

Holmes – Perhaps the most famous quotation in American Common Law - "The **life of the law** has not been logic; it has been experience."

1. Nature of Legal Profession

The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees.

2. Law as prediction of when state will use force

"Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But 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 that he does want to know what the Massachusetts or English 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.**"

- Holmes, *The Path of the Law*, 10 *Harvard Law Review* 457 (1897).
http://www.constitution.org/lrev/owh/path_law.htm

- People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.
- 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 conscience.
- Law as practice consequences of actions
- You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.
- [I]f 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 that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind.

- The public really pays the damages, and the question of liability, if pressed far enough, is really a question how far it is desirable that the public should insure the safety of one whose work it uses.

3. Law is not Logic, but Tradition, History, Precedent

- The Life of the Law is not reason, but experience.
- You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for the determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.
- At present, in very many cases, if we want to know why a rule of law has taken its particular shape, and more or less if we want to know why it exists at all, we go to tradition.
- ...
- The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules.

4. Law, Morality, Choice Theory

[T]he law, if not a part of morality, is limited by it.

The law can ask no better justification than the deepest instincts of man.

We learn that for everything we have we give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect

The fallacy to which I refer is the notion that the only force at work in the development of the law is logic.

Justice Oliver Wendell Holmes, Jr. (1841-1935)

*** Quote ***

Oliver Wendell Holmes, Jr. was born in Boston on March 8, 1841. He would live until two days short of his 94th birthday. His father, Oliver Wendell Holmes, Sr., was a physician, a professor of medicine at Harvard, and an author of novels, verse, and humorous essays. Thus, Holmes grew up in a literary, and prosperous, family.

Holmes attended private schools in Boston and then, like his father, Harvard. Young Holmes was not overly impressed with the Harvard of that time, finding the curriculum stultifying (Henry Adams later remarked that "Harvard taught little, and that little ill."). He exercised his literary talents as editor of the Harvard Magazine, and in numerous essays. His graduation was even in some doubt, as he had been publicly admonished by the faculty for "disrespect" towards a professor. Holmes evidently took this as an affront and left to train for the Civil War. His unit was not immediately sent to the front, and Holmes was persuaded to return and receive his degree.

After graduating from Harvard, Holmes began his Civil War service. He was wounded in battle three times and also suffered numerous illnesses. Though he was later to glorify wartime service, he declined to renew his term of service when it expired. Holmes apparently, and justifiably, felt that he had done more than his duty, and had survived one battle too many to continue tempting fate.

Holmes returned to Boston, decided to study law, and entered Harvard Law School in 1864. Though at first uncertain that law would be his profession, he soon became immersed in study and decided that the law would be his life's work. He committed himself to the law, but not necessarily to the private practice.

After passing the required oral examination, Holmes was admitted to the Massachusetts bar in 1867. For the next fourteen years he practiced law in Boston. But his love for legal scholarship, rather than the mundane daily practice, was evident during this period. He worked on a new edition of Kent's Commentaries, a mammoth endeavor that took some four years, and became the editor of the American Law Review.

Holmes married Fanny Dixwell in 1872. They had known each other since Holmes was about ten years old, as she was the daughter of the proprietor of the private school he attended. Their marriage was to be childless, and endured until her death in 1929.

Holmes's most famous work, *The Common Law*, published in 1881 grew out of a series of twelve lectures he was invited to deliver, which required that he explain the fundamentals of American law. Holmes questioned the historical underpinnings of much of Anglo-American jurisprudence. The work contains Holmes's most famous quote, "The life of the law has not been logic; it has been experience." Holmes had come to believe that even outdated and seemingly illogical legal doctrines survived because they found new utility. Old legal forms were adapted to new societal conditions.

Shortly after publication of *The Common Law*, Holmes was offered a post teaching law at Harvard. After some intense negotiation, mainly centered on money, because Holmes was not wealthy and needed the income to live, he accepted the professorship. But after teaching only

one semester, he resigned to accept an appointment to the Supreme Judicial Court of Massachusetts, the state's highest court. The opening had arisen at the end of the current Republican governor's term, and as he was to be succeeded by a Democrat, the appointment had to be accomplished with dispatch. Holmes's departure from Harvard caused some consternation, however, as he was one of only five full-time professors, and an endowment had been specially raised to fund his professorship.

Holmes served on the Supreme Judicial Court for twenty years, becoming chief justice. He loved the work—the legal research and the "writing up" of cases. Holmes found the work easy, at least for him. He could see immediately to the heart of an issue, and his intellectual powers were far superior to his colleagues. Holmes was never accused of modesty, especially concerning his superiority to his fellow judges. Though he was happy on the Supreme Judicial Court, he desired greater fame and challenge.

The opportunity for ultimate professional advancement came in 1902, when Holmes was appointed by President Theodore Roosevelt to the United States Supreme Court. His appointment might never have happened, except that the "New England seat" on the court became vacant during Roosevelt's term, and Roosevelt and Holmes were both friends with Massachusetts Senator, Henry Cabot Lodge. Lodge persuaded Roosevelt that Holmes was "safe," meaning favorable towards Roosevelt's progressive policies. Roosevelt would later regret the appointment, after Holmes participated in striking down some of Roosevelt's initiatives.

Oliver Wendell Holmes, Jr. would serve on the Supreme Court longer than any other person—thirty years. He was called "The Great Dissenter" because he was often at odds with his fellow justices and was capable of eloquently expressing his dissents. Louis Brandeis often joined him in dissents, and their views often became the majority opinion in a few years' time. Holmes resigned due to ill health in 1932, at age ninety. He died in 1935 and is buried in Arlington National Cemetery next to his wife.

Holmes's legal philosophy evolved over the sixty-odd years he wrote on the law. At first, he attempted a rational, systematic, or "scientific" conceptualization. But over time, he came to realize that the law was more of a compendium of decisions reflecting individual judges' resolutions of actual cases. Thus, the growth of the law was by experience molded to actual controversies in the society of the day.

Widely considered a "liberal" because he believed in free speech and the right of labor to organize, Holmes was very conservative in his response to injury cases. He was a champion of "judicial restraint"—deferring to the judgment of the legislature in most matters of policy.

Holmes is considered one of the giants of American law. Not just because he wrote so well, but also because he wrote so much, and for so long. A lawyer seeking a quote from Holmes is never left wanting. Even the Internal Revenue Service building in Washington, D.C. bears his writing, "Taxes are the price we pay for a civilized society."
<http://www.let.rug.nl/~usa/B/oliver/oliverxx.htm>