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# The Prophecies of the Prophetic Jurist – A Review of Selected Works of Oliver Wendell Holmes, Jr.

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**The Prophecies of the Prophetic Jurist – A Review of Selected Works of  
Oliver Wendell Holmes, Jr.\***

**Kissi Agyebeng\***

**Abstract**

This is a review of the methodology and style of legal research of Oliver Wendell Holmes, Jr., focusing on the ideological and philosophical leanings that informed his scholarship. The review spans selected works of his undergraduate days through his mid-career writings and his representative opinions on the Supreme Judicial Court of the State of Massachusetts and the Supreme Court of the United States.

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## **Dedicated to Sefah Agyebeng and Akua Ntriwaa, my parents.**

You have your way. I have my way. As for the right way, the correct way, and the only way, it does not exist.  
- Friedrich Nietzsche

### **Introduction**

It is said that there are two kinds of people, namely, those who make the world move, and those who watch as the world moves. We may term the first category of people as the “shakers and movers”. They influence their society and generation so infectiously that many years after their departure from this world the trails blazed by them are immortalized in the psyche of the living. We may also term the latter category of people as the “shaken and moved”. They influence their society and generation so disinfectiously that their memories die with them.

We may transpose the traits of these two categories of people into the area of the study and research in the law. There are those whose thoughts and opinions dramatically shape the development of the law. There are also those whose preoccupation is the consumption of the scholarship of others. Oliver Wendell Holmes Jr.<sup>1</sup> belongs to the category of “shakers and movers” in the law.

This presentation is review of selected works of Holmes.<sup>2</sup> It should be pointed out at the outset that this is not a review of the substantive law opinions held by Holmes. It is a

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<sup>1</sup> (1841-1935). Legal scholar and former justice of the United States Supreme Court.

<sup>2</sup> The works reviewed comprise of articles, book reviews, editorial comments, a book, and representative judicial opinions spanning a period of 74 years. The review spans his undergraduate and youthful writings,

review of his methodology and style of legal research as reflected in the selected works. The presentation is divided into three parts. Part I is a descriptive analysis of some key themes which run through Holmes' scholarship. Part II is an appraisal of the modes or styles of scholarship adopted by Holmes and the broad concepts underlying his work. Part III is a general critique of his worldview, writing style and language.

### **Part I – Thematic Highlights**

Holmes views the law as the foundation of knowledge and he regards the study of law as the province of men of higher calling. He proclaims that, “[O]f course, the law is not the place for the artist or the poet. The law is the calling of thinkers.”<sup>3</sup> However, he is a strong legal critic who is often disenchanted by the shortcomings of the law and legal fictions employed to prop up legal principles in a seemingly unsuccessful attempt to give them a semblance of validity. His criticisms are firebrand and it is not surprising that he tones down the harshness of his critique with the words:

I trust that no one will understand me to be speaking with disrespect to the law, because I criticize it so freely. I venerate the law, and especially our system of law, as one of the vastest products of the human mind. No one knows better than I do the countless number of great intellects that have spent themselves in making some addition or improvement, the greatest of which is trifling when compared with the mighty whole.<sup>4</sup>

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his mid-career writings, and those of the closing chapters of his life. As the title suggests, this presentation does not cover the entire works of Holmes. In this presentation, I have intentionally employed the present and present continuous tenses to give the impression that Holmes lives on, though he, as they say, “kicked the bucket” roughly 70 years ago.

<sup>3</sup> Oliver Wendell Holmes, *The Profession and the Law* (Lecture delivered to undergraduates of Harvard University on 17 February 1861) in *THE COLLECTED WORKS OF JUSTICE HOLMES – COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES*, vol. 3, 472 (Sheldon M. Novick, ed., 1995).

<sup>4</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 473 (1897) [*The Path of the Law*].

He engages not so much in the explanation of legal principles but in deep exposition of the evolution of the law. His main theme, therefore, is metaphysics and the nature of law. He admonishes that "...to explain how mankind first learned to promise, we must go to metaphysics, and find out how it ever came to frame a future tense."<sup>5</sup> He goes to great lengths to show the incorrectness of accepted notions on the evolution of the law.<sup>6</sup> To Holmes, law "is a great mass of rules, showing when and how far a man is liable to be punished, or to be made to hand over money or property to his neighbors..."<sup>7</sup>

Holmes' pieces on the nature of law are largely a reaction to the Austinian notion that law, properly so called, is a command of a definite political superior or sovereign, which obliges political inferiors or subjects to acts or forbearances of a class, by the imposition of a penalty in case of disobedience.<sup>8</sup> Holmes sees the law as "essentially empirical".<sup>9</sup> Therefore, "[T]he first call of a theory of law is that it should fit the facts."<sup>10</sup> He does not deny that law is a command of a sovereign, but that "...it is not the will of the sovereign that makes lawyers' law, even when that is its source, but what a body of subjects, namely the judges, by whom it is enforced, say is his will."<sup>11</sup>

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<sup>5</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 251 (Boston: Little, Brown & Co., 1881) [THE COMMON LAW].

<sup>6</sup> *Ibid.*

<sup>7</sup> Oliver Wendell Holmes, *Just the Boy Wanted*, *YOUTHS COMPANION* (7 February 1889) 73, reprinted in *COLLECTED WORKS*, vol. 3, *supra* note 3 at 338.

<sup>8</sup> See John Austin, *The Uses of the Study of Jurisprudence*, in *The Province of Jurisprudence Determined*, 9 (H.L.A. Hart, ed., 1954).

<sup>9</sup> Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 *AM. L. REV.* 1, 4 (1870)[*Codes, and the Arrangement of the Law*].

<sup>10</sup> *THE COMMON LAW*, *supra* note 5 at 211.

<sup>11</sup> Oliver Wendell Holmes, *The Law Magazine and Review*, Editorial Comment, 6 *Am. L. Rev.* 723 (1872).

Holmes also discusses in some detail the concepts of rights, duty and the basis of liability. He treats these themes as a complementary whole spanning all aspects of the law. He points out that the great body of law is found in the principles of liability,<sup>12</sup> and that “[L]egal duties are logically antecedent to legal rights.”<sup>13</sup> Therefore, “...a sound classification of the law [is] impossible, except on the basis of the ultimate conception, *duty*, instead of the derivative notion, *rights*, which is the foundation of existing systems.”<sup>14</sup> [Original emphasis]

The concepts of legal possession and ownership also run through Holmes’ scholarship. According to him, “possession is the beginning of ownership.”<sup>15</sup> We learn from him that, “[L]aw, being a practical thing, must found itself on actual forces.”<sup>16</sup> His notion of possession, therefore, is the existence of a group of facts which inures to the benefit of the claimant of the specific right, if those facts apply to him, and which exacts a protection from the law, by constraining his neighbors in a way in which it would not if all the facts in question were not true of him.<sup>17</sup> To Holmes the concepts of possession and ownership are meaningful as far as the law secures their protection.<sup>18</sup>

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<sup>12</sup> Oliver Wendell Holmes, *The Common Law*, *Boston Daily Advertiser* 1, 1 January 1881.

<sup>13</sup> THE COMMON LAW, *supra* note 5 at 219.

<sup>14</sup> Oliver Wendell Holmes, *The Arrangement of the Law – Privity*, 7 AM. L. REV. 46 (1872).

<sup>15</sup> *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

<sup>16</sup> Oliver Wendell Holmes, *Possession*, 12 Am. L. Rev. 688, 719 (1878) [*Possession*].

<sup>17</sup> *Ibid.* at 698-9.

<sup>18</sup> THE COMMON LAW, *supra* note 5 at 214.

The theory of torts also engages his attention a great deal. His insistence on the treatment of torts as a philosophical study is intriguing.<sup>19</sup> He comes to the unhappy and unconvincing conclusion that “Torts is not a proper subject for a law book.”<sup>20</sup> He draws attention to the “fundamental fiction” underlying the law of torts, which is that “all [men] are presumed to know [its contents].”<sup>21</sup> This inevitably leads him to assert that “[t]he standards of the law are standards of general application ... [and the law] does not attempt to see men as God sees them.”<sup>22</sup> But he graciously admits that in exceptional cases the law sees men as God does by excusing their defaults arising from their congenital defects.<sup>23</sup>

The concepts of agency and bailment are his other thematic interests. Under these heads, he engages in an obscure discussion of the evolution of the law and its consistency.<sup>24</sup> The discussion primarily attempts to show why a principal/master is held liable for the wrongs of his agent/servant. He also reflects on the constant friction between logic and good sense to explain how ancient legal principles may be reconciled with present notions of policy and justice.<sup>25</sup>

His peculiar way of discussing legal issues sets him in a class of his own – a class to which few legal scholars belong or will ever belong – a class marked by deep thinking

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<sup>19</sup> Editorial Comments printed in THE COLLECTED WORKS OF JUSTICE HOLMES – COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES, vol. 1, 273-241 (Sheldon M. Novick, ed., 1995) [COLLECTED WORKS, vol. 1].

<sup>20</sup> *Ibid.* at 237.

<sup>21</sup> Oliver Wendell Holmes, *The Theory of Torts*, 7 AM. L. REV. 652, 656 (1873).

<sup>22</sup> Oliver Wendell Holmes, *Trespass and Negligence*, 14 AM. L. REV. 1, 14 (1880).

<sup>23</sup> *Ibid.*

<sup>24</sup> See Oliver Wendell Holmes, *Common Carriers and the Common Law*, 13 AM. L. REV. 609 (1879).

<sup>25</sup> See Oliver Wendell Holmes, *Agency II*, 5 HARV. L. REV. 1 (1891) [*Agency*].

philosophical romance with the law. In the next part we will discuss Holmes' techniques of scholarship and his ideological inclinations.

## **Part II – Methodology**

Holmes engages in fundamental research, that is, “research designed to secure a deeper understanding of law as a social phenomenon, including research on the historical, philosophical, linguistic, economic, social or political implications of law.”<sup>26</sup> He adopts several techniques of research including legal theory, doctrinal scholarship, historical/comparative analysis, and, to some strained extent, feminism. We will discuss these techniques in turns. It should be noted that the discussion on feminism, is not an attempt to proffer a definitive statement on Holmes' style. It is more of a cautious and possibly arbitrary inquiry into his mind.

### **i) High Legal Theory**

Holmes undertakes “research designed to yield a unifying theory or perspective by which legal rules may be understood, and their application in particular cases evaluated and controlled.”<sup>27</sup> We designate his style of legal theory as “high” because he engages in very deep reflection on the nature of law and its evolution.

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<sup>26</sup> HARRY W. ARTHURS *et al.*, *LAW AND LEARNING – Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law*, 66 (Ottawa: The Council, 1983). The authors explain at p. 69 that the term “proceeds from the intellectual perspective that law is problematic rather than certain, that its causes and effects, rather than its formal rules, invite scrutiny.” A careful reading of the writings of Holmes would reveal that he discusses law as a social phenomenon by revealing its inadequacies, rather than dwelling on its formal and logical characteristics.

<sup>27</sup> *Ibid.* at 66.

Theory and contemplation about legal issues are all that matter to Holmes. He says of himself, “[T]heory is my subject, not practical details.”<sup>28</sup> He reflects that “[T]heory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.”<sup>29</sup> Therefore, he theorizes about legal concepts rather than substantive legal principles. He seeks to streamline legal concepts into a philosophical continuum.

Dare to find fault with his high theoretical proclivities and his answer will be a tacit, “[T]heory is not to be feared as unpractical, for to the competent, it simply means going to the bottom of the subject...But the weak and foolish must be left to their folly.”<sup>30</sup> His love for theory and philosophy spans his entire writing career. Writing as an undergraduate, he says of Socrates and Plato, “I say of these two grand heathen, the master the inspired fighter, the scholar the inspired thinker, fills my heart with love and reverence at one of the grandest sights the world can boast.”<sup>31</sup>

One may not lightly take issue with Holmes when he asserts that there is, perhaps, no “more exalted form of life than that of a great thinker, wrapt in the successful study of problems to which he devotes himself.”<sup>32</sup> But to make a sweeping statement, as he often

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<sup>28</sup> *The Path of the Law*, *supra* note 4 at 477.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* at 477-8.

<sup>31</sup> Oliver Wendell Holmes, *Plato*, 2 *University Quarterly* 205 (1860), reprinted in *COLLECTED WORKS*, vol. 1, *supra* note 19 at 153.

<sup>32</sup> Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 *Harv. L. Rev.* 443, 451 (1899).

does, that theory is the standard of achievement and the greatest form of happiness, appears to blow matters out of proportion.

Happiness and achievement are states of an individual's perception of what (s)he desires from life. What may represent a state of achievement and a source of happiness to one person may equally represent a state of nothingness and a source of grave frustration to another. Holmes may consider himself a content and successful person because he theorizes. However, for the pragmatist who measures contentment and success in material wealth, theory will be to him as a lesson in swinging a baseball bat will be to a footballer. Holmes' belief that "[W]hatsoever thy hand findeth to do, do it with thy might [being] more important than the vain attempt to love one's neighbor as one's self"<sup>33</sup> is a testimony to the truism that theorizing cannot represent for all men a state of achievement and happiness.

Holmes theorizes just for its sake. This tendency sometimes clothes his writings in high doses of abstraction. He compares the charm of theorizing to the thrill of winning a boat race. He asks:

What is a boat race? What difference does it make that one crew can row three miles ten seconds quicker than another? In the immediate – in the coarse and directly practical sense it makes no difference at all. Yet who is there with soul so dead that he does not care much more for it than for most useful things – that he would not take a lifelong pride in helping to win one – or to make it a worthy contest? This uselessness is the highest

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<sup>33</sup> Oliver Wendell Holmes, Address (Speech delivered to the Bar Association of Boston on 7 March 1900), printed in COLLECTED WORKS, vol. 3, *supra* note 3 at 498 at 499.

kind of use. It is kiddling and feeding the ideal spark without which life is not worth living.<sup>34</sup>

If the object of theorizing is the attainment of a sense of achievement of one's intellectual contribution to life, we may readily agree with philosopher Holmes that there is no difference with that object and the object of winning a boat race. However, if the object of theorizing is useless objectlessness, then we may part company with philosopher Holmes, by humbly asserting that the difference may lie in the fact that there is at least a useful object in participating in a boat race, which is – winning.

In any case, what Holmes takes for granted is that there may be much more at stake in a boat race than merely winning. In the case of career boat racers, for example, there may well be a world of difference “in the coarse and directly practical sense” that one crew can row one-hundredth of a second faster than another. This is because winning a race practically implies earning a living for such racers, and not just the attainment of a sense of pride – a vanity that cannot ensure their sustenance.

Let us take the case of a prizefighter, for instance. He does not care so much for the pride associated with winning a fight. However, he cares very much about surviving the bout and taking the prize money. This material object will be to him a useful kind of use. The present writer is, however, not unmindful of the fact that our prizefighter's concerns may not amount to much in the grand Holmesian theoretical world, in which achievement is measured in generous doses of abstraction than in material gain.

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<sup>34</sup> Oliver Wendell Holmes, Address (Speech delivered at a tavern club dinner on 24 November 1896), printed in COLLECTED WORKS, vol. 3, *supra* note 3, 516 at 517.

We learn from Eagleton that there are different categories of theorists.<sup>35</sup> There are emancipatory theorists who expose, transform and destabilize. On the other hand, there are conservative theorists who explain, refurbish and incorporate. Then we have necessitarian theorists who answer inquiring questions with a Wittgensteinian reply – “This is just the way we do things.”

Holmes’ intellectual development is a progression through the above categories. His undergraduate and youthful writings reveal his zeal to expose and transform.<sup>36</sup> He warns that “[W]e must beware of the pitfall of antiquarianism, and must remember that for our purposes our interest in the past is for the light it throws upon the present.”<sup>37</sup> However, he appears to forget his own warning as he grows increasingly conservative,<sup>38</sup> and painfully necessitarian.<sup>39</sup>

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<sup>35</sup> Terry Eagleton, *The Significance of Theory*, in THE SIGNIFICANCE OF THEORY AND OTHER ESSAYS 24 (T. Eagleton, ed., 1990).

<sup>36</sup> See for instance, Oliver Wendell Holmes, Editorial Comment, 3 AM. L. REV. 357 (1869), where he says that:

While conservative New Jersey furnishes a quiet Southern exposure for the ripening of lawyers of the Old School, in the busy West, justice is administered by men more intent on adapting the law to modern requirement than on standing in the ancient ways. And it is well that this is so.

<sup>37</sup> *The Path of the Law*, *supra* note 4 at 474.

<sup>38</sup> Richard F. Devlin tells us in a review essay – *The Law and Politics of “Might”*: *An Internal Critique of Hutch’s Hopeful Hunch*, 38 OSGOOD HALL L.J. 545 (2000) – that he learned from his friends that “as men get older they become more conservative, but as women get older they become more radical.” This observation applies squarely to Holmes as he grows older. Indeed, in a speech delivered at a dinner of the Harvard Law School Association of New York on February 15, 1913, printed in COLLECTED WORKS, vol. 3, *supra* note 3, 505-508, he says of himself at 507 that, “[B]ut as I grow older I grow calm.”

<sup>39</sup> In his long tenure as a justice of the United States Supreme Court, he was very slow to declare laws which infringed the United States Constitution as unconstitutional. He very often avoided the constitutional question by the adoption of an interpretation which, according to him, would preserve the *status quo* even when the statute in question was palpably unconstitutional. For instance, in *Blodgett v. Holden*, 275 U.S.

## ii) Doctrinal Scholarship

Holmes' methodology is largely doctrinal. He adopts a conceptual and critical approach in his scholarship by analyzing the implicit in the sources to expound his theoretical leanings. He questions old assumptions the correctness of which has been taken for granted and he proposes new models of legal thought. He engages in censorial jurisprudence, in the sense of theorizing about the nature of law with regard to its relations to the facts of life. His empiricist outlook makes him hostile to formalism, which is marked by a reverence for the role of logic in the life of the law with little urge to link it empirically to the facts of life.

Holmes is a realist at heart. He tries to show that the study of the law cannot be dissociated from social forces. We learn from him that:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>40</sup>

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142 (1928) on the question of whether the provisions of a revenue Act were unconstitutional in so far as they imposed a tax on gifts made prior to a certain date, he says at p.147 of the report that:

Although research has shown and practice has established the futility of the charge that it was a usurpation when this Court undertook to declare an Act of Congress unconstitutional, I suppose that we all agree that to do so is the gravest and most delicate duty that this Court is called on to perform. Upon this among other considerations the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.

<sup>40</sup> THE COMMON LAW, *supra* note 5 at 1.

There is force in this reasoning. However, it appears to be a simplistic manner of explaining the evolution and workings of the law. The life of the law has been both logic and experience. For even if it is assumed that the law is what the judges pronounce it to be<sup>41</sup> when they apply rules to factual situations, ultimately they must find rational reasons to back their decisions. Just as the law cannot be dissociated from its social context, in the same vein its application and enforcement cannot be divorced from sound reasoning. Logic and experience are different sides of the same coin – law. A balance must, however, be struck to avoid leaning too heavily on one side. Holmes appears to appreciate this point when he says that:

The whole outline of the law as it stands to-day, is the resultant of a conflict between logic and good sense – the one striving to carry fictions out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust.<sup>42</sup>

Holmes' realist outlook is vivid in his youthful writings.<sup>43</sup> His account of the determination of the province of jurisprudence is purely a practitioner's viewpoint. It, therefore, tends to belittle the importance of teaching and studying the law as a scholarly discipline. Holmes carries his realist outlook to the bench, and very often decides cases based on "ordinary common sense rather than abstract metaphysical theory."<sup>44</sup> On the question of whether a party assaulted with a knife is obliged to retreat rather than defend himself, he pointedly remarks that:

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<sup>41</sup> *Supra* note 11 and accompanying text.

<sup>42</sup> *Agency*, *supra* note 25 at 14.

<sup>43</sup> *Codes, and the Arrangement of the Law*, *supra* note 9 at 5 where he says that:

Courts, however, give rise to lawyers, whose only concern is with such rules as the courts enforce. Rules not enforced by them, although equally imperative, are the study of no profession. It is on this account that the province of jurisprudence has to be carefully determined.

<sup>44</sup> *Per* Sopinka J. in *Snell v. Farrell*, (1990), 72 D.L.R. (4th) 289, 300.

The law has grown, and even if historical mistakes have contributed to its growth it has tended in the direction of rules consistent with the human nature...Detached reflection cannot be demanded in the presence of an uplifted knife.<sup>45</sup>

His pronouncements on the bench at first appear to suggest, if only in theory, that he is a judicial activist.<sup>46</sup> For a judge who advocates for striking down laws on the ground of conceptions of morality, it comes as a surprise that he says in the next moment that:

No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good.<sup>47</sup>

One is tempted to dismiss this judicial acrobatics as mere conceptual inconsistency. Holmes, however, proves himself an unabashed conservative judge by upholding the constitutionality of statutes even when there is a clear reason to do otherwise. He makes a pronouncement of a lifetime that, “[I]n a case of social history...we should be slow to overrule the decisions of courts steeped deep in the local tradition, even if we saw reasons for doubting it...”<sup>48</sup> Holmes then becomes a passivist to a fault. This is because, at least in one case, his over-bearing conservative stance results in grave injustice.<sup>49</sup>

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<sup>45</sup> *Brown v. United States*, 256 U.S. 335, 343 (1921). Earlier in his judicial life he expressed his realist sentiments in *Vegean v. Gunther*, 167 Mass. 92, 104 (Mass. Sup. Jud. Ct. 1896) where he remarked that “[T]he true ground of decision are considerations of policy and social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which no nobody disputes.”

<sup>46</sup> In *Otis v. Parker*, 187 U.S. 606, 608 (1903) he says that:

While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its end, or based upon conceptions of morality with which they disagree.

<sup>47</sup> *Ibid.* at 609.

<sup>48</sup> *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

<sup>49</sup> In *United States v. Ju Toy*, 198 U.S. 253 (1905), the appellant, who was of Chinese origins, was denied permission to land by the collector of the port of San Francisco, while returning to the United States after a temporary departure. The collector’s decision was affirmed by the Secretary of Commerce based on an

Holmes views laws as predictions of what the courts will do.<sup>50</sup> The predictions translate into prophecies when he says that:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of consequence...If we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but does want to know what the...courts are likely to do in fact. I am much of this mind. *The prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law.*<sup>51</sup> [Emphasis added]

This viewpoint is heavily laden with the notion that law is merely a sanction mechanism devoid of the larger objective of it being a social construct intended to guide the conduct of men. Judges do not decide cases in vacuum. They pass over a body of rules to reach their conclusions. The law, therefore, is not merely what the courts will do in fact, but the composite whole of what they will consider to do what they will do, together with what they will do in fact.

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exclusion Act, although the Appellant claimed to be a U.S. citizen by birth. On the question of whether the decision of the Secretary of Commerce was conclusive, Mr. Justice Holmes held, at p.263 of the report, that:

If, for the purposes of argument, we assume that the Fifth Amendment applied to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we cited and the almost necessary result of the power of Congress to pass exclusion laws.

This decision can only mean that U.S. citizens may be deported from the U.S. and the affected individual cannot seek redress in a court of law. Indeed, Justice Brewer, with whom Justice Peckham concurred, stated in his dissenting opinion, at p.269 of the report that, “[S]uch a decision is to my mind appalling. By all the authorities the banishment of a citizen is punishment, and punishment of the severest kind.”

<sup>50</sup> “The Path of the Law”, *supra* note 4 at 457 where he says that:

When we study the law we are not studying a mystery but a well known profession...The object of our study, then is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.

<sup>51</sup> *Ibid.* at 459-461.

### iii) Historico-comparative Scholarship

Holmes employs a mixture of legal historical research and comparative analysis in his scholarship. He regards legal history as very important to the study of the law. Writing as an undergraduate he says that, “[H]istory should be the finest, in fact, the all comprehending study.”<sup>52</sup> Throughout his writing career, he never abandons the notion that legal history is the foundation of jurisprudence. He dilates legal theory by alluding to its historical context as he observes that:

The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation...The history of what the law has been is necessary to the knowledge of what the law is...<sup>53</sup>

The truism in this observation is that the study of the law is essentially a study of its evolution and its future direction as a tool for social change. Holmes’ style is more of an internal legal change historical model, that is to say, he notes deficiencies in the law and he uses its historical social context as a base to forge for changes in the law. He tries to “see the law as an organic whole...as a reaction between tradition on the one side and the changing desires and needs of a community on the other.”<sup>54</sup>

Comparative analysis may be done for several reasons. One object may be advocating for changes in a specific area of the law in one’s legal system by reference to that of a legal system which one considers as more developed in that area. We may term this type – *referential development scholarship*.

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<sup>52</sup> Oliver Wendell Holmes, *Books*, 4 HARVARD MAGAZINE 408 (1858).

<sup>53</sup> THE COMMON LAW, *supra* note 5 at 1.

<sup>54</sup> Oliver Wendell Holmes, Address (Speech delivered at a banquet of the Middlesex Bar Association on 3 December 1902), printed in COLLECTED WORKS, vol. 3, *supra* note 3, 535 at 536.

Another object may be an attempt at showing the diverse perspectives that have influenced the evolution of one's legal system. We may term this type – *referential evolution scholarship*.<sup>55</sup>

Holmes engages in the latter form of comparative analysis to explain the historical context and foundations of the diverse sources of American law, and to show the influence of Roman, German and English law on American jurisprudence. In one article, for instance, his main object was discovering whether there was a German element to be taken account of in the common law theory of possession.<sup>56</sup> He also uses historical inquiry to contradict orthodox assumptions thereby casting serious doubts on their significance.<sup>57</sup>

Holmes' historico-comparative analysis is superlative and it makes interesting reading. He goes to great lengths to reveal the real reasons behind common law principles by shaking off their deep-seated obscurity. Ironically, the antiquarianism surrounding the principles clouds his mind and renders him a conservative member of the bench.

#### **iv) Feminist Method?**

The period in which Holmes lived was primarily patriarchal. The feminist movement then was at the stage of advocating for women enfranchisement. Feminist jurisprudence was nowhere near the level of maturity it has attained today. Perhaps as a reflection of his

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<sup>55</sup> The suggested forms are not intended as conclusive or exhaustive.

<sup>56</sup> *Possession*, *supra* note 16.

<sup>57</sup> *Ibid.*

time, we do not find Holmes expending his energy on feminism. However, the “woman question”<sup>58</sup> was posed directly to him in the case of *Quong Wing v. Kirkendall*.<sup>59</sup>

At first blush we may be tempted, and rightly so, to dismiss Holmes as anti-feminist for upholding gender-based state-sanctioned discrimination, especially as the Act in question appears to discriminate on grounds “founded on the personal attributes of those engaged in the same occupation.”<sup>60</sup> It is, however, arguable, albeit tenuously, that Holmes’ remarks are an affirmation of a realist differential feminist model, which finds its answer to the “woman question” as lying not in the equal treatment of the sexes, but as lying in differentiation in treatment to achieve the result of equality. This view makes sense if we

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<sup>58</sup> See Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1890), where she explains that:

The woman question asks about the gender implications of a social practice or rule: have women been left out of consideration? If so, in what way; how might that omission be corrected? What difference would it make to do so? In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also “male” in a specific sense. The purpose of the woman question is to expose features and how they operate, and to suggest how they might be corrected.

<sup>59</sup> 223 U.S. 59 (1912). The plaintiff, a Chinese woman, sued to recover money paid under duress and protest for a license to do hand laundry work. The law under which the fee was exacted imposed the payment upon all persons engaged in laundry business other than steam laundry business, with a proviso that it should not apply to women so engaged where not more than two women were employed. The issue was whether the provision was an unconstitutional discrimination depriving the plaintiff of the equal protection of the law. Mr. Justice Holmes ruled, at p.63 of the report, that:

If the State sees it fit to encourage steam laundries that is its own affair. And if again it finds a ground of distinction in sex, that is not without precedent...It is recognized in the respective rights of husband and wife in land during life, in the inheritance after the death of the spouse...If the State of Montana deems it advisable to put a lighter burden upon women than upon men with regard to employment that our people regard as more appropriate for the former, the Fourteenth Amendment does not interfere by *creating a fictitious equality where there is real a difference*. [Emphasis added]

<sup>60</sup> *Ibid.* at 65, *contra per* Justice Lamar.

were to be less theoretical and more practical to admit that there exists a real physical difference between the male and female species of the human race.

On another score, it may be argued, and even more tediously that, in characterizing the object of the Act as putting “a lighter burden upon women than upon men with regard to employment”, Holmes may have been adopting an ethic of care feminist model which “demands that [men, being] in the stronger position attempt, so far as it is possible, to understand the needs of [women,] the weaker party and to use [their] power to remedy the situation.”<sup>61</sup> We have identified and discussed Holmes’ methodology. In the next part we will attempt a general critique of his writings.

### **Part III – Writing Style and Language**

Holmes has mastery over language. He develops his themes cleverly and without much blemish. His language flair transcends beyond his native English to Latin and Greek. This trait, however, sometimes lures him to intersperse some of his writings with whole paragraphs of Latin rendering the comprehension of readers like the present writer inadequate to appreciate the full import of what is intended. The lucidity of his language fluctuates between clarity and obscurity. The latter level is, perhaps, for the benefit of high theorists like him. It is doubtful, however, whether obscurity serves any purpose.

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<sup>61</sup> Alexandra Z. Dobrowolsky and Richard F. Devlin, *The Big Mac Attack: A Critical Affirmation of MacKinnon’s Unmodified Theory of Patriarchal Power*, 36 MCGILL L.J. 575, 601 (1990-91).

In his book, *THE COMMON LAW*,<sup>62</sup> he builds upon his previous work in a more comprehensive manner. However, being largely a collection of articles written over a number of years, it tends to be disjointed and it lacks a natural flow of thought.

Holmes asserts himself forcefully and he is confident in the correctness of his own views. He says that “the trouble with Austin was that he did not know enough English law.”<sup>63</sup> Proposing a toast at a Tavern Club dinner for A.V. Dicey, he says, “I do not want to praise my friend Dicey too highly because there are a few small points upon which we differ and in which of course he is wrong.”<sup>64</sup> (Un)happily, trashing is sometimes his creed.<sup>65</sup>

Holmes displays an over-bearing patrician worldview that is disturbing. He says that:

...it is no sufficient condemnation of legislation that it favors one class at the expense of another; for much or all legislation does that; and none the less when the *bona fide* object is the greatest good of the greatest number. Why should the greatest number be preferred? *Why not the greatest good of the most intelligent and most highly developed? The greatest good of a*

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<sup>62</sup> *Supra* note 5.

<sup>63</sup> *The Path of the Law*, *supra* note 4 at 475.

<sup>64</sup> *COLLECTED WORKS*, vol. 3, *supra* note 3 at 523.

<sup>65</sup> In a book notice printed in *COLLECTED WORKS*, vol. 1, *supra* note 19 at 159, he writes:

We are sorry that the publishers, whose well-known names appear on the title-page of this book should have so far fallen away from their usually careful selection as to have undertaken its publication. It belongs to that class of vulgar novels, and what is worse, vulgar novels written by women, which are one of the afflictions of our day.

Perhaps Holmes would have been less hostile to the publication if it had been authored by a man with a male as the hero since the reason for his trashing was simply that:

...in all this there is a certain purity of tone that is really much better than the hot, bad atmosphere of some books of more ability, but *three* times are rather too much for a heroine to love, and there is through the whole this tainting vulgarity. [Original emphasis]

*minority of our generation may be the greatest good of the greatest number in the long run.*<sup>66</sup> [Emphasis added]

Holmes makes no suggestion as to who qualifies as the most intelligent. He also does not tell us what he means by “most highly developed”. However, without a doubt he certainly would regard himself a member of these classes. Moreover, he gives us no clue as to how the greatest good of these classes will inure to the benefit of the rest of us. Holding on to such views, we find him, fifty-four years later, displaying gross insensitivity to the sensibilities of persons with sub-normal intelligence in the case of *Buck v. Bell*.<sup>67</sup>

## **Conclusion**

Oliver Wendell Holmes is certainly one of the greatest legal scholars the world will ever know. His scholarly legacy is, perhaps, unsurpassed and 70 years after his death his thoughts and opinions are cited as though they were expressed yesterday. If the belief in reincarnation is legitimate, we should hope that he would be reborn to continue with his

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<sup>66</sup> Oliver Wendell Holmes, *Summary of Events*, Editorial Comment, 7 AM. L. REV. 582, 584 (1873).

<sup>67</sup> 274 U.S. 200 (1927). The Appellant, a feeble minded daughter of a feeble minded woman, gave birth to a feeble minded child. She was then sterilized under the direction of the superintendent of the State Colony for Epileptics and Feeble Minded in Virginia. The operation was performed by virtue of an Act which recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives. It was argued that the Act was void under the Fourteenth Amendment as it denied the Appellant due process of law and the equal protection of the law. At p.207 of the report, Mr. Justice Holmes held:

We have seen more than once that the public welfare may call upon the *best citizens* for their lives. It would be strange if it 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 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*. [Emphasis added]

excellent legal expositions. We should not hope, however, that he would be reborn an imbecile. For in that case we will lose his worth, judging by his own standards, because he will rather be a burden on society.<sup>68</sup>

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<sup>68</sup> It is also hoped that the pun intended here would not be assumed to be the present writer's view on the worth of persons of sub-normal intelligence. Indeed, human worth is immeasurable. We should resist the temptation to play God by categorizing individuals as (un)worthy to society, especially when the categorization is based upon factors like congenital defects that those afflicted can do nothing about.