

**Frederic R. Kellogg.** *Oliver Wendell Holmes Jr. and Legal Logic*. The University of Chicago Press 2018. 224 pp. \$45.00 USD (Hardcover ISBN 9780226523903).

Fred Kellogg's book, *Oliver Wendell Holmes Jr. and Legal Logic*, re-visits the most iconic and powerful figure in American law, Oliver Wendell Holmes, Jr. Why? Hasn't Holmes been understood, digested, and, while worthy of historical notice, been superseded by better legal minds? Kellogg makes a convincing argument that this is not the case. Indeed, rather than Holmes having been superseded, the important conclusion of Kellogg's book is that a new return to the analytical tools Holmes developed is urgently needed. That is, adoption of Holmes' reconstruction of legal logic could greatly improve contemporary legal practice and theory.

Kellogg makes his argument through a careful analysis of Holmes' legal theory, most importantly by situating it in the historical milieu in which it developed. Through his interaction with some of the intellectual giants of his time, both in Europe and the United States, Holmes was immersed in the intellectual movements of his day. Darwinism, experimental science, and, importantly for the book, theories of logic saturated his intellectual environment. Through archival sources Kellogg shows that Holmes read John Stuart Mill on logic and attended some of Charles Sanders Peirce's lectures centered upon issues of logic and induction.

One of the great virtues of Kellogg's careful analysis of the sources of Holmes' thought is that it renders very apparent some of the assumptions of Holmes' theory that later legal thinkers were unable to notice because of their own unexamined assumptions, thereby rendering their own interpretations of Holmes' theory inaccurate. For example, Kellogg shows that the ascendant and now dominant legal positivist position in law and the legal academy rests upon an implicit and unanalyzed deductivist mode, a model of legal reasoning where similarities in fact patterns are assumed and identifiable and discreet laws are, it is taken for granted, then applied. These assumptions are ones that Holmes' theory necessarily rejects. Although these assumptions are unconsciously shared by the majority of legal positivists, realists, and seemingly opposing theorists such as Ronald Dworkin and his conception of law as integrity, as well as Critical Legal Scholars, this aspect of Holmes' theory is rendered invisible. As a result of this a strangely distorted picture of Holmes's thought is accepted. For example, you get extremes like Grant Gilmore or Albert Alschuler's picture of Holmes as a monstrous and amoral theorist who aggrandizes war. You also get strange pictures of Holmes as a proto-legal positivist, thereby adopted by H.L.A. Hart's followers as one of their own, or by realists (and this is more controversial, resting as it does upon a caricature of Jerome Frank's thought) as a proto-legal realist offering a theory of law as determined by the judge's psychological propensities.

Kellogg shows that all these later appropriations or attacks upon Holmes ignore the place of the historical path of the law in Holmes' legal theory. Of course, this would seem difficult to ignore when analyzing his work given the centrality of the concept of path in Holmes' theory. But, once again, Kellogg's analysis is convincing. While the theorists listed above offer synchronic theories, Holmes offers a conception of law as developing incrementally in common law practices. That is, he offers a diachronic conception of law. Instead of the generally ahistorical analysis of law and legal reasoning offered by the positivists and their interlocutors, Holmes offers a theory of law based upon a slow process of accretion and evolution, one rooted in the fact-intensive and socially grounded practice of common law case-by-case adjudication. This, in large part, inverts the picture of law where given similarities in facts are assumed and given discrete and identifiable laws are then applied. In Holmes' theory, neither similarity nor discrete and given laws are assumed. Instead, similarity is constructed through social practices and, when these various social practices conflict, legal

process and an extended social analysis are utilized to bring about a new harmony. This new harmony is sometimes built upon the elimination of one of the conflicting practices. But often, and more constructively, it might emerge through creativity and legal proceedings based upon broad participation and clear understanding of facts, therefore in the process offering a newly forged reconstruction of the social practices in question.

This picture of Holmes' theory is further developed through a careful construction of Holmes' use of social induction. Rather than legal logic or at least authority being located in one sovereign spot, such as the early legal positivist Austin argued must be the case, once the diachronic aspects of legal practice are foregrounded, the logic and the authority of law are located in a diverse and dialogical space, with multiple sources of input. This diversifies the conception of law—offering a conception of law that is emphatically not judge-centered, as against what most interpreters of Holmes would have it. It also has the implication that boundaries between law and non-law are not nearly as clear and distinct as the legal positivists, and those beholden to the assumptions the positivists, implicitly require in order for their analysis to be legitimate. The result, in turn, is that the currently ubiquitous 'application of law versus discretion' model of discourse common to the positivists, Dworkin, CLS scholars, etc., starts in the wrong place. Indeed, Kellogg gives a nice example to show how Holmes' theory would deal with such a problem, thereby sowing the application versus discretion distinction as largely mistaken in all but the most trivial of cases.

The example offered is of an employment contract that requires the payment of a 'heap' of wheat for a day's labor. What a heap is, of course, is an example of the sorites problem—when do enough grains of wheat in a pile become a heap? Without recourse to the 'myth of the given' (that is, a belief in a logically compelled or semantically required perfect use of the word 'heap') the deductivist account shared by the legal positivists, Dworkin, CLS scholars, etc., requires a case brought under the heap employment contract to be decided through the use of judicial 'discretion,' thereby seeming to be 'lawless.' But under the Holmesian historically and socially rooted inductivist model, Kellogg shows that what a 'heap' entails can be successfully articulated through a path of successive cases starting out at extremes and then gradually creating a social consensus as to what is required in wheat-heap payments in the employment context. The discretion problem disappears when the judge is seen not as the center, but as a participant, admittedly an important participant, in a much broader practice.

Importantly, Kellogg's analysis shows that another favorite of contemporary legal theory that has infected legal practice is misguided—the fact/value distinction. It also shows just how far afield the claims of Holmes as amoral monster are. Holmes did not require that law be amoral, only that the morality of law be collectively decided, rather than decided by judges. That is, law evolves socially, is context- and fact-dependent and based upon incremental growth, a growth that should not be truncated by 'herculean' judges using their own favorite set of principles. Indeed, this shows that it is the Hart/Dworkin tradition that over-emphasizes the judge's import. Law is, for Holmes, more democratic than deductivist, more social than 'principled' (whatever that is taken to mean by theorists such as Dworkin, Herbert Wechsler, Scalia or Roberts). A democratic ethic is quite possibly very messy. It may not be as principled as legal theorists would like, but it does not lack morality; it merely decenters the judge. Kellogg helpfully offers a few theorists that understood and showed in their work at least some of the more profound implications of Holmes' theory. Kellogg includes in this group Karl Llewellyn (at least in his later work) and, most importantly, Edward Levi, whose work is seen as most closely aligned to Holmes.

Kellogg is a leading authority when it comes to Holmes. And the theory offered in *Oliver Wendell Holmes Jr. and Legal Logic* offers a profound challenge to the future of legal theory as well

as legal practice. Deductivist theories, in Kellogg's terminology, currently dominate the legal academy, especially constitutional theory. This is patently unjustified if Holmes' theory is a more accurate or a more attractive and effective theory of law. Kellogg offers a portrait of Holmes that is an important and resounding challenge to contemporary theory and practice. Legal practice as portrayed by Holmes is empirically informed, socially based, and more democratically constructed. Since Holmes, the dominant theories have rested upon the felt need to clearly separate law from other areas of society, to find principles that avoid the need for careful understanding of context, and, ultimately, to identify a pure legal realm unadulterated by the messier aspects found in other areas of society. This has resulted in a type of legal theory that offers more and more unhelpful variations on the theme of application versus discretion. Kellogg shows convincingly that this is not the only path that needs to be taken, and that Holmes offers a much more fertile path, albeit one that makes the understanding and practice of law not nearly so controllable in theory or practice. This is an important book, a book that sets a profound challenge to the (often wrongly and dogmatically held) assumptions and ideals of contemporary legal theory.

**Brian E. Butler**, University of North Carolina Asheville