Oliver Wendell Holmes, Jr., Legal Theory, and Judicial Restraint

Frederic R. Kellogg

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Oliver Wendell Holmes, Jr., is considered by many to be the most influential American jurist. The voluminous literature devoted to his writings and legal thought, however, is diverse and inconsistent. In this study, Frederic R. Kellogg follows Holmes's intellectual path from his early writings through his judicial career. He offers a fresh perspective that addresses the views of Holmes's leading critics and explains his relevance to the contemporary controversy over judicial activism and restraint. Holmes is shown to be an original legal theorist who reconceived common law as a theory of social inquiry and who applied his insights to constitutional law. From his empirical and naturalist perspective on law, with its roots in American pragmatism, emerged Holmes's distinctive judicial and constitutional restraint. Kellogg distinguishes Holmes from analytical legal positivism and contrasts him with a range of thinkers, including John Austin, Thomas Hobbes, H. L. A. Hart, Ronald Dworkin, Antonin Scalia, and other leading legal theorists.

Frederic R. Kellogg has been Visiting Scholar in the Department of Philosophy at the George Washington University, Senior Fulbright Fellow at the University of Warsaw, and Visiting Professor at Moscow State University. He is the author of *The Formative Essays of Justice Holmes: The Making of an American Legal Philosophy*, as well as numerous articles on legal philosophy and jurisprudence.

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In memory of Paul A. Freund and Elliot L. Richardson

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Preface

I have a learned friend, whose name would be well recognized if I were to disclose it, who though active in supporting conservative judicial nominees confides deep misgivings about the philosophical basis of contemporary judicial conservatism. For my part I have long had misgivings about contemporary legal philosophy, which I find to be illuminating, if not parallel, in regard to my friend's central concern, the basis for judicial restraint. In part, this book is an attempt to place this issue in a broader historical and theoretical context, I hope neither innately liberal nor conservative, as those terms are popularly understood.

More important, this is a book about Oliver Wendell Holmes, Jr., and his contribution to legal theory. These subjects converge because, even while Holmes was engaged in refining a concept of law grounded in the philosophy of the common law, the intellectual landscape in England and America was changing. Holmes's classic treatise, *The Common Law*, has never been adequately understood as a reconceptualization of common law opposing the legal positivism of John Austin and Thomas Hobbes. Legal positivism became influential in England and America with John Austin's *Lectures on Jurisprudence* (1861) and was reinforced by H. L. A. Hart in the following century. It has come to dominate theories of law, both liberal and conservative. Now, with legal positivism at an impasse, a reconsideration of Holmes may be welcome.

This study is dedicated to the late Professor Paul A. Freund of Harvard Law School, who ignited my original interest in Justice Oliver Wendell Holmes and the insights to be gained through careful mining of his complex and controversial work. It is also dedicated to the late

Elliot L. Richardson, whose combination of scholarly intelligence and public service set a motivating, while equally impossible, example.

I would like to recognize an early and broad-ranging influence of members of the Harvard University faculty, especially Bernard Bailyn, my senior tutor Gordon S. Wood, Talcott Parsons, Erwin Griswold, Clark Byse, Mark deWolfe Howe, and Harold Berman. My interest in Holmes is partly traceable to an early fascination with the question of whether law and morals are separate, which was treated in a compilation entitled "Introduction to Law" distributed to students at Harvard Law School in the 1960s. Prompted by the insights of Professor Howe, I sensed then that Holmes's position in the famous 1897 essay "The Path of the Law" was subtle and unlike that of either Lon L. Fuller or H. L. A. Hart,[1] but I could find little elucidation in *The Common Law*.

Between law school and practice I studied social theory under Talcott Parsons, and I read much of Emile Durkheim's work. Rereading *The Common Law*, I was struck by the comparison between Durkheim's evolution from mechanical to organic social solidarity and Holmes's evolution from moral toward external standards. Having had the opportunity to observe something close to Holmes's notion of specification[2] in my exposure to legal practice, I was prompted to look for the origins of his thought in the early writings.

This led to research at George Washington University, where I went through the masters and doctoral programs in jurisprudence at the National Law Center, concentrating on Holmes. A comment by Grant Gilmore on a work submitted for publication encouraged me to improve my understanding of pragmatic philosophy and Holmes's relation to it. I eventually published *The Formative Essays of Justice Holmes: The Making of an American Legal Philosophy* in 1984 treating this connection, but I was not alone in being unsatisfied that it adequately addressed the more difficult questions.

I later read Gerald J. Postema's *Bentham and the Common Law Tradition*, published in 1986, and I saw how strongly Holmes's theory opposed legal positivism while fitting the common law tradition; it struck me

[1] Mark DeWolfe Howe, "The Positivism of Mr. Justice Holmes"; Henry M. Hart, Jr., "Holmes' Positivism – An Addendum"; Howe, "Holmes' Positivism – A Brief Rejoinder"; H. L. A. Hart, "Positivism and the Separation of Law and Morals"; Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart"; in *Introduction to Law, Selected Essays Reprinted from the Harvard Law Review* (Cambridge, Mass.: Harvard Law Review Association, 1968).

[2] See discussion of "successive approximation," chapter 3.

then that Holmes had updated common law theory with a concept of community inquiry parallel to that of the classical American pragmatists, with whom he associated in mid-nineteenth-century Cambridge. I tested various aspects of this hypothesis in several papers,[3] culminating in one delivered at the 2001 meeting of the American Philosophical Association, Eastern Division, entitled "The Construction of Positivism and the Myth of Legal Indeterminacy." My commentator, Brian Bix, gave me helpful guidance.

Since 1984, Holmes has received much attention. There have been four biographies, four symposia, two new collections of his writing, two volumes of essays and one evaluating his contemporary influence, and numerous articles and monographs.[4] The evaluation is Albert W. Alschuler's *Law without Values: The Life, Work, and Legacy of Justice Holmes.* My own study might be considered as an alternative evaluation from the perspective of contemporary theory. I take a more sympathetic view of Holmes's contribution. As Professor Matthias Reimann, who wrote more favorably of Holmes before Alschuler's book, notes in his review of it,

[3] Frederic R. Kellogg, "Pragmatism and Liberalism: Two Distinct Theories of Law and Justice," paper delivered at the Eastern Division of the American Philosophical Association, December 1991; "Common Law and Constitutional Theory: The Common Law Origins of Holmes' Constitutional Restraint," 7 *George Mason L. Rev.* 177–234 (1984); "Learned Hand and the Great Train Ride," 56 *American Scholar* 471 (1987); "Legal Philosophy in the Temple of Doom: Pragmatism's Response to Critical Legal Studies," 65 *Tulane L. Rev.* 15–56 (1990); "Who Owns Pragmatism?" 6 *Journal of Speculative Philosophy* 67 (1992); "Justice Holmes, Common Law Theory, and Judicial Restraint," 36 *John Marshall L. Rev.* 457 (2003); "Morton White on Oliver Wendell Holmes," 40 *Transactions of the Charles S. Peirce Society* 559 (2004).

[4] Gary J. Aichele, *Oliver Wendell Holmes Jr.: Soldier, Scholar, Judge* (Boston: Twayne Publishers, 1989); Liva Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (New York: Harper Collins, 1991); Sheldon M. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (Boston, Toronto, and London: Little, Brown, 1989); G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford: Oxford University Press, 1993); Robert W. Gordon, "Holmes' Common Law as Legal and Social Science," 10 *Hofstra L. Rev.* 719 (1982); "Symposium: The Path of the Law after One Hundred Years," 110 *Harv. L. Rev.* 989 (1997); "Symposium: The Path of the Law 100 Years Later: Holmes' Influence on Modern Jurisprudence," 63 *Brook L. Rev.* 1 (1997); "Symposium: The Path of the Law Today," 78 *B. U. L. Rev.* 691 (1998); *The Collected Works of Justice Holmes: Complete Public Writings and Selected Opinions of Oliver Wendell Holmes*, ed. Sheldon Novick, 3 vols. (hereafter "*Collected Works*") (Chicago and London: Chicago University Press, 1995); Richard A. Posner, ed., *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Formative Writings of Oliver Wendell Holmes, Jr.* (Chicago and London: Chicago University Press, 1992); Albert W. Alschuler, *Law without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago and London: University of Chicago Press, 2000). Many of the articles are listed in the Bibliography.

"its main importance lies in a simple but valuable reminder: if American legal culture continues to revere a Nietzschean nihilist, a power-addicted war enthusiast, and an emotional cripple without sympathy for the underdog, it is flirting with moral bankruptcy."[5] While aware of the basis for such criticism, I will try to present a balanced picture, grounded in an admittedly condensed consideration of Holmes's huge output.

The arrangement of the book is as follows. In the first two chapters I describe the general contours of Holmes's judicial restraint and intellectual background. In the third I compare his conception of law and its origins to the reigning theory, legal positivism. In the fourth I address its relation to the tradition of common law. In chapters 5 and 6, I trace the original emergence of Holmes's conception in the years of scholarship following the Civil War, to document my controversial dissociation of it from the analytical positivism within which Holmes is commonly included. Chapter 7 elaborates on Holmes's famous skepticism and his view of the relation of law and morals. In chapter 8, I address the continuing misunderstanding of Holmes's approach to principles and "policy." In chapter 9, I present a common law–based elucidation of his constitutional restraint, and in chapter 10, I evaluate his thought from the perspective of contemporary legal and political theory.

I am grateful to various journal editors and other commentators, on a number of papers, including Andrew Altman, Patricia Beard, Brian Bix, Philip Bobbitt, R. Paul Churchill, Larry Goffney, Peter Hare, Catherine Kemp, David Lyons, Edward H. Madden, Mark Medish, Kevin Mellyn, James Oldham, Lucius Outlaw, Robert Park, Ferdinand Schoettle, Thomas L. Short, Beth Singer, Mark Tushnet, and Kenneth Winston, for their helpful comments and criticism; to William A. Truslow and Dale Brunsvold for their timely help; and to many members of the Society for the Advancement of American Philosophy for their enlightenment and encouragement. While I hope the cautious faith of these people in my purposes was not misplaced, I admit to a dimness of vision of things poorly understood, and a natural blindness to my errors, with confidence that many more are yet to be uncovered, for which all of the above should remain blameless.

Special thanks are owed to Erika S. Chadbourn and David Warrington and the staff of the Special Collections department of the Harvard

[5] Matthias Reimann, "Lives in the Law: Horrible Holmes," 100 *Mich. L. Rev.* 1676 (2002); Reimann, "Why Holmes?" 88 *Mich. L. Rev.* 1908 (1990).

University Law School Library; to the George Washington University and R. Paul Churchill, then Chair of the Department of Philosophy; and to the staffs of the Burns and Gelman Libraries at the George Washington University, Professor Charles Karelis for his intensive commentaries on my manuscript, and most of all to my wife Molly Shulman Kellogg, for the immeasurable support that made this project possible.

1

A Time for Law

> It cannot be helped, it is as it should be, that the law is behind the times. As law embodies beliefs that have translated themselves into action, while there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field. It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong.
>
> Justice Oliver Wendell Holmes, 1913[1]

I begin this exploration with a comment by Justice Holmes at seventy-one, speaking to the Bar Association of the City of New York. He is discussing the role of timing in judicial decisions, timing indeed in constitutional law. Holmes is alone as a legal theorist in focusing so heavily on it – on the notion of readiness or unreadiness, of a social context within which legal and constitutional rulings are made. But consider: what of court intervention in public school segregration, in prosecutorial fairness and police coercion of confessions, disparate state laws against abortion, affirmative action in employment discrimination, the constitutionality of laws barring same-sex marriage, the juvenile death penalty? Has not the context and timing of judicial rulings in these matters, for good or ill, been a large measure of their apparent justification – or lack thereof?

[1] Holmes, "Law and the Court," speech at a dinner of the Harvard Law School Association of New York on February 15, 1913, in Mark deWolfe Howe, ed., *The Occasional Speeches of Justice Oliver Wendell Holmes* (Cambridge, Mass.: Belknap Press, 1962), 168.

Separation of the races could hardly seem unconstitutional to a mostly white America in 1896, when it was upheld in *Plessy v. Ferguson.*[2] Integrating the public schools would have been unthinkable then, but in 1954? After passage of the Civil Rights Act of 1964, judicial orders decreeing affirmative action in employment were common, after findings of race discrimination. Leading universities soon took affirmative steps to increase the enrollment of minority students. Such programs came under attack for reverse discrimination. In 2002, after wrestling with this question (and with itself) for two generations, the Supreme Court upheld a carefully tailored University of Michigan affirmative action plan in *Grutter v. Bollinger,*[3] but set a time limit for constitutionality of twenty-five years, after which, presumably, affirmative action is due to become unconstitutional.

What is involved here? As the constitutional scholar Paul A. Freund repeatedly asked, should the Court serve as the "conscience of the country"?[4] The very idea of a *moving* national conscience is murky and uncertain. In his 1969 Oliver Wendell Holmes Lectures, Alexander Bickel thoroughly deflated the notion that the court could associate its rulings with an inexorable "progress."[5] Conservatives irk any liberal crowd with their caricatures of a "living constitution." As history reveals, the Court can get carried too far. In abortion, there was no uniform drift of national consensus to support a wholesale removal of traditional state jurisdiction in *Roe v. Wade.*[6] The Court's actions under the Constitution are final, save a curative amendment, and they short-circuit more natural movements of national conscience, they close off further civil debate, leaving room only for vitriol. When the Massachusetts Supreme Court found a constitutional right to same-sex marriage, it affected the politics of the 2004 national elections.

The recent case of *Roper v. Simmons* illustrates the problem. There the Court held by a slim 5–4 majority that capital punishment was unconstitutionally "cruel and unusual" when applied to juveniles (having upheld it only sixteen years before). The *Roper* decision was guided in part by

[2] *Plessy v. Ferguson,* 163 U.S. 537 (1896).

[3] *Grutter v. Bollinger,* 539 U.S. 306, 342 (2003): "It has been 25 years since Justice Powell first approved the use of race to further the interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

[4] E.g., Paul A. Freund, *On Law and Justice* (Cambridge, Mass.: Belknap Press, 1968), 35.

[5] Alexander Bickel, *The Supreme Court and the Idea of Progress* (New York, Evanston, and London: Harper & Row, 1970).

[6] *Roe v. Wade,* 410 U.S. 113 (1973).

the fact that a growing number of states that authorize capital punishment (although not yet a majority) now outlaw it for juveniles. It was guided also by the observation that juvenile executions are banned in an overwhelming majority of foreign countries. This reasoning inflamed the conservative dissenters. Wrote Justice Antonin Scalia, "The court thus proclaims itself the sole arbiter of our nation's moral standards – and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures."[7]

There are searching questions raised by Holmes's observation. Is the division on the current Court to be explained by the line he draws in warning that the Court should stay "behind the times"? What is the role of popular consensus in legal interpretation? A student curious about such questions would seek with difficulty any satisfactory explanation in the university library under "theories of law."[8] Perhaps more elucidation might be found under the catalogue of "politics," not reassuring to anyone who imagines that unchanging "principles" govern the Bill of Rights. Still, as Holmes said in 1913, battles before the Court generally rage among and between *opposing* principles (is there any such thing as a "neutral" principle?). The cases that work their way up through the courts are the most difficult, not the most obvious. Stubborn controversies can prove relentless in finding a way, through experienced counsel, to entail the jurisdiction of the U.S. Constitution.[9]

How then did Holmes, at seventy-one, come to explain the plight of his court, besieged by criticism for having overturned much (though by no

[7] *Roper v. Simmons*, No. 03–633 (U.S. Supreme Court, March 1, 2005), 125 S. Ct. 1183, 1222. "[N]o national consensus exists here." 125 S. Ct. 1183, 1222 n. 8 (Scalia, joined by Thomas, dissenting).

[8] This is not to suggest that theories of law and constitutionalism in which popular consent plays an important part are by any means novel. The English scholar Thomas Smith (1514?–77) saw a strength of English legal practice as resting on the participating co-determination of the people. Carl J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago: University of Chicago Press, 1967), 67. Richard Hooker (1553–1600) wrote that "laws they are not therefore which public probation hath not made so" and "laws therefore human of what kind so ever are available by consent." From the *Laws of Ecclesiastical Polity* (New York: Legal Classics Library, 1998), I, x, 8; Friedrich, *Philosophy of Law*, at 75. Bruce Ackerman notes the role of consensus in *We the People* (Cambridge Mass.: Belknap Press, 1991). It is rather the place of prevailing standards in immediate decisions that distinguishes Holmes's view.

[9] "Given a sufficient hardihood of purpose at the rack of exegesis, and any document, no matter what its fortitude, will eventually give forth the meaning required of it." Edward S. Corwin, "The Supreme Court and the Fourteenth Amendment," in *American Constitutional History: Essays by Edward S. Corwin*, ed. Gerald Garvey and Alpheus T. Mason (New York, Evanston, and London: Harper & Row, 1964), 68.

means all) state regulatory legislation for over a decade, as a misreading not of principle but of timing? Holmes had the reputation then, as now, of a deep but dimly visible foundation beneath his fluent utterances. The invisibility of the ostensible ground beneath his frequently skeptical remarks has left his skepticism open to characterization as cynicism.[10] This impression is buttressed by a lifelong tendency to glorify struggle, in a way that often seemed "childish" to his friend William James.[11] The role of conflict is easily oversimplified in interpretations of Holmes; though he had a personal side, and experiences as a soldier, to reinforce the impression, a cynical deference to power has on careful examination almost nothing to do with his judicial philosophy.

My purpose is to explore the background to Holmes's 1913 comment, to focus on its derivation in Holmes's development as a scholar and theorist, and to consider its intellectual contours, how it fits into a theory of law and compares with other leading theories – both historically and in a contemporary context, especially as regards the leading theories of this past century, those expounded by H. L. A. Hart, Joseph Raz, Ronald Dworkin, and their contemporary critics and followers.

First I note a connection between Holmes's 1913 comment and three writers and jurists whose thoughts and lives overlapped with his: James Bradley Thayer, lawyer, scholar, and Harvard law professor through whom the younger Holmes gained editorship of *Kent's Commentaries on American Law*, a move that would profoundly affect his thinking; Felix Frankfurter, the Harvard law professor who supplied Justice Holmes with his personal secretaries and later became a Supreme Court Justice himself; and Learned Hand, by all accounts "the greatest judge never appointed to the Supreme Court," who venerated Holmes and seems to have influenced his attitude toward free speech in time of war.[12]

Characterizing the spirit of judicial restraint, Thayer would write in 1893: "The safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and the clear limits of judicial power; so that responsibility may be brought sharply home where it belongs." This runs counter to the common acceptance of final judicial interpretations

[10] E.g., Alschuler, *Law without Values*.

[11] William James to Frances R. Morse, April 12, 1900, in Ignas K. Skrupskelis and Elizabeth M. Berkeley, eds., *The Correspondence of William James*, vol. 9 (Charlottesville and London: University Press of Virginia, 2001), 184.

[12] See Kellogg, "Learned Hand and the Great Train Ride," 56 *American Scholar* 471 (1987).

of the Constitution. There is a renewed concern among legal scholars that the public, in our litigious society, is being left out of the shaping of constitutional law and hence of our most fundamental rights. Mark Tushnet, in his book *Taking the Constitution Away from the Courts* (1999), and Larry D. Kramer, in *The People Themselves: Popular Constitutionalism and Judicial Review* (2004), have lately brought this concern back to the forefront.[13]

The sentiment, or one very like it, goes back to Thayer (1901):

> [T]here has developed a vast and growing increase of judicial interference with legislation. This is a very different state of things from what our fathers contemplated, a century or more ago, in framing the new system. . . . Great, and indeed, inestimable as are the advantages in a popular government of this conservative influence, – the power of the judiciary to disregard unconstitutional legislation, it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors.[14]

Citing this passage in a dissenting opinion, the famous 1943 flag salute case, Felix Frankfurter at the height of World War II opposed the court majority in its decision to reinstate a young Jehovah's Witness expelled from school for refusing on religious grounds to participate in the Pledge of Allegiance. "The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process." We can imagine the outcry if the current Court were to stay its hand in such a case.[15]

Even more extreme, consider Learned Hand, who in the Oliver Wendell Holmes Lectures at Harvard in 1958 (funded by the Holmes Devise, created after the childless Holmes willed the balance of his estate to the federal government), caused an academic uproar by denouncing the Bill of Rights as grounds for overturning legislation, likening such Supreme Court jurisdiction to the ordination of a council of moral censors: "For myself it would be most irksome to be ruled by a bevy of

[13] Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton: Princeton University Press, 1999), and Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004).

[14] James B. Thayer, *John Marshall* (Boston: Houghton Mifflin, 1901), 106.

[15] *West Virginia State Board of Education v. Barnett*, 319 U.S. 624, 667–71 (1943) (Frankfurter, dissenting).

Platonic Guardians, even if I knew how to choose them, which I most assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."[16]

Insofar as there is a connection with Holmes, the notion of timing in judicial self-restraint is connected with the preservation of democratic debate, of the popular grounding of democratic institutions. What do we know about this reason, and what are its contours? How may it be understood as a consistent, coherent theory of law – if a theory of law at all? The popular constraint on judges is the claim of a dominant text, illuminated only by its putative "original understanding." But we are in a skeptical moment just now; textualism as a judicial guide to final constitutional meaning cuts both ways, and can result no less in the exercise of a constitutional litmus test.

The two competing notions, that of an authoritative law that always contains the right answer, and that of a law of timing, of consensus, are radically opposed. The notion of a judicial system that somewhere holds a right or better answer for every legal question is found in Ronald Dworkin's *Taking Rights Seriously*, where if necessary the judge must turn to principles and rights. Here we encounter Holmes's second point above: "It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong."[17]

What guidance can Holmes give us? Perhaps his notion here, though sounding conservative, may hide a licentious set of assumptions – that there is *no* legal answer, that the justices simply hoist their fingers to the wind. They sit down to assess the state of the national conscience, whatever that means, and decide whether the time is right to implement the enduring principles of the United States Constitution as they see them.

This book addresses a threefold subject: the intricate intellectual path of Justice Holmes, his relation to contemporary legal theory, and the controversial subject of judicial restraint. Oliver Wendell Holmes, Jr., was the rare son who could eclipse a famous and dominant father, an acutely

[16] Learned Hand, *The Bill of Rights* (Cambridge, Mass.: Harvard University Press, 1958), 73.
[17] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977); Holmes, supra n. 1.

ambitious workaholic without children, a prodigious scholar who mastered in his time the history, theory, and practice of American law (a feat perhaps never again to be matched), judge for fifty years on the highest courts of Massachusetts and the United States. He has cast a long shadow upon the judges and scholars of our time – over a century now since he took a seat at sixty-one on the highest court of the land. Yet Holmes scholarship has been disorderly, even schizophrenic. His influence is undoubted, but its source ill-understood, giving rise to cycles of severe criticism. We are in one now.

Much of this criticism is responsible and illuminating. Once an icon, Holmes has been humanized. Where it falls short is in understanding the sources and development of his thinking. Confusion is understandable, given his unusual path and the subtlety of the original position, established early in his career. Before trying to characterize it, and where it might enlighten us, I give an example that demonstrates both the problem of understanding Holmes and its potential.

Two eminent scholars, Louis Kaplow and Steven Shavell, have recently published a controversial book about law entitled *Fairness versus Welfare* (2002), addressing a fundamental question about law. To what degree should we consider the impact on general welfare, as opposed to notions of fairness, in deciding legal matters? The authors take an extreme position against the advocates of fairness; they claim, and attempt to demonstrate, that any policy pursued on grounds other than social welfare – including fairness among the parties in the case – may end up making everyone worse off.[18]

Holmes, as many scholars have noted, often sounded a similar view in such comments as "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage" and "Moral predilections must not be allowed to influence our minds in settling legal distinctions."[19] Such comments sounded radical in their day and have maintained a ring of contemporary relevance. Did Holmes adopt a position similar to Kaplow and Shavell, as has often been suggested? That would be inconsistent with the distinctive position that is captured in his 1913 speech. The law is behind the times; while

[18] Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Cambridge, Mass.: Harvard University Press, 2002).

[19] Holmes, "The Path of the Law," in *Collected Legal Papers* (New York: Harcourt Brace, 1920), 184; *The Common Law* (Boston: Little, Brown, 1881), 118.