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Educational materials for Oliver Wendell Holmes

INTRODUCTION TO OLIVER WENDELL HOLMES, JR.

In this article, Bradley Watson shows how Oliver Wendell Holmes, Jr., one of the most-cited and influential U.S. Supreme Court justices, formulated a strong critique of natural law and set the stage for modern attitudes towards jurisprudence. According to Holmes, there are no objective standards of morality upon which to base laws, and thus law must be concerned only with practical effects and social advantage. In holding this view, Holmes was influenced by the doctrines of pragmatism and Social Darwinism, which asserted that life is constantly adapting to its environment, and that change or progress is the only and ultimate end of history. For Holmes, law is merely the prediction of what the courts will do. Since there are no standards of morality, judges cannot decide cases by reason, but rather must do so by sentiments or "felt necessities." As such, what is true is what gets accepted in the marketplace of ideas, and what is right is simply what triumphs. Although Holmes respected certain judicial rulings as expressions of the popular will, he also argued that judges needed to be active in interpreting the law according to their own feelings. Both judicial activism and judicial restraint are therefore needed for the sake of progress. This view of the judge's role continues to exert great influence on contemporary legal philosophy.

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OLIVER WENDELL HOLMES

Oliver Wendell Holmes, Jr., was born in Boston on March 8, 1841. His family was part of New England's ruling class and his father, Dr. Oliver Wendell Holmes, was a prominent author and physician. As a boy, Holmes was educated by a tutor and went to Harvard for college. Shortly before his graduation, Holmes learned that he had been called up to fight in the Civil War by President Lincoln and was commissioned in the Twentieth Massachusetts Volunteers. Holmes was seriously wounded in three separate skirmishes on the front, but was returned each time to Boston for his convalescence and ultimately awarded the ranks of Colonel and Major. It was then that he turned to a study of the law.

In 1867 he was admitted to the bar and, through much hard work, was made editor of the American Law Review in 1870. In 1872, he was married to Fanny Dixwell, daughter of his long-time childhood tutor. At the age of 39, Holmes was recalled to Harvard, but this time as a teacher in the Harvard Law School. Two years later he became Associate Justice of the Massachusetts Supreme Court. In 1902, Holmes was appointed to the Supreme Court of the United States by President Theodore Roosevelt. His appointment was immediately and unanimously confirmed. After serving thirty years as Justice, Holmes resigned on January 12, 1932. On his ninetieth birthday he delivered a short radio speech in which he summed up the core of his life philosophy in one line: "To live is to function; that is all there is to living." He died in Washington, DC on March 6, 1935 and is buried in Arlington National Cemetery.

To read more about Oliver Wendell Holmes, Jr.'s life and works, please click here.

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GLOSSARY OF TERMS FOR OLIVER WENDELL HOLMES, JR.

eugenics:

the view and method of improving society by means of genetic modifications

judicial activism:

the judicial philosophy that judges should exercise their power and take into account their own feelings when interpreting the law

judicial restraint:

the judicial philosophy that judges should limit their power and instead interpret the law as strictly and faithfully as possible

jurisprudence:

the study of law and legal principles

legal realism:

a theory about the nature of law developed in the first half of the twentieth century that holds as its essential tenet the indeterminacy of law. Oliver Wendell Holmes advanced a particularly pragmatic view of legal realism. *See* PRAGMATISM.

natural law:

the philosophical view that objective standards of right and wrong are universally accessible to all rational beings

natural right:

a right considered to be conferred by natural law, as opposed to rights derived from the compact between citizen and government

pragmatism**:**

the school of philosophy which holds that truth is merely what works or what is useful

Social Darwinism**:**

a philosophy that applies Darwin's theory of evolution to society. Social Darwinists believed in the inexorability of evolution, change, and growth toward infinitely malleable ends and that the state had a role in ensuring that growth. The notion that individuals in society are in constant struggle and that this struggle motivates human evolution characterizes the thought of the Social Darwinists on the "right." Those on the "left" believed that struggle could be administratively managed and overcome.

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OUTLINE OF ESSAY ON OLIVER WENDELL HOLMES, JR.

I. Introduction to Oliver Wendell Holmes

A. Holmes was one of the most influential Supreme Court justices in American history

B. He was deeply critical of the natural law and natural rights traditions

C. For Holmes, law must only be concerned with the practical effects that it will have on society

D. He held that since there are no objective standards of right and wrong, law cannot be based on some

timeless natural law

II. Holmes, pragmatism, and Social Darwinism

A. Holmes was influenced by and was an exponent of pragmatism and Social Darwinism

B. Both views see life as constantly changing to its environment

C. Change or progress thus becomes the ultimate goal of this doctrine

III. Prediction and the law

A. For Holmes, law is merely the prediction of what the courts will in fact do: as predictors, lawyers are in some sense prophets, foretelling what will happen

B. Judges cannot decide cases by reason alone, but must look to science and economics; their decisions are based on the common sentiments of a certain historical period

C. Particular cases are decided upon not by reasons, but by “felt necessities,” and therefore judges make decisions first, and then come up with reasons afterwards

D. Not rooted in reason, laws can be changed by a shift in the whims of public opinion

IV. Cases and criteria

A. Holmes argues that courts must interpret and balance rights

B. In Schenck v. United States, Holmes puts forth the standard of “clear and present danger” as the criterion for limiting free speech; this marks a shift from examining the content of speech to looking at its consequences

C. For Holmes, truth is what gets accepted in the marketplace of ideas; in other words, what is true is what triumphs

D. Similarly, what is right is what prevails; “natural rights” are only those that are agreed upon and willed by a particular community at a particular time

E. The development of history dictates the progress of morals

V. Progress and the courts

A. While Holmes sometimes deferred to the rulings of the courts as expressions of the popular will, he also thought that judges often need to take an active stance towards interpreting the law

B. Both activism and restraint are required at various moments for the sake of progress

C. Since progress can only come through dominant ideas, weaker ideas must be opposed

D. The desire for progress motivated Holmes’ decision in Buck v. Bell to uphold the compulsory sterilization of the mentally handicapped

E. Holmes’ judicial activism set the stage for modern attitudes towards jurisprudence


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STUDY GUIDE FOR OLIVER WENDELL HOLMES, JR.

Part I. Basic Interpretation of Holmes

If you are interested in the thought of Oliver Wendell Holmes after reading Watson's essay, please go to the Primary Source Documents to read some of the essential passages of his *Collected Legal Papers* as well as some of his Supreme Court decisions that relate to the article. A biography of Oliver Wendell Holmes is also available. As you go back to the primary sources, keep in mind the following questions:

1. How does Holmes define "law"? How does he define "truth"? Are these two definitions consonant with one another?
2. What are the tasks of judges and lawyers, for Holmes?
3. In what ways did pragmatism and Social Darwinism influence Holmes' judicial philosophy?
4. How does the "clear and present danger" criterion fit into the rest of Holmes' thought?
5. With what aspects of the natural law tradition does Holmes find fault?

Part II. Connections to Other Thinkers

In order to understand Holmes' writings more completely, it is important to place him in his proper context. Holmes made an important contribution to American jurisprudence and, although his approach to judicial activism diverged explicitly from the natural law tradition, his theories were partially defined in opposition to that tradition. As you look deeper into Holmes' works and thought, consider these questions in order to see how he fits into the broader history of ideas:

1. According to Aristotle, justice is giving to each person his due. For Aristotle, moreover, what each person is due is based upon some natural law. Compare this view of justice with Holmes' progressive stance of judgments based on "felt necessities."
2. As a part of the Social Darwinist tradition, Holmes' legal philosophy is oriented towards the most advantaged ideas or groups, for truth is simply that which is accepted by a community, and what prevails is right. This seems to stand in contrast to the modern liberal philosophy of John Rawls, who holds that justice must be to the benefit of the least advantaged. Compare these two opposing philosophical positions.
3. The essential tenet of social Darwinism is the doctrine of progress. Although the Darwinian model is biological in nature, the doctrine of progress and the infinite perfectibility of man was adopted by many Enlightenment thinkers who regarded pure reason as the apotheosis of human capacity. Whereas the former tradition rejects reason and truth as such, the second embraces them. Are these traditions at odds? The concept of progress also appears in the natural rights theories of thinkers such as Hobbes and Locke. Do Hobbes and Locke to some extent prepare the way for the Enlightenment and the social Darwinian schools of thought? In your own words, how are they similar, and how are they distinguishable?
4. According to Holmes, standards of right and wrong are merely cultural conventions, agreed upon by particular communities. How, then, are communities (or individuals) to come to agreement when they conflict with one another? How would Holmes' response be similar to or different from that of Hobbes?
5. For Thomas Aquinas, the law should not be much higher than the average level of virtue of its citizens. On this model, then, it would seem that laws can and should vary according to the moral sentiments and characters of the people under these laws. How is this similar to Holmes' position that the laws are ultimately based on the feelings of the judges and of people? How is it different?
6. Virtue is of the utmost importance in Aquinas' understanding of law. To what extent does virtue play a role in Holmes' understanding of law?
7. As Watson notes, "After the Civil War, pragmatism and Social Darwinism came to dominate the American intellectual landscape." Why would these doctrines, which held that moral standards are variable, come after the Civil War, which was motivated by a philosophy of natural rights? Is there an explanation as to why forms of moral non-absolutism (like Holmes') should come after

the War? How might the thought of Lincoln or the content of the Post-Civil War Amendments present alternatives to Holmesian moral relativism?

Part III. Critical Interpretation of Holmes

With a basic understanding of Holmes' thought, let us examine his work more critically. Are his arguments persuasive? Can we expand on Holmes' thought to determine what he would say about issues that he did not directly address? Use the questions below as your guide.

1. For Holmes, it is clear that "might makes right," that moral standards are only those norms that triumph over others. However, it is also the case that, for him, "might makes true." At first glance, this appears to be a contradiction. If "might makes true," then there is no such thing as absolute truth. But if there is no such thing as absolute truth, then how do we know either that "might makes right" or that "might makes true"? Is this contradiction resolvable?
2. According to Holmes, dominant groups and ideas must be given pride of place. But this seems to yield a problem, for some judicial cases are such that it is precisely what ideas are dominant, or what groups are the most advantaged, that are in question. Consider a case in which two men are arguing over which of them rightly owns a certain large sum of money. Whoever wins the case will be well off, and whoever loses it will be poor. How, then, does Holmes' judicial philosophy apply in this case?
3. Is Holmes' contention that judges decide cases and then later find reasons for those decisions a convincing position? Why or why not?
4. In Schenck v. United States, Holmes puts forth the "clear and present danger" test as the doctrine to be used for limiting free speech. This test focuses not on the content of speech, but rather on its consequences. It is concerned with practical effects instead of their moral causes. In other words, this "clear and present danger" test implies that one can say whatever one wants, just not too influentially or too openly. But this seems to go against Holmes' position that what prevails in a community is right, for the "clear and present danger" test prevents ideas from becoming accepted by inhibiting their distribution. What would Holmes say about this apparent conflict?
5. In "The Path of Law," Holmes asserts that the study of law is merely a predictive or prophetic science: lawyers tell you how cases will be decided in the future, by consulting past decisions, records, laws, etc. What is puzzling, however, is that this appears to be inconsistent with what Holmes says elsewhere. Indeed, he says that judges do not base their decisions primarily upon reasons (which are found only after the decisions), but rather upon "felt necessities." But if judges decide their cases upon "felt necessities," then how can one ever predict what the judges will rule? The dilemma is as follows. If judges decide their cases according to laws, then prediction is possible; but in that case the decisions would not be based upon "felt necessities." On the other hand, if decisions are based on "felt necessities," then prediction is not possible, for those decisions would not be made according to predictable laws. What would Holmes say about this contradiction? Is there a solution to these seemingly conflicting notions?

Part IV. Contemporary Connections

Holmes has left an important mark on American jurisprudence and Constitutional interpretation. Therefore, let us now turn to some contemporary issues and see how Holmes' thought might be applied to them:

1. A central debate in contemporary jurisprudence is between constitutional originalism and the notion of the Living Constitution. Judicial originalists claim that the Constitution has a fixed meaning that can be properly interpreted, and that judges must stick to the original intent and meaning of the Constitution as closely as possible. Those who believe in the Living Constitution, on the other hand, hold that the meaning of the Constitution is flexible and dynamic, and can be reinterpreted in accordance with current ideals and practices. Justice Holmes is often characterized as one of the earliest figures to defend a notion of the Living Constitution. Indeed,

he argued that judges should often take an active and creative role in interpreting laws. What he critiqued was a notion of laws according to reason; for him, law and legal decisions are ultimately based upon "felt necessities." At the same time, however, the sort of reason-based idea of law that Holmes opposed does not seem to apply to constitutional originalists, for it is by convention that the role of the courts is to interpret and apply preexisting laws. So the constitutional originalists are not basing their philosophy necessarily upon reason, but more immediately upon convention. In a strange twist, this would seem to place Holmes in the natural law tradition, adhering to some absolute standard of judicial activism. What would Holmes say in response?

2. Holmes' criterion of "clear and present danger" as the standard for limiting free speech puts the focus not on the content, but on the consequences of that speech. In *Schenck v. United States*, Holmes applied this criterion in the case of anti-governmental publications. How would Holmes apply the "clear and present danger" standard to the issue of pornography? Would Holmes include moral danger as a legitimate danger under this standard?
3. There seems to be a certain tension or conflict in Holmes' philosophy. While he values progress and change as ideals, he nevertheless contends that there are no objective, absolute standards of good and evil, right and wrong. But if no such standards exist, then what reason does Holmes have for considering progress and change to be ideals – and indeed to be goods? This tension in Holmes' thought is paralleled in the modern liberal idea of a tolerant, pluralistic society in which people are free to pursue their own notions of the good life. The conflict comes from the fact that tolerance and pluralism are upheld as goods, while modern liberals deny that common goods should be upheld in society. How would Holmes respond to the critique of the conflict in his own philosophy, and what would he say about the modern liberal ideal of tolerance and pluralism?
4. Just as eugenics was a prominent topic in Holmes' day, it is making a resurgence in contemporary discourse. One example is the issue of selective abortion on account of innate biological defects in the fetus. Does the modern-day justification of selective abortion mirror Holmes' assertion that the mentally handicapped must be compulsorily sterilized because they are a burden to society? Or does the modern-day justification differ in a crucial way?