

How Jurists Serve as Role Models: the Example of Oliver Wendell Holmes Jr.

by Dr. iur. h.c. Gerhard Strate, Attorney, Hamburg^[*]

The most recent decision of the Federal Constitutional Court of Germany regarding preventative detention^[1] demonstrates once more what is typical of our highest court: its independence – its aversion to prevailing trends and its indifference to the expectations of politicians. Germany's Basic Law has granted this court a constitutional framework, allowing it to be a genuinely powerful constitutional court. The right to file a constitutional action has given the Federal Constitutional Court of Germany a scope of influence which has been a blessing for this republic in the sixty years of its existence, has made a major contribution towards breathing life into the catalog of basic rights, and has impacted not only the judicial decisions of the courts of record, but, in many cases, has also left its mark on the rules governing daily cooperation and conflict. The only other court exercising a similar influence on the organization of social life is the highest court of the United States^[2]: the Supreme Court of the United States. It and the Federal Constitutional Court of Germany are the only national courts of renown.

They owe their status, however, not only to how their functions are closely tied to their respective constitution^[3], but also to fortunate coincidences related to the justices serving this court. They were not only the brilliant jurists with unblemished legal careers who found their way to the Constitutional Court of Germany or the Supreme Court. They were also frequently independent thinkers from the world of science or with backgrounds in administrative and legal practice – unconventional thinkers who initially were often in the minority, in the end becoming the forerunners of subsequent majorities.

One of them is Oliver Wendell Holmes Jr. He deserves to be remembered.

Back in the fall of last year, when I wanted to give a short talk on the life of Oliver Wendell Holmes at the Rotary Club Hamburg-Lombardsbrücke, the President of the club was so well informed on the subject that during her short introduction she asked me: "Did you know him?"

Well, in the course of my legal career I had plenty of opportunity to meet this or that famous American jurist. But my answer to that question had to be no.

At the time of my talk, Oliver Wendell Holmes had already been dead for 75 years. Deceased on 6 March 1935 in Washington D.C., born in Boston on 8 March 1841. Even when someone's life lasts nearly 94 full years, as in the case of Oliver Wendell Holmes, the path such a life took is quickly forgotten and the impact which continues

to reverberate to this day is hardly noticed by those of the following generations left behind.

My concern is to make people aware of this influence. And why I particularly want to do this at a post-exam celebration of young jurists is something I will save for the end, if it doesn't automatically become clear anyway at some point before then.

One person who was really a contemporary of Oliver Wendell Holmes Jr. was the American President Franklin Delano Roosevelt. Several days after his swearing-in on 3 March 1933, he sought out Holmes at his house in Washington. Roosevelt called Holmes the greatest living American and asked him for a commentary: "You have lived through half our country's history; you have seen its great men. This is a dark hour. Justice Holmes, what is your advice to me?" Holmes answered: "You are in a war, Mr. President. I was in a war, too. And in a war there is only one rule: Form your battalions and fight!"^[4] At the time, both meant the domestic political situation which was marked by massive unemployment and social distress. In hindsight, however, this comment has a prophetic ring given the events of the subsequent decade and the Second World War.

Starting from the beginning: At the age of 16, in 1857, Oliver Wendell Holmes became a "Harvard man" in Cambridge, the town across the Charles River from the city of his birth, Boston. At first, he studied philosophy. He was torn away from his studies in 1861 by the Civil War. He fought – within a short time he was quickly promoted to First Lieutenant – in the 20th Regiment of the Volunteer Infantry of Massachusetts and took part in all the big battles in the first three years of the war, suffered wounds three times, some of them serious. At the battle near Fort Stevens, Holmes met another great American President, Abraham Lincoln. The exchange of words they had, when Holmes saw a tall, gaunt President Lincoln standing out in the open in the midst of an enemy bombardment, was one-sided and short: "*Get down, you fool!*"^[5].

Three years later, Holmes left the military and enrolled at Harvard Law School. Like every young jurist he questioned his chosen career in jurisprudence and repeatedly wondered whether law was really "worthy a whole intelligence." "*One found oneself plunged in a thick fog of details – in a black and frozen night, in which were no flowers, no spring, no easy joys. Voices of authority warned that in the crush of that ice any craft might sink.*"^[6]

It was no doubt also the competition with his powerful father, a man by the same name, Oliver Wendell Holmes Sr., which kept him going. At the time, his father was a famous man, a doctor and poet, who felt only contempt for his son's decision to study law. When Holmes Jr. visited his father to inform him that he would study at Harvard Law School, his cutting reply was: "*What's the use of that, Wendell? A lawyer can't be a great man.*"^[7] Holmes Jr. got his revenge for this not only with caustic comments. When an American author once condescendingly remarked: "So

you are the son of the celebrated Oliver Wendell Holmes,” the retort he received was prompt and to the point: *"No, he was my father."* [\[8\]](#)

In the ten years following his graduation in 1866 Oliver Wendell Holmes Jr. first worked as an attorney, but, alongside this, started extensive scholarly activity, beginning with a revision of a standard work at the time, "Kent's Commentaries on American Law". His famous commentary, "The Common Law", was published in 1881.

This work is a provocation of the predominant teaching of the time – especially at Harvard. It is so spirited it is as if the young lieutenant were again galloping towards enemy lines. The book starts with a bugle call:

The object of this book is to present a general view of the Common Law. To accomplish the task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it has been experience.

And continues:

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. [\[9\]](#)

The book continues with criminal law, tort law, contract law, property and inheritance law, in each case drawing not only on sources in Roman and English law, but also with repeated references to "Early German Law".

One year after the publication of this work, Oliver Wendell Holmes's career as a judge began. He became a member of the Supreme Judicial Court of Massachusetts. Under his influence the highest court in this state began to recognize the right of workers to form labor unions. "Fundamental fairness" required that workers meet companies "on an equal footing."

This legal decision was possibly what brought Holmes to the attention of Theodore Roosevelt. Theodore Roosevelt was initially the running mate of William McKinley who became President in 1900. After he was shot dead by an anarchist in September 1901, Theodore Roosevelt was sworn into office as President. Just a few months later he nominated Holmes to the U.S. Supreme Court. Roosevelt was a Republican but he felt a commitment to the interests of working people and led a determined campaign against the rising monopolies of the day. He was obviously hoping that Oliver Wendell Holmes would support his course. When, in response to Roosevelt's instruction to the Department of Justice, the merger of three railroad companies into

the world's largest railroad company, Northern Securities, was prohibited, the case was brought to the Supreme Court.

Holmes had to disappoint him. The Supreme Court approved the President's anti-trust measures by a narrow majority of 5 to 4 votes. But Roosevelt's worst setback was that it was "his" man in the Supreme Court, Oliver Wendell Holmes Jr., who voted *against* the administration's measures, and instead of being satisfied with merely rejecting them, Holmes Jr. opposed the majority opinion with a brilliant dissenting opinion based on legal reasoning. Although the anti-trust measures attracted public sympathy, especially since the financial package for this monopoly was backed by J.P. Morgan, at the time (just as today) one of the "usual suspects" for dubious financial transactions. This public sympathy, which made the whole affair into a great case, made Holmes uneasy. He started his dissenting opinion with the words:

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. [10]

Theodore Roosevelt, only interested in the result, is supposed to have reacted to this dissenting opinion with the angry comment: "*I could carve a judge out of a banana with more backbone than that.*" [11] This did not irritate Holmes. He viewed his dissenting opinion as being consistent with his earlier days at the Massachusetts Court where he lent his support to the rights of labor unions. He perceived a trend towards "combination", both among entrepreneurs and workers.

Just one year later Holmes was again in the minority. In the case *Lochner v. People of the State of New York* the majority of the Supreme Court justices declared a New York state law to be unconstitutional which limited working hours in bakeries to a maximum of sixty hours a week and ten hours a day. This limit on working hours was said to be an infringement of the basic right to liberty guaranteed under the 14th Amendment of the Constitution. The majority opinion, which filled many, many pages, suggested that the bakers of New York and their employees would be robbed of their right to liberty and free contract if this law were to be enforced. Today, the reasoning of the 21-page long majority opinion is only of interest to historians, the dissenting opinion of Oliver Wendell Holmes Jr., by contrast, remains a source of copious quotations among contemporary American jurists to this day. It consists of a mere 38 lines and begins with the sentences:

But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought

not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States. (...)

General propositions do not decide concrete cases. [\[12\]](#)

These words stung like the crack of a whip in the ears of his colleagues. Oliver Wendell Holmes Jr. rejected the notion of tying the constitution to a specific economic system and wanted to give free reign to legislative experiments in the individual states. This second dissenting opinion launched his reputation as the "great dissenter". He was a *great* dissenter, not only because of the precision of his reasoning, the sharpness of his language and the reduction of his text to what was absolutely necessary. He was a *great* dissenter because each dissent announced the birth of a new thought. These dissenting votes were numerous and all of them would be worth mentioning. I would like to limit my remarks to one more.

It is the year 1929. On 12 April 1929, the Supreme Court is considering the case of the immigrant Rosika Schwimmer. Schwimmer was a pioneer in the Hungarian women's movement and the international peace movement. In 1918/1919 she was a member of the Hungarian National Council and had to flee from the "white terror" of the Horthy regime which had just seized power. She emigrated to America and, after a few years, applied for American citizenship. In conformance with the Naturalizations Act of 1906, this required the applicant to swear an oath of allegiance. The procedure was preceded by filling out a questionnaire. Question 22 stated: "If necessary, are you willing to take up arms in defense of this country?" Rosika Schwimmer answered: "I would not take up arms personally." [\[13\]](#)

That was justification enough to refuse to grant her citizenship. Her complaint against this decision went as far as the Supreme Court. There, too, she failed to persuade the seven justices. The majority opinion stated that her declarations were vague and ambiguous. Pacifism was compatible with the constitution but that did not change the fact that every American was obligated to defend his country against all enemies.

Two weeks following the hearing of the Schwimmer case on 30 April 1929, Holmes's wife Fanny, who he had known since childhood and with whom he had been married since 1872, died. Holmes was then 88 years old. Despite this stroke of fate, just one week after her burial, he was at his high desk, [\[14\]](#) writing his dissenting opinion. It was only a few paragraphs long, but full of the power of clear wording. The first sentence begins with biting derision:

The applicant seems to be a woman of superior character and intelligence, obviously more than ordinarily desirable as a citizen of the United States. [\[15\]](#)

Still brimming with derision, he turns his attention to the appropriateness of the questions directed at Rosika Schwimmer during the naturalization procedure:

So far as the adequacy of her oath is concerned I hardly can see how that is affected by the statement, inasmuch as she is a woman over fifty years of age, and would not be allowed to bear arms if she wanted to. [16]

The derision then makes way for deadly seriousness when Oliver Wendell Holmes Jr. focuses on fundamental questions towards the end of his opinion:

Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believed more than some of us do in the teachings of the Sermon on the Mount. [17]

Oliver Wendell Holmes Jr. chose to resign from the U.S. Supreme Court in 1932, at the age of 90. He died on 6 March 1935, was buried in Arlington Cemetery.

What is his legacy?

There are virtues which are especially apt for a jurist intending to pursue a career in law: Always have a mind of your own, don't let your thoughts remain forever stuck in a rut; think out of the box on occasion, say no even when many are about to say yes, dismiss arrogance lightly, deride it, oppose dull phrases with sharp insights, drop complacency and demonstrate moral courage.

* This is a text of a talk, edited somewhat for publication, which the author was invited to give by the Faculty of Law of the University of Rostock at the post-exam celebration on 6 May 2011 and at the Faculty of Law of the University of Halle/Wittenberg at the post-exam celebration on 1 July 2011. The author is a member of the Committee of Constitutional Law of the Federal Bar Association.

[1] Ruling dated 4 May 2011 – 2 BvR 2333/08, 2 BvR 571/10, 2 BvR 1152/10, 2 BvR 2365/09, 2 BvR 740/10, in EuGRZ 297 ff. (reprinted there with the introduction to the oral opinion of the court written by the President of the Federal Constitutional Court and the Chairman of the Second Chamber, Prof. Dr. Andreas Voßkuhle).

[2] Formally it has existed since 1789 but it acquired its powerful institutional role under its fourth chief justice, John Marshall, who held this position for 34 years (1801 – 1835).

[3] United States Constitution Article III, Section 1; Articles 92, 93 of the German Basic Law.

[4] Quoted from *Bowen*, *Yankee from Olympus: Justice Holmes and his Family*, Little, Brown and Company, New York 1945, p. 414.

[5] The authenticity of this story – several versions of which exist – of the meeting of Oliver Wendell Holmes Jr. and Abraham Lincoln has been repeatedly questioned, but it originates from Holmes himself, cf. *Novick*, *Honorable Justice – The Life of Oliver Wendell Holmes*, Little, Brown and Company, Boston 1989, p. 422.

[6] Quoted from *Bowen*, l.c. (FN 4), p. 216.

[7] *Bowen*, l.c. (FN 4), p. 201.

[8] Quoted from *Marke*, *A Law Student's Guide to Mr. Justice Holmes*, 28 U. Fla. L. Rev. 376, 385 (1975 – 1976).

[9] *Holmes*, *The Common Law*, Boston 1881, (Reprint 1991), p. 1.

[10] 193 U.S. 197, 364.

[11] *Abraham*, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, 2nd Edition, New York 1985, p. 69.

[12] 198 U.S. 45, 76/77.

[13] 279 U.S. 644, 647.

[14] As one of the law clerks of Oliver Wendell Holmes reported, he wrote most of his judicial opinions at a high desk he inherited from his grandfather. His reasoning was: "*There is nothing so conducive to brevity as a feeling of weakness in the knees.*"; cf. *Griswold* in his preface to *Novick* (Editor), *The Collected Works of Justice Holmes*, University of Chicago Press, London 1995, p. xiv.

[15] 279 U.S. 644, 653.

[16] 279 U.S. 644, 653/654.

[17] 279 U.S. 644, 654/655.