultima ratio, not only regum, but of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference." Id. at 44.

36. JAMES, PRAGMATISM—A NEW NAME FOR SOME OLD WAYS OF THINKING (1925) 51; reprinted in HALL, READINGS IN JURISPRUDENCE (1938) 227-229.

37. It is true that Holmes scoffed at pragmatism and called it "an amusing humbug—like most of William James's speculations. . . ." 1 HOLMES-POLLOCK LETTERS (1941) 139. But it is also true that the substantial elements of pragmatism find strong support in his philosophy. Every one of the ingredients in pragmatism mentioned by William James, a boyhood friend of Justice Holmes (supra note 36) is in accord with the viewpoint of Holmes. William James states that the "tough-minded" pragmatists are materialistic, sensationalistic, skeptical and irreligious. JAMES, PRAGMATISM (1909) 12. Is there any doubt that Justice Holmes discloses the noted characteristics? Gregg, The Pragmatism of Mr. Justice Holmes (1943) 31 GEO. L. J. 262.
ship of William James and later of John Dewey,²⁸ which was called Pragmatism.³⁹ This distinctly American philosophy stressed the practical results of a given course of action and contended that the over-all effects and consequences of human action determined all human, moral and religious ideals. If the proposed action works it is good and true; if it does not work it is bad and false.

This is not the place to dissect or evaluate Pragmatism in all its aspects. Our sole purpose, as in the matter of the appraisal of Holmes' legal philosophy, is to point out that the influence of pragmatism was, and is, important in explaining the current breakdown of precedents, the elimination of principles and the rejection of legal concepts. Not without reason is the pragmatic approach called an "engineering interpretation" by Dean Pound,⁴⁰ who first publicized the importance of the pragmatic approach in the matter of law reform and accepted its cardinal principle that "the essence of good is simply to satisfy demand."³⁴¹ The key formula of legal pragmatism was expressed by its distinguished promoter in the following words:

"... if in any field of human conduct or in any human relation the law, with such machinery as it has, may satisfy a social want without a disproportionate sacrifice of other claims, there is no eternal limitation inherent in the nature of things, there are no bounds imposed at creation, to stand in the way of its doing so."³⁴²

It is not necessary to point out that neither the natural law nor the inalienable rights of the individual nor the permanency of constitutional principles are retained in the stated pragmatic prescription. Any, and therefore, all claims of human kind may be translated into the law provided that the given claim does not clash against the disproportionate claims of other members of the community.

Twenty years ago Dean Pound cautiously warned that this "gimme"-

³⁸ To understand the immense influence of pragmatism in America, one must realize that it has substantially captured the educational techniques of many colleges and universities. John Dewey is America's pragmatic schoolmaster and was influential in the recasting of educational programs in terms of the pragmatic approach. Essays in Honor of John Dewey (1939). It is interesting to note that John Dewey offered his pragmatism to the law. Dewey, Logical Method and Law (1924) 10 Corn. L. Q. 17.

³⁹ Pragmatism is a term of comparatively recent origin in philosophy. It seems to have been first used in print by William James in 1898.

⁴⁰ Pound, Interpretation of Legal History (1923) 127.

⁴¹ Id. at 157.

⁴² Pound, An Introduction to the Philosophy of Law (1922) 97-98.
philosophy might be put to ill use. His direful statement has come true.

During the past twenty years pragmatism has been the source of a constantly mounting trend to treat law as force, a struggle for power. To sum up the pragmatic influence in the law: If legal pragmatism is right, then our common law is wrong. If the only true solution is the one that works, then principles and standards have no value unless and until it is shown that they work. Indeed Pragmatism offers a flexible weighing machine which permits the Supreme Court, or any court, to consider afresh each case as it is presented without reliance or dependence upon former precedents. The pragmatic formula is always the same: try anything once and at once; the true rule of law is not determinable until the results and consequences have been appraised and even then the truth, like an A & P special, is good only for the day!

Under the full sweep of the pragmatic jurisprudence there is and can be no certainty in the law.

To repeat Justice Roberts' warning about the evil of disregarding precedents and to apply it to the doctrines of legal pragmatism it may be truly said that the pragmatic approach leaves the courts "an unchartered sea of doubt and difficulty without any evidence that what was said yesterday will hold good tomorrow . . . ."

In 1925 the writer, after analyzing the then recent entry of Pragmatism into the law, concluded as follows:

"Motion is necessary in the development of law, but there is a present tendency to treat change as synonymous with improvement in the legal order. It

43. POUND, op. cit. supra 164, n. 40.
44. Dean Pound no longer stresses the weighing of claims and wants as the end of law. His pragmatic test, defended two decades ago is now displaced by a new prophecy. "But some part of the path of the juristic thought of tomorrow is already apparent. It seems to be toward an ideal of cooperation rather than one of competitive self-assertion." POUND, SOCIAL CONTROL THROUGH LAW (1942) 126-127. Italics inserted. Cf. note 42 supra.
45. Llewellyn, The Conditions For And The Aims and Methods of Legal Research. (1929) HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 35: "We shall not get down to the real study of 'how rules work' until we come to see that until we know how a rule works, we do not know what a rule is. A rule of law conceived merely as a formula of words is emptiness. A rule of law acquires content and meaning only in terms of behavior. First (and this under Holmes' formula) the behavior of future courts."
46. A story, probably apocryphal, is told about the lawyer who cited a few cases in the Supreme Court which antedated the recent reorganization of the Court. One of the Justices asked: "Do you offer these cases as existing law?" The lawyer replied, "Yes, if the Court please, unless the earlier precedents are handed down after the manner of a railroad excursion ticket—good for this day only!"
47. Note 5 supra.
is possible to infuse too much flexibility just as it has been admitted that the old order paid too much attention to the finality of precedent. There is no particular virtue in being on our way unless we know where we are going. The cautious traveler is not averse to a guidebook; the experienced hunter includes a compass in his outfit; even the casual pedestrian does not disdain a glance at the signboards in strange places. May we not suggest to the pragmatic jurist the importance of taking on board similar protection against the hurricane of social wants and demands, some instrumentalities—in the shape of permanent constitutional principles and natural rights—before we engage passage with him on the maiden voyage, before we give an unconditional welcome to pragmatism as a philosophy of law?"

This appraisal and warning return reinforced by the intervening events of the past twenty years. The infiltration of the pragmatic influence has contributed in substantial degree to the present judicial tendency to depart from stare decisis, to substitute claims for rights, and to add to the let-'em-have-what-they-want formula, derived from Justice Holmes, the comfortable try Anything Once and at once program of legal pragmatism.

Comparing the potential evils of pragmatism with the present collapse of precedents in the Supreme Court, the same general tendency may be noted. The common danger under legal pragmatism and also under the judicial elimination of precedents is that each case, divorced from a stable background of law, constitutional or common, will be subjected to the supposedly superior wisdom and isolated intelligence of Nine Men, unhampered by juridical guide post or compass—save only the gladsome and generous full-speed-ahead objective of satisfying all wants and claims as far as possible. The practical defects of legal pragmatism (and pragmatism prides itself on its practical advantages) are two-fold:

(1) No group of individuals, however wise, is capable of matching the accumulated wisdom and experience of the past generations. "Law must be stable" is an aphorism that is defensible as a means of preserving the rich accumulations of ancient, medieval and modern law.

(2) Such stability also guarantees certainty and continuity of law; and provides the element of predictability necessary in the conduct of societal relations.

But legal pragmatism has one more serious defect: It tends to uproot all ideals, principles and concepts of the legal order; erases all permanent truths and reduces law to a mechanical contraption for measuring contesting claims and wants, rather than rights and duties.

48. Kennedy, Pragmatism As a Philosophy of Law (1925) 9 Marq. L. Rev. 63, 76-77.
Of course it is not possible to measure the exact effect of any factor in producing the present disunity in the Supreme Court; nor is it claimed that legal pragmatism is accepted by the Justices of the Supreme Court. The point that is herein made and emphasized is the striking parallel which exists between an outstanding philosophy of law in the American scene and the present trend in the Supreme Court. Whether the parallel is coincidental or not, the contention is made that the movement in the direction of the abandonment of precedents and principles in American law is undesirable whether it "just growed" like Topsy or is an offshoot of the James-Dewey philosophy of Pragmatism transplanted in the law.

Enter Realism*
(to be continued)

49. It seems that the present attitude of the Supreme Court—or the fluctuating majority of the Justices—in some cases is occasionally pragmatic. If a decision can be given to a party without a serious clash with other claims and wants, the decision may be so given, even though past precedents are bypassed in the particular case, overruled if necessary but sometimes ignored or distinguished. This may possibly explain the Mahnich case (supra note 5) and the Schneiderman decision (supra note 16).

*It was hoped that the last, and most important chapter, in the history of the whittling down of stare decisis—the Advent of Legal Realism—might be completed. But the rapid changes in the decisions of the Supreme Court, the many different schools of legal realism and the deadly deadline prevented. Suffice it to say, subject to enlargement and proof later, that Realism is the most important single factor in the present breakdown of precedents in American law. Justice Cardozo defined Realism as follows:

"The most distinctive product of the last decade in the field of jurisprudence is the rise of a group of scholars styling themselves realists and content with nothing less than revision to its very roots of the method of judicial decision which is part of the classical tradition." Address before New York State Bar Association, 55 REPORT OF NEW YORK STATE BAR ASSOCIATION (1932) 267.

Realism is especially revealing in its appraisal of constitutional law, the legal material which is of the greatest interest in the Supreme Court. Our organic law, as appraised by some of the Realists, has been reduced to the proportions of a "totem" or "fetish" surrounded by "myths" and "folklore."

A bibliography of articles written by the author has been added in support of the above article.

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