



A Tribute to Late Professor Catherine Wells.

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*The AAL Magazine; Professor Catharine Wells, I have had the benefit of reading your brilliant book on a legend in American legal history. What drove you to write a book on Oliver Wendell Holmes?*

**Prof Wells;** First, thank you for your kind words and for the opportunity to share my views on Holmes. I had two reasons for writing on Holmes. The first was a matter of personal history. I began my academic career in philosophy where my field of specialization was American pragmatism and specifically the philosophy of Charles Peirce. Holmes was a member of the group that formulated pragmatism; and thus, when I turned to law, his work represented a natural place to begin my study of jurisprudence. More importantly, however, was the fact that I saw Holmes as a one of the primary creative forces in American law. He had an unusually long career on the bench. He was a judge on the Massachusetts Supreme Judicial court for over thirty years and then served another twenty on the Supreme Court of the United States. During his tenure on the Massachusetts court, he played an important role in retrofitting the common law to the requirements of a new age, and his time on the Supreme Court was equally consequential. The growth of the federal government changed the nature of

federal/ state relations forcing corresponding adjustments in American constitutional law. All in all, fifty years on the bench gave his work a kind of continuity and coherence that enhanced the importance of his individual views.

In addition, I was particularly interested in the fact that Holmes's reputation transcended legal boundaries. His life spanned two centuries, and he was involved in all the great events of that era – from serving in the Union Army during the Civil War to adjudicating the important questions raised by Roosevelt's New Deal. In conversation, he had a tendency to shock and surprise. His lively sense of humor made him a desirable guest and produced legendary stories of his wit. The public perceived him as being intelligent, learned, and wise. Ultimately, he came to represent the value of these qualities in solving society's problems.

*The AAL Magazine; Why do you think Justice Holmes is unique among a brand of other justices produced by the U.S Supreme Court.. What really inspired you?*

**Prof. Wells;** What really inspired me was his energy. The obstacles he encountered never slowed him down. He never gave up on his aspiration to live each day to the fullest. He was an intellectual who was equally drawn to practical achievement and philosophical speculation. The result was a life of great originality.

*The AAL Magazine; You referred to in your book, Justice Holmes's sense of reductionism which could be a rare talent among learned justices. Could you elaborate by citing some examples?*

**Prof. Wells:** In the *Path of the Law*, Holmes expounds what he calls a predictive theory of law. Law, he thought, should not be understood as a series of abstract propositions that could be interpreted

independently of their context. Instead, the meaning of a legal doctrine was found in its effects on legal decision-making. For example, a student completely understands the doctrine of *res ipsa loquitur* when (s)he can predict its consequences for legal decision-making. Thus, Holmes rejects the idea that we understand legal doctrines when we can list out a series of synonyms that seem to capture its meaning. Instead, its meaning is reduced to a set of practical consequences.

**The AAL Magazine;** *Your research also touches on Justice Holmes's infatuation with the Buddhist Philosophy which is a dominant religion in Sri Lanka and Buddhism has survived and natured in Sri Lanka for more than 2500 years. This is quite interesting. Could you share with us his extent of appreciating Buddhist values and how it contributed to his legal career? This has some resonance to your claim that he had a sense of reductionism which is also part of Buddhist teaching of the 'correct understanding and mindfulness'.*

**Prof. Wells;** Holmes was profoundly moved by the transcendentalism of Ralph Waldo Emerson. Emerson believed that the world of sensation should be understood as a metaphor suggesting a deeper reality that exists below the surface of ordinary experience. If we take ordinary experience literally, the most we can learn will be the principles that allow us to predict the course of future experience. Deeper truths come from a more wholistic view, such as the one that Emerson described in this well-known passage: "Crossing a bare common, in snow puddles, at twilight, under a clouded sky, without having in my thoughts any occurrence of special good fortune, I have enjoyed a perfect exhilaration. I am glad to the brink of fear. In the woods too, a man casts off his years, ... In the woods, we return to reason and faith. ... Standing on the bare ground, — my head bathed by the blithe air, and uplifted into infinite space, —

all mean egotism vanishes. I become a transparent eye-ball; I am nothing; I see all; the currents of the Universal Being circulate through me; I am part or particle of God".

To my eye, this is not Buddhism. For one thing, Emerson is immersed in sensory experience. But there is a certain commonality. The import of the passage is that we are not the person that is presented in sensory experience. Rather we exist as spiritual beings that are part and parcel of a universal presence.

Holmes, like many New Englanders, did not talk much about religion, but he often referred to Emerson as the greatest influence on his life. Ironically, the main effect of this view was a rejection of the idea that secular law was based on natural law. Many western religions think of God as a separate being that governs the physical world. Thus, it makes sense to them that man's law should emulate the law of God. But, following Emerson, Holmes would have understood natural law as something more far more profound than the rules that govern human affairs.

**The AAL Magazine;** *If I may venture into the Justice Holmes' magnum opus his Book The Common Law published in 1881, do you think that his dictum '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, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed'. Don't you think this is a stinging vindication of the constitutional theory that the Constitution must be reflective of the current realities of the society?*

**Prof. Wells;** Yes, I do. In fact, Holmes is often identified as the father of American realism precisely because of statements like

the one you quote. I think, though, that this is somewhat misleading. Realism comes in many different stripes. In the extreme, there are realists who claim that the law is whatever the judge says it is. They believe that the judge has unlimited discretion to decide cases in accordance with whim and to justify their decisions by manipulating legal doctrine. I do not think that Holmes is a realist in this sense. There is a lot of distance between extreme realism and the kind of formalism that Holmes was rejecting. Holmes thought the formalist was wrong in suggesting that cases could be decided by the application of logic and legal doctrine. But equally, he thought that judges were bound by their oath to follow the law. This is not a contradiction. For Holmes, the law was more than legal doctrine. He recognized that law exists in a context of commerce and culture and that a decision that frustrated the operation of these legitimate forces would not be good law. He also thought that common law decision-making had its own set of norms that these too must be observed by a conscientious judge. Thus, a Holmesian judge was not free to impose her own views on the case at bar. Instead, (s)he was bound to conform her decision to a number of different factors.