NORTH CAROLINA LAW REVIEW

Volume 24 | Number 2 Article 2

2-1-1946

Learning and Science

Oliver Wendell Holmes Jr.

(or are we?) that trial by battle and the ordeal were worthless machinery for the attainment of justice. How clear are we that the methods and procedures now employed in the settlement of legal disputes are adequate vehicles for justice?

The quest for truth involves what the lawyer calls "getting the facts." The facts must be had before a court can make a decision in a controversy, and often, as many good lawyers have discovered, when the facts underlying a dispute are found, the dispute is resolved without litigation. But the essential facts are often elusive and witnesses hard to find or obscure in their testimony. It is here, in getting at the facts and so arriving at the truth of a situation, that the man of science can often make a valuable contribution.

In a cruder age, when the procedures we now employ in the law had their beginnings, the scientist had not yet put in his appearance, and so it is that there still is a want of awareness of his potential services to the law. Scientific crime detection is just in its infancy. We still are far from a full realization of the contributions available to criminal law administration from the psychiatrist and the criminologist. An explosion occurs and people are killed and property destroyed. The observations of one chemical engineer based on his investigations of the situation may be more reliable on the causes of the explosion than the testimony of a dozen eyewitnesses.

This, indeed, is a scientific age and the law must ever make increasing use of the scientist in the settlement of disputes. But even so we must not underestimate the place occupied in this scene by the men trained in the law. The scientist can give us great impetus in our search for facts—in our quest for truth—but it remains for the lawyer to assemble the facts applicable to a concrete controversy and it remains for a judicial tribunal to appraise these facts and to declare the legal result.

Urbana, Ill.
April 1, 1946

LEARNING AND SCIENCE

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As most of those here have graduated from the Law School within the last twenty-five years, I know that I am in the presence of very learned men. For my own part, lately my thoughts have been turned to

* Late Justice of the United States Supreme Court. An address delivered at a dinner of the Harvard Law School Association in honor of Professor C. C. Langdell, June 25, 1895. Reproduced from Speeches, Boston, Little, Brown & Co., 1918, by courtesy of the publishers.

"old, unhappy, far-off things,
And battles long ago";

and when once the ghosts of the dead fifers of thirty years since begin to play in my head, the laws are silent. And yet as I look around me, I think to myself, like Correggio, "I too am, or at least have been, a pedagogue." And as such I will venture a reflection.

Learning, my learned brethren, is a very good thing. I should be the last to undervalue it, having done my share of quotation from the Year Books. But it is liable to lead us astray. The law, so far as it depends on learning, is indeed, as it has been called, the government of the living by the dead. To a very considerable extent no doubt it is inevitable that the living should be so governed. The past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it. There is, too, a peculiar logical pleasure in making manifest the continuity between what we are doing and what has been done before. But the present has a right to govern itself so far as it can; and it ought always to be remembered that historical continuity with the past is not a duty, it is only a necessity.

I hope that the time is coming when this thought will bear fruit. An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things, as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom. Who here can give reasons of any different kind for believing that half the criminal law does not do more harm than good? Our forms of contract, instead of being made once for all, like a yacht, on lines of least resistance, are accidental relics of early notions, concerning which the learned dispute. How much has reason had to do in deciding how far, if at all, it is expedient for the State to meddle with the domestic relations? And so I might go on through the whole law.

The Italians have begun to work upon the notion that the foundations of the law ought to be scientific, and, if our civilization does not collapse, I feel pretty sure that the regiment or division that follows us will carry that flag. Our own word seems the last always; yet the change of emphasis from an argument in Plowden to one in the time of Lord Ellenborough, or even from that to one in our own day, is as marked as the difference between Cowley's poetry and Shelley's. Other changes as great will happen. And so the eternal procession moves on, we in the front for the moment; and, stretching away against the unattainable sky, the black spearheads of the army that has been passing in unbroken line already for near a thousand years.