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The Legacy of Oliver Wendell Holmes, Jr. — for Today

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We Unitarian Universalists have a habit of making lists of famous UUs. As the saying goes, “We believe in deeds not creeds,” which can prompt us to lift up the lives of our most exemplary ancestors. (There’s some pride in there as well about all the famous people from history who were Unitarians or Universalists.) So occasionally, I like to invite us to take a closer look at one of those names and consider just how UU were they? And what insights might their life have for us today? This morning, drawing from Liva Baker’s biography [The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes](#) (Harper Collins, 1991), I would like to invite us to reflect on the **life and legacy of Oliver Wendell Holmes, Jr.**

Holmes lived to be almost ninety-four years old. He was born on March 8, 1841 (two decades before the Civil War) and died on March 6, 1935 (a few years before the start of the Second World War). He is most famous for being a Supreme Court justice. On his ninetieth birthday—a little less than a year before he finally resigned his seat on the high court—he was hailed as “**America’s most respected man of the law**” and “**the best company in Washington**” (3).

And although in his day he became the Supreme Court justice whom a random citizen on the street might be most likely to remember the name of, it is interesting to note that, “**Few Americans of stature have had less contact with the public. He was in fact a snob....** He did not participate in popular causes, and after he took his seat on the U.S. Supreme Court, he rarely made a public speech” (7). Part of what made him famous were memorable sayings like, “I

really like paying taxes. It is buying civilization” (8). (Keep that pro-tax saying in mind. We’ll come back to it later.)

For now, allow me to turn back the clock, trace some of the path that led to his renown—and consider some lessons we might learn along the way. From a UU perspective, it is interesting to note that **Holmes’s grandfather, The Rev. Abiel Holmes, was a strict Calvinist who strongly disapproved of Unitarianism.** Indeed, in 1829, First Church Cambridge, Massachusetts, fired him for refusing to exchange pulpits with theologically liberal preachers (29). Adding insult to injury, around that time, Oliver Wendell Holmes, Sr. (the father of the justice) had become a member of King’s Chapel in Boston, a Unitarian congregation that became famous in 1785 for removing all the trinitarian references to the Book of Common Prayer (31).

The father-son conflict between Abiel and Holmes, Sr. carried on into the next generation. When Holmes, Jr. said he was going to law school, his father told him “A lawyer cannot be a great man” (6). Later in life, when he was receiving all those ninetieth birthday honors, he still recalled the sting of those and other harsh remarks from his father and said, **“I wish that my father could have listened tonight for only two or three minutes. Then I could have thumbed my nose at him”** (7).

Holmes, Sr. was a professor at Harvard Medical School and a well-known poet. His literary connections meant that his son grew up around such luminaries as Longfellow, Emerson, Hawthorne, and Melville (15). (As the saying goes, “Alexander the Great may have accomplished a lot, but he did have Aristotle as his tutor!”) In Holmes’s case, “It mattered that his great-grandfather was Judge Oliver Wendell, his grandfathers were Judge Charles Jackson and the Reverend Abiel Holmes, and that his father was Dr. Oliver Wendell Holmes” (45). Indeed, it was Holmes, Sr. who literally coined the phrase “Boston Brahmin” (That’s how Boston elite they were!) All that being said, Holmes, Jr. was brought up to be a privileged Boston Brahmin in every way but one: **his family of origin was not wealthy, but they did leverage their historic name and connections to provide cultural, educational, and vocational opportunities for the family** (48).

My favorite story from Holmes’s childhood is that when he was enjoying all that praise at age ninety, “The daughter of a former neighbor recalled how **her mother had disliked the ‘little**

Holmes boy’ because he hid behind trees, jumped out, and yelled ‘boo’ at her” (49). (The lesson here is watch what you do because people may remember it more than eight decades later!)

The young Holmes, of course, went to college at Harvard (72). But the first major turning point came when he was twenty. The Civil War started and he enlisted as a private in the Union Army (97). Fanny Dixon, who knew him before the war and was later married to him for nearly sixty years, said that his experience as a soldier saved him from being a “coxcomb,” meaning “a vain and conceited man”—what was then called a “dandy” (105). Holmes fought in “most of the major campaigns in and around Virginia and Maryland except Gettysburg and was wounded three times, once almost mortally” (106). The number of casualties he saw impacted his lifelong work ethic and ambition. He said that, the “real anguish” is not hard work, but “**never to have your opportunity**” (160).

Turning to the question of just how Unitarian was this famous UU ancestor, both his family and Fanny’s family were at least nominally Unitarian. His parents had been married at the Unitarian King’s Chapel (39), and he had also been christened there as a child (47). But he and Fanny were married in Christ Episcopal Church, Cambridge, which may have been because First Unitarian was in between ministers at the time (222). More tellingly, Fanny was known to have said, “**In Boston one has to be something and Unitarian is the least you can be**” (77).

In reading about Holmes’s life, the place where I see a UU perspective is much less in theology than in his willingness to take an unorthodox approach to the law. Three brief excerpts give a taste of his perspectives:

- “**It is revolting to have no better reasons for a law than that it was laid down in the time of Henry IV.** It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” (The Path of the Law,” 1897)
- “**Certitude is not the test of certainty.** We have been cock-sure of many things that were not so.” (“Natural Law,” 1918)
- “**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.” (“Learning and Science,” 1895)

He first began to articulate his jurisprudence in his landmark book The Common Law, which has been continuously in print since it was first published in 1881 (253).

After serving as a lawyer, Holmes was a professor at Harvard Law School for only a few months in 1883, when the opportunity to pursue his true ambition presented itself: a vacancy on the Massachusetts Supreme Court (265). As a judge, among his pet peeves were longwinded lawyers and judges who wrote lengthy opinions. His own opinions were often surprisingly concise. And if after a few minutes he had gotten the essence of a lawyer’s argument, he might seem to the lawyer to still be taking notes on the case when in fact he may well have begun writing a personal letter (274). Here you see traces of both his brilliance and his arrogance. That being said, **“of 1,290 opinions he wrote for the count majority over the next twenty years; only one was reversed by the U.S. Supreme Court.”** So maybe he was paying enough attention!

In 1902, President Theodore Roosevelt appointed Holmes to the United States Supreme Court. Despite Holmes’s accomplishments, **the single greatest factor that led to his Supreme Court appointment is that in the summer of 1884 Holmes had been one of the few people who publicly stood by his friend Henry Cabot Lodge** during a political controversy. Although Holmes did not know it at the time, it turns out that, “Lodge never forgave an enemy, but he also never forgot a friend” (342). And two decades later, Lodge was the person Roosevelt trusted to recommend the best nominee for the high court (340).

Over time, Holmes has been increasingly remembered as a liberal jurist. People seem to remember what might be called “his civil libertarian outbursts,” but they were “in fact **rarer and less libertarian than was often thought.**” People also “seem to remember his support for legislation that promised social and economic reform,” but the truth is there were many other cases in which he was not particularly concerned with equality. “Holmes’s record in civil rights cases during his three decades on the Supreme Court was mixed but leaned toward support of Southern customs.” (386). And in general, his judgements were a little more favorable to

[African-Americans] when civil rights were involved than when property rights were the issue” (386). It was said that, whereas his fellow Supreme Court Justice **Louis Brandeis had “sympathy of the oppressed,” Holmes had “contempt for the oppressor”** (588). And privately it was clear that Holmes never sought to be a hero to progressives; rather, his desire was to be well regarded as a philosopher of the law (508).

There is one final set of cases I should mention. World War I lasted a little more than four years from 1914 to 1918. Toward the end of the war in 1917, Congress passed the Espionage Act both to protect military secrets and to prevent “obstruction of military recruitment or operations.” A year later in 1918, Congress passed the **Sedition Act aimed at suppressing any dissent to the war with heavy fines and years of jail time for “discouragement of recruiting” or “utterances of ‘disloyal or abusive language’ about the government, the conduct of the war, the Constitution, even the flag or uniform”** (511).

Almost two thousand U.S. citizens were prosecuted under those two laws for “speeches, books, newspaper articles, and pamphlets,” although “one U.S. attorney estimated that at least 90 percent of alleged pro-German plots never existed” (512). Those were the circumstances in which Holmes in March 1919, writing for the unanimous justices in *Schenck v. United States*, penned some of history’s most famous words *against* free speech:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.... The question in every case is whether the words used are used in circumstances and are of such a nature as to create a **clear and present danger** that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. (523-524)

And while I admire the brilliance of Holmes’s prose, I think he was wrong to criminalize U.S. citizens who were merely distributing fliers raising alternative perspectives to the loud drumbeat of war recruiting.

Fascinatingly, Holmes was also conflicted about his opinion in *Schenck*, and—in the wake of further study and debates with friends and colleagues—less than a year later in November 1919 he changed his mind. He wrote a dissent (joined by Brandeis) in *Abrams v.*

United States that becomes one of the “most quoted justifications for freedom of expression in the English-speaking world”:

The ultimate good desired is **better reached by free trade in ideas**—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.... We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country. (540)

As the fever of war began to break, Holmes’s reconsidered defense of free speech would come to have a “prominent place in American constitutional history” (547).

There is one other significant case that we have not addressed. ***Buck vs. Bell in 1927 is arguably the most egregiously wrong majority opinion Holmes ever wrote*** (598). But I am setting it aside because it will serve as a bridge to my sermon for next week. For now, let us turn to the end of Holmes’s life.

In 1929, after almost sixty years of marriage, Holmes’s beloved Fanny died. Holmes was devastated. Fascinatingly, instead of a minister stepping in to help, Holmes’s fellow Unitarian on the Supreme Court, Chief Justice William Howard Taft made the memorial arrangements. Apparently, **Taft “knew how to run a Unitarian funeral”** (619). In between serving as the 27th President of the United States (1909 - 1913) and the 10th Chief Justice of the Supreme Court (1921-1930), Taft had been president of the Unitarian National Conference (1915-1925) and Vice-President of the American Unitarian Association (1916-1922). Needless to say, a future sermon on Taft is forthcoming.

But returning our focus to Holmes, in 1931, two years after Fanny’s death and less than two months before his ninety-first birthday, he finally resigned from the Supreme Court. In his final few years, he did not keep up with the business of the court (628). Instead, he kept himself occupied both with non-fiction (primarily philosophy and history) and with what he described as a **new “consuming weakness” for detective novels**, including Agatha Christie and Dashiell Hammett (640). On March 6, 1935, Oliver Wendell Homes, Jr. died of bronchial pneumonia, two

days before what would have been his ninety-fourth birthday (642). His funeral was held on his birthday at All Souls' Church, Unitarian in Washington, D.C. (643).

Now, I haven't forgotten to come back to Holmes's aphorism, **"I really like paying taxes. It is buying civilization."** He wasn't joking. He and Fanny never had children (227-230). So, "After making a few small bequests to the servants and his nephew, **he left...a little more than a quarter of a million dollars—to the United States government without explanation.**" Congress, of course, did what Congress does: they appointed a study committee which eventually recommended that the funds be used to produce a definitive multivolume history of the United States Supreme Court (642). To date, ten large volumes have been published with three additional volumes currently in the works to take the set through end of the Warren Court in 1969.

In reflecting on the life and legacy of Oliver Wendell Holmes, Jr., I have been inviting us to wrestle with some of the messiness and complexity that is the reality of his—or any other person's—life. But despite his flaws (and with awareness of the number of times he helped perpetuate an unjust status quo through either his actions or inaction), there were times when Holmes acted significantly to help create a more just world—both in his own day and with ripples that continue even into our own time. And so, the question arises for us too: within our sphere of influence, how might we act for peace and justice in the days to come? **What will our children, grandchildren, and great-grandchildren say about the legacy they inherit from us?**