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.
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, 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 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

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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, 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. 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,


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“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.”  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

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.