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The Descending Trail: Holmes' Path of the Law One Hundred Years Later

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THE DESCENDING TRAIL: HOLMES' *PATH OF THE LAW* ONE HUNDRED YEARS LATER

*Albert W. Alschuler**

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* Wilson-Dickinson Professor, University of Chicago Law School. I am grateful for the comments of Frank Easterbrook, Sheldon Novick, Stephen Pepper, Sydney Hyman, and Richard Posner and for the research support of the Leonard Sorkin Faculty Fund and the Herbert and Marjorie Fried Faculty Research Fund at the University of Chicago Law School. This Article is part of a larger study of Holmes' life and work tentatively titled *Oliver Wendell Holmes and the Decline of Rights*.

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I. INTRODUCTION: WITH FRIENDS LIKE THESE

One hundred years ago, the *Harvard Law Review* published an article that Sanford Levinson calls “the single most important essay ever written by an American on the law.”¹ The article was *The Path of the Law* by Oliver Wendell Holmes, Jr.,² and Levinson’s appraisal of its significance is echoed by many others. Morton Horwitz declares, “With ‘The Path of the Law’ Holmes pushed American legal thought into the twentieth century.”³ Phillip Johnson observes, “This lecture has been so influential in shaping the thinking of American lawyers that it might be described as almost part of the Constitution.”⁴ Richard Posner proclaims that *The Path of the Law* “may be the best article-length work on law ever written.”⁵

Holmes presented this article as an address at the Boston University Law School early in 1897. He was then 55 and a Justice of the Supreme Judicial Court of Massachusetts. Five years would pass before Theodore Roosevelt would appoint him to the Supreme Court. Holmes would remain on the Court for 29 years—long enough that, two months after his retirement, he could receive a visit from another President Roosevelt.

1. Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?)*: *The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1228 (1991) (book review).

2. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

3. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 142 (1992).

4. PHILLIP E. JOHNSON, *REASON IN THE BALANCE: THE CASE AGAINST NATURALISM IN SCIENCE, LAW, AND EDUCATION* 140 (1995).

5. Richard A. Posner, *Introduction* to *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* at x (Richard A. Posner ed., 1990). Even Saul Touster, a critic of Holmes who called his lectures on *The Common Law* “a clear failure,” described *The Path of the Law* as Holmes’ “acknowledged masterpiece in jurisprudence.” Saul Touster, *Holmes a Hundred Years Ago: The Common Law and Legal Theory*, 10 HOFSTRA L. REV. 673, 685, 692 (1982).

Franklin Roosevelt's call came on Holmes' 91st birthday, four days after Roosevelt's inauguration.⁶

Reiterating ideas that Holmes had sketched in *The Common Law* sixteen years earlier and in other writings extending over more than a quarter century, *The Path of the Law* provides a mature, polished expression of his understanding of law. Four closely related ideas convey this concept, which I will call Holmesian positivism.⁷

First, Holmes' prediction theory of law:

The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.⁸

Second, his "bad-man" perspective on law:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.⁹

Third, his opposition to the use of moral terminology in law:

For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether. . . . We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.¹⁰

6. SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 376 (1989).

7. Many scholars who call themselves positivists would not accept Holmes' version of the doctrine. See H.L.A. HART, *THE CONCEPT OF LAW* 39 (1961); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 167-68 (Anders Wedberg trans., 1961); JOSEPH RAZ, *THE AUTHORITY OF LAW* 38-39 (1979).

8. Holmes, *supra* note 2, at 461.

9. *Id.* at 459.

10. *Id.* at 464. Holmes also wrote, "The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense . . . and so to drop into fallacy." *Id.* at 460.

Fourth, his alternative theory of contract:

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.¹¹

This Article examines Holmes' vision of law. It focuses on what Holmes thought law *is*. Part II of the Article, after reviewing some familiar objections to Holmes' definition, asks why this definition spoke of predicting the behavior of courts rather than of other governmental agencies. It argues that Holmes' focus on the judiciary smuggled considerably normativity into his purportedly descriptive definition. A definition that adhered more closely to the "bad man" perspective would not have mentioned courts and would have been more obviously unacceptable.

Part III criticizes Holmes' good-man, bad-man dichotomy. It suggests that this division obscures a reason for law observance that proves decisive much of the time—a sense of reciprocity or mutual obligation that law ought to foster.

Part IV considers the confusing and unsatisfactory debate between positivists and non-positivists concerning the separation of law and morals. It argues that although law and morality are distinct in some respects, our thought and language make complete separation of the "is" and the "ought" impossible.

Part V notes that efforts to define law are unlikely to succeed without an answer to John Noonan's question, "Why do you want to know?" The usual objective of legal theorists in defining law (even of most positivists although not of Oliver Wendell Holmes) has been to address the question of obligation—to identify directives presumptively entitled to obedience.

Part VI takes this theoretical perspective as its starting point, offering a definition of law that is exactly the opposite of Holmes': Law consists of those societal settlements that a good person should regard as authoritative. After examining some of the circumstances bearing on the normative issue that this definition emphasizes and begs, this Part explains why no theoretical definition of law can be any good.

Following Part VI's detour to explore a different definition of law, Part VII returns to Holmes' essay, examining his proposal to purge moral terminology from the law and his alternative theory of contracts.

11. *Id.* at 462.

This Part argues that Holmes inverted ordinary language for no evident reason, harming rather than enhancing the law's ability to accomplish its ends. A conclusion then reminds readers of the remarkable influence of Holmes' destructive essay.

In addition to its definition of law, *The Path of the Law* offers Holmes' views about how law has developed and how it should. Other writers marking the essay's centennial have claimed that Holmes' discussion of law's development is in tension with his "bad man" concept of law and that his essay offers "conflicting perspectives" on law.¹² A few writers have even maintained that *The Path of the Law* follows a "descent-ascent structure," moving from a "deflationary" to an "elevated" account of law,¹³ and that it progresses from cynicism to idealism to romanticism.¹⁴ Oddly, the writers who most revere Holmes appear to be the ones most insistent on "the lack of consistency in his thought."¹⁵ Although this Article examines Holmes' view of law's past and future only in passing, the claim that *The Path of the Law* is internally inconsistent and that the concept of law examined in this Article is contradicted by other portions of the essay merits some comment.¹⁶

The language that best supports a romantic reading of *The Path of the Law* does come in its final sentences: "The remoter and more general aspects of the law are those that give it universal interest. It is through them that you . . . connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."¹⁷ Two-thirds of the very short (average five-

12. See, e.g., William W. Fisher III, *Interpreting Holmes*, 110 HARV. L. REV. 1010, 1111 (1997).

13. Thomas C. Grey, *Plotting The Path of the Law*, 63 BROOK. L. REV. 19, 28-29 (1997).

14. Richard D. Parker, *The Mind of Darkness*, 110 HARV. L. REV. 1033, 1033 (1997).

15. See, e.g., Richard A. Posner, *Foreword: Holmes*, 63 BROOK. L. REV. 7, 16 (1997).

16. In my view, because Holmes was indifferent to the flourishing or happiness of all members of society, he should not be regarded as a utilitarian or a pragmatist. Holmes was, however, a consequentialist. He emphasized law's consequences and the possibility that ancient laws no longer served their purposes primarily because he believed that winners in the struggle for dominance should accomplish their objectives without self-delusion and waste. David Luban presents a portion of the relevant evidence in David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1553-54 (1997).

Even if one were to view Holmes as a utilitarian or pragmatist, however, he could have regarded law as an exercise of power or of sovereignty without the slightest contradiction. Holmes' view of law as power, or as the prediction of judicial decisions from a bad man's perspective, would not have precluded him from arguing that the content of law should be shaped by utilitarian objectives. How law functions is one issue, and what it should say is another. The struggle to discover conflict and tension in *The Path of the Law* reveals how determined some of Holmes' admirers are to avoid the darker implications of his thought.

17. Holmes, *supra* note 2, at 478.

page) commentaries on *The Path of the Law* in the *Harvard Law Review's* centenary issue salute this peroration.¹⁸

The audience's eyes might have widened, however, as Holmes delivered his Emersonian words. Far from offering echoes of the infinite and a hint of the universal law, *The Path of the Law* had insisted that a legal "decision can do no more than embody the preference of a given body in a given time and place."¹⁹

An attempt to see Holmes' conclusion as more than contradictory or empty rhetoric, however, can be successful. One need only recognize Holmes as the Nietzschean that many of his writings reveal—a figure who not only saw Darwinian struggle as the order of the universe but also *venerated* power, conflict, violence, death, and survival. Holmes, for example, proclaimed the message of war "divine,"²⁰ and he repeatedly described "uneconomic" acts like a daredevil's fatal plunge over Niagara Falls as "a perfect expression of the male contribution to our common stock of morality" and as "kindling and feeding the ideal spark without which life is not worth living."²¹ Even if a decision can do no more than embody the preference of a given body in a given time and place, a sufficiently Olympian observer of the struggles of human beings (and insects) may catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law. People who view Holmes as a romantic tend to overlook what he romanticized.²²

18. See Fisher, *supra* note 12, at 1010; Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1016 (1997); Martha Minow, *The Path as Prologue*, 110 HARV. L. REV. 1023, 1024 (1997); Sheldon M. Novick, *Holmes's Path, Holmes's Goal*, 110 HARV. L. REV. 1028, 1030 (1997); Parker, *supra* note 14, at 1037; G. Edward White, *Investing in Holmes at the Millennium*, 110 HARV. L. REV. 1049, 1052-53 (1997); see also David J. Seipp, *Holmes's Path*, 77 B.U. L. REV. 515, 523 (1997); Catharine Pierce Wells, *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, 63 BROOK. L. REV. 59, 61 (1997).

19. Holmes, *supra* note 2, at 466.

20. Oliver Wendell Holmes, *The Soldier's Faith: An Address Delivered on Memorial Day, May 30, 1895, at a Meeting Called by the Graduating Class of Harvard University*, in *THE ESSENTIAL HOLMES*, *supra* note 5, at 87, 91.

21. Oliver Wendell Holmes, *Remarks at a Tavern Club Dinner for Rudolph C. Lehmann*, Nov. 24, 1896, in 3 *THE COLLECTED WORKS OF JUSTICE HOLMES* 516-17 (Sheldon M. Novick ed., 1995).

22. See Letter from Oliver Wendell Holmes to Harold Laski, June 1, 1927, in 2 *HOLMES-LASKI LETTERS* 948, 948 (Mark D. Howe ed., 1953) ("I do accept 'a rough equation' between isness and oughtness."); Letter from Oliver Wendell Holmes to Morris Cohen, Jan. 30, 1921, in Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 27 (1948) ("I do in a sense worship the inevitable."); MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS* 46 n.41 (1963) (Holmes' acknowledgement in a letter to James Bryce on Sept. 17, 1919 that he came "devilish near to believing that might makes right."). David Luban observes, "[T]he 'hint of the universal law' that Holmes speaks of . . . turns out to be an appreciation of how savage life really is." Luban, *supra* note 16, at 1558.

Nearly all of the statements that Holmes' admirers treat as proof of his idealism, romanticism, utilitarianism, and moral vision prove compatible on examination with his Nietzschean world view, yet the attempted reconciliation does not work in the other direction. Holmes' darker statements are rarely subject to rosy interpretations; they are unmistakably what they appear to be. Unless Holmes was the thorough-going Nietzschean, social Darwinist, and Thrasymachian²³ that his speeches and letters depict, he was indeed incoherent.²⁴

23. The reference is to Thrasymachus, who contended in a dialogue with Socrates, "Justice is nothing else than the interest of the stronger." PLATO'S THE REPUBLIC 19 (B. Jowett trans.) (Vintage Books, undated).

24. Holmes enthusiast Robert Gordon writes:

Take the "bad man" and the "prediction theory." This can't possibly be a theory that law has no moral content. "The law is the witness and external deposit of our moral life," Holmes says in *The Path*, and elsewhere makes it clear that the law of any age is saturated with "prevalent moral and political theories" as well as "[t]he felt necessities of the time."

Gordon, *supra* note 18, at 1015 (citing OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark D. Howe ed., 1963) (1881); Holmes, *supra* note 2, at 459). Of course, one can recognize that moral sentiments shape law (and who could deny it?) while at the same time regarding these sentiments as matters of personal taste or as claptrap. Shortly after the passage of *The Path of the Law* that Gordon notes, Holmes observes that government officials may fail to enact legislation because "the community would rise in rebellion." Holmes, *supra* note 2, at 460. He comments, "[T]his gives some plausibility to the proposition that law, if not a part of morality, is limited by it," but he promptly rejects the idea. The limits of public tolerance are "drawn from the habits of a particular people at a particular time," and Holmes in fact "once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer." *Id.*; see also Letter from Oliver Wendell Holmes to Alice Stopford Green, Feb. 7, 1909 (quoted in Sheldon M. Novick, *Justice Holmes's Philosophy*, 70 WASH. U. L.Q. 703, 721 (1992)) (describing morals as a "contrivance of man to take himself seriously"); Letter from Oliver Wendell Holmes to Harold Laski, Apr. 13, 1929, in *THE ESSENTIAL HOLMES*, *supra* note 5, at 113 ("What damned fools people are who believe things. . . . All 'isms' seem to me silly . . ."); Letter from Oliver Wendell Holmes to Harold Laski, Sept. 15, 1916, in 1 HOLMES-LASKI LETTERS, *supra* note 22, at 21 ("All my life I have sneered at the natural rights of man.").

Thomas Grey maintains that Holmes' declaration, "[I]f my fellow citizens want to go to Hell I will help them," is an "example of Holmes using hyperbole to produce paradox." As one item of proof, Grey notes Holmes' statement in *The Path of the Law* that "[t]he practice of [the law], in spite of popular jests, tends to make good citizens and good men." Grey, *supra* note 13, at 32 & n.54 (quoting 1 HOLMES-LASKI LETTERS, *supra* note 22, at 249; Holmes, *supra* note 2, at 459). This statement is in fact a favorite of writers who see Holmes as contradictory but insist that Jeckyll-Holmes prevailed over Hyde-Holmes.

Grey, however, knows better. He observed in an earlier article that Holmes' speeches on ceremonial occasions never described law "as a force for good . . . whether as the bulwark of liberty, the refuge of the oppressed, the source of order and stability, or the guarantor of prosperity. Their focus is on the intrinsic joys . . . of the lawyer's work." Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 851 (1989) (citing as an example

Holmes' statement, "I say . . . that a man may live greatly in the law as elsewhere; that there as well as elsewhere he may wreak himself upon life, may drink the bitter cup of heroism, may wear his heart out after the unattainable."). For Holmes, the practice of law made good men only in the Nietzschean sense that it made men passionate.

Even David Luban, whose perception of Holmes is very close to mine, attempts halfheartedly to resuscitate Holmes at the end of a centenary essay on *The Path of the Law*. Luban recites the same declaration that Grey does about how the practice of law produces good men, observing that this statement comes "just one paragraph after [Holmes] has introduced the bad man." Luban notes, "The contrast must be intentional. The bad man always treats business as business, and Holmes . . . seems to think that lawyers are different." Luban, *supra* note 16, at 1582.

But Luban knows better too. Earlier in the same essay, describing Holmes as a "vitalist," he observed, "[W]hat is noteworthy is that he gives us no hint of what a lawyer's ideal might consist in, beyond having ideals." *Id.* at 1561. Luban also noted:

[E]specially in his official eulogies . . . for recently deceased Massachusetts lawyers, Holmes adds the unconsoling consolations of stoical devotion to duty, devoid of sentiment and harboring no illusions about higher meaning in lawyers' work. . . . Here is a typical Holmes finale . . . : "We are here—a few men in a room, unhelped, simply stopping for a moment to look the greatest of all facts in the face, to honor the dead, and then like soldiers to go back to the front and fight until we follow our brothers."

By this time Holmes's listeners could surely guess how he would eulogize them But Holmes was not done: "Both of those whom we commemorate were fighting men and so helped to teach us how to do our fighting—helped us to remember that when war has begun any cause is good, that life is war, and that the part of man in it is to be strong."

Id. at 1548-49 (quoting Oliver Wendell Holmes, *Edward Avery and Erastus Worthington*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 102, 104 (Mark D. Howe ed., 1962)). Luban observes, "Holmes jerks away even the consoling fiction that lawyers pursue causes they believe right: 'When war has begun any cause is good, [and] life is war.'" *Id.*

Some scholars offer even less evidence to support their idealized depictions of *The Path of the Law* at its centennial. Compare Wells, *supra* note 18, at 83 ("The pragmatic insistence on the primacy of individual perception, the relevance of viewpoint, and the good faith practice of listening as a precondition of knowledge are powerful incentives for respecting—perhaps loving—one's neighbors. For this reason, Holmes's framework is one that may promote a wholesome and moral life.") with Oliver Wendell Holmes, *The Gas Stokers' Strike*, 7 AM. L. REV. 582 (1873) ("[I]n the last resort a man rightly prefers his own interest to that of his neighbors.") and HOLMES, *THE COMMON LAW*, *supra*, at 38 ("It seems clear that the *ultima ratio* . . . is force, and that at the bottom of all private relations, however tempered by sympathy and all the social feelings is a justifiable self-preference.") and Oliver Wendell Holmes, *Speech at a Dinner Given to Justice Holmes by the Bar Association of Boston on March 7, 1990*, in *THE ESSENTIAL HOLMES*, *supra* note 5, at 79 ("I think 'Whatsoever thy hand findeth to do, do it with thy might' infinitely more important than the vain attempt to love thy neighbor as thyself.") and FRANCIS B. BIDDLE, *JUSTICE HOLMES, NATURAL LAW, AND THE SUPREME COURT* 7 (1961) (quoting Holmes' statement that "lov[ing] thy neighbor as thyself" is "the test of the meddling missionary") and Letter from Oliver Wendell Holmes to Lewis Einstein, Dec. 19, 1910, in *THE HOLMES-EINSTEIN LETTERS* 59, 59 (James Bishop Peabody ed., 1964) ("[T]he condition of

One strategy for shielding Holmes (partially) from the kinds of criticisms this Article offers is to portray his thought as rich, complex, and contradictory. Another is to declare that he simply did not mean what he said.²⁵ The thoughtful and impressive commentary by David Dolinko in this issue generally takes this tack.²⁶

Dolinko argues that reading Holmes' work in a "deadly literal" fashion reveals such "obvious" mistakes and "glaring errors" that Holmes probably did not make them.²⁷ According to Dolinko, responding to what Holmes actually argued in the work his enthusiasts call "the single most important essay ever written by an American on the law" is like shooting fish in a barrel; that task is much too easy.²⁸ A more charitable hypothesis is that Holmes' predictive theory of law and his advocacy of the bad-man perspective were "strategies for undermining the misleading picture of law" offered by Dean C.C. Langdell and other late-nineteenth-century thinkers.²⁹ Dolinko concludes: "Of course [Holmes'] strategies themselves make use of one-sided, exaggerated claims about law that are easy to ridicule."³⁰ Nevertheless, when compared to the ubiquitous bogeyman of American law, Dean Langdell, Holmes looks great. "[T]he prediction/bad-man theory can be seen as a heuristic device to get Holmes's audience to think of law as an activity rather than as a set of rules."³¹

others . . . certainly is beyond our power. Whence the futility of the command to love one's brother as oneself.").

That many of Holmes' admirers now grasp at passing phrases, turn a deaf ear to much of his message, treat the central tenets of his jurisprudence as rhetorical gimmicks, and attribute views to him that he certainly would have mocked may be a sign that his influence is beginning to fade. Nevertheless, the mythical Holmes, who Grant Gilmore maintained was "concocted principally by Harold Laski and Felix Frankfurter about the time of World War I," was always more popular than the man whom Gilmore described as "savage, harsh and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 48-49 (1977). Although Gilmore, as Holmes' authorized biographer, had control of Holmes' papers from 1967 until his death in 1982, and although Gilmore apparently did considerable research on his subject, he published very little about Holmes beyond this passage. See Robert M. Mennel & Christine L. Compston, *Introduction to HOLMES & FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934*, at xxxviii-xli (Robert M. Mennel & Christine L. Compston eds., 1996).

25. See, e.g., Gordon, *supra* note 18, at 1015 ("The 'bad man' turns out to be one of Uncle Alec's practical jokes—a deliberate provocation, a device to shock the audience out of complacency and into an enquiring state of mind.").

26. David Dolinko, *Alschuler's Path*, 49 FLA. L. REV. 421 (1997).

27. *Id.* at 423-24.

28. *Id.*

29. *Id.* at 427.

30. *Id.*

31. *Id.* at 428. Dolinko takes the idea that law should be viewed as an activity rather than

Langdell, a distinctive target, may have been the only person in the history of legal thought to have declared “substantial justice” and the “interests of the parties” irrelevant to the resolution of a legal issue.³² He was not, however, the “legal theologian” that Holmes depicted.³³ Langdell’s thought manifested American law’s inward and inductive turn during the final third of the nineteenth century and its abandonment of the concept of natural justice that had contributed to the law’s vitality in the early part of the century.³⁴ Langdell and Holmes thus had much in common,³⁵ and the fact that Langdell’s vision of law was consider-

a set of rules from Richard Posner, who takes it from Robin West. Yet Langdell surely realized that law was an activity in the sense that judges, lawyers, and “legal scientists” had work to do. Holmes, moreover, surely realized that law was also a set of rules. I wish that Dolinko, Posner, and West would speak prose.

32. C.C. LANGDELL, *A SUMMARY OF THE LAW OF CONTRACTS* 20-21 (2d ed. 1880) (presenting Langdell’s infamous analysis of “the mailbox rule”).

33. Holmes called Langdell a “legal theologian” in an unsigned review of Langdell’s *A Summary of the Law of Contracts*, 14 AM. L. REV. 233, 234 (1880). The review is reprinted in Touster, *supra* note 5, at 709-10 app. 1.

34. See Robert W. Gordon, *Legal Education and Practice: The Case for (and Against) Harvard*, 93 MICH. L. REV. 1231, 1240 (1995) (“[Langdellians] agreed that [legal] science should be a positive science based on discoverable, observable facts In part this commitment to facts expressed an attitude—a ‘masculine’ readiness to look brute reality unblinkingly in the face, to throw off the crutches of religion, moral sentiment, and the stale formulae of conventional professional wisdom, and to embark upon the strenuous, tough-minded, intellectual path.”); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2086 (1995) (“It is ironic that Langdell was associated with a viewpoint that in an important way was the opposite of what he was trying to argue.”); Stephen A. Siegel, *Joel Bishop’s Orthodoxy*, 13 LAW & HIST. REV. 215, 253 (1995) (“Langdell and his followers . . . were among the first Western jurists to adopt a wholly secular approach to law.”).

35. Here is a passage of the introduction to Langdell’s contracts casebook, the passage most derided as proof of Langdell’s “conceptualism”:

Law, considered as a science, consists of certain principles or doctrines. . . . Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. . . . Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, . . . being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.

C.C. LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS* vi-vii (1871).

And here is a passage of Holmes’ *The Path of the Law*:

ably stiffer than Holmes' does not alibi Holmes'. Moreover, treating Holmesian jurisprudence as a rhetorical "strategy" or "heuristic device" seems to leave it short of greatness and, in addition, to neglect the extent to which smart people still take it seriously.³⁶

The most apt comparison may not be between Langdell and Holmes; refighting their battles may resemble taking sides between the Bolsheviks and Mensheviks. A better comparison may be between Langdell and Holmes on the one hand and Marshall and Lincoln on the other—between American law before and after Darwin.³⁷ It may even be between Holmes and the classical natural lawyers described in James Gordley's fine commentary in this issue.³⁸ The skepticism of twentieth-

The means of the study are a body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years . . . In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. . . Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system. . .

The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time.

Holmes, *supra* note 2, at 457-58.

36. Modern lawyers cherish the myth that law once was found but now is made. Once upon a time, the myth declares, some old fogies led by Mayor Langdell ran the town. Wearing black hats and occasionally wrapping themselves in black robes, they persuaded themselves and everybody else that they had mystic powers and could deduce the entire corpus of law from the brow of Zeus. One day, however, a hero rode into town. "Law should serve the real-life needs of ordinary people," he declared. "Arise from centuries of superstition and consider at last what law *does*!" People heard the hero's cry and, one by one, joined his crusade. The most devoted of his disciples were the rough-and-ready hands at Realist Ranch. Together they vanquished the fogies and all lived happily ever after. Do you ask the hero's name? Why, ma'am, his name was Holmes.

This story, although false or greatly exaggerated in almost every respect, is so inspiring that ever since the prophets Frankfurter and Llewellyn told it (Saint Peter Frankfurter and Saint Paul Llewellyn, if I remember correctly), every challenge to the story has been regarded as heresy. Moreover, a heretic who challenges only part of the story always can be answered by reciting the rest of it. Thus, keepers of the faith place any apparent failings of the hero in context by recalling how bad the fogies were. Onè group of legal theologians (often called the Nuanced Ones) note that the hero needed all the weapons at his command to confound the evildoers, that he often spoke in code, and that, rather than concentrate on the literal meaning of his words, one should pursue his deeper wisdom and master his larger purposes. (Sorry, I cannot resist a heuristic device or two myself.)

37. For a start to this comparative work, see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

38. James Gordley, *When Paths Diverge: A Response to Albert Alschuler on Oliver Wendell Holmes*, 49 FLA. L. REV. 441 (1997). I have only a few difficulties with Gordley's commentary. First, unlike Gordley, I believe that Holmes was a social Darwinist and

century lawyers runs so deep, however, that few of them have considered either possibility.

II. POSITIVISM AND PREDICTION IN PERSPECTIVE

Holmesian positivism says in essence that the law is what the law does. Sanctions are what count. I may declare, for example, that a teapot is my property. From a Holmesian perspective, I mean that if Professor Weyrauch takes the teapot, I can go to court, and the court will order Professor Weyrauch to return the teapot to me. Moreover, the court will send the sheriff after Professor Weyrauch if he does not comply. Were I unable to secure a judicial order confirming my right to the teapot, I could not sensibly say that the teapot was my property. When I call a teapot my property (and so make a statement of law), I am simply predicting what the courts will do in fact.³⁹ The introductory paragraph of *The Path of the Law* concluded, "The object of our study . . . is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."⁴⁰

Taking Holmesian positivism seriously (or trying to) reveals its limitations and its artificiality. Viewing a series of issues from the positivist perspective shows that Holmes' definition of law corresponds neither to the ordinary meaning of this word in our language nor to the meaning of law in our lives.

A. *When the Predictor and the Predicted Are Identical*

One defect of Holmes' definition of law has been noted more frequently than any other; from a judge's perspective, predicting legal rulings is mind-boggling. A judge might say to herself, "I would like to decide this case according to law. What is the law?" Justice Holmes might then appear before the judge in a dream and advise her that law is a prediction of what she will do in fact. A judge who began to say to

Thrasymachian who recognized no basis for political or social action other than self-interest. Indeed, the evidence recited in Gordley's commentary itself seems to me to support this conclusion. Second, I regret that Gordley regarded some of the ethical views I voice in this Article as possibly incompatible with his; I must have mumbled. The question Gordley asks at the end of his commentary has an easy answer: Yes, I would be delighted if my work, along with his, helped to "take us within hailing distance of the classic natural lawyers." See *id.* at 462.

39. See HOLMES, *THE COMMON LAW*, *supra* note 24, at 170 ("When we say that a man owns a thing, we affirm directly that he has the benefit of the consequences attached to a certain group of facts, and, by implication, that the facts are true of him.").

40. Holmes, *supra* note 2, at 457.

herself, "To decide this case according to law I must predict what I will do," could only hope to wake up.⁴¹

Although predicting judicial decisions is a small part of the work of judges,⁴² it is a substantial part of the work of lawyers engaged in advising clients. Nevertheless, some scholars have doubted that the prediction of future decisions appropriately describes law even from a lawyer's vantage point. Henry M. Hart once wrote that he could not understand how the "bad man" view helped lawyers except "to make [them] more effective counsellors of evil."⁴³ Hart wondered whether the world would be tolerable "if statutes all were drawn, or cases all decided, on the assumption that all lawyers will do this and all clients will want them to."⁴⁴

B. *Do Dissenting Opinions Always Contradict the Law?*

When Holmes addressed questions of law in his dissenting opinions, he had little occasion to predict what the courts would do in fact. His fellow Justices had done it already. If law is simply a matter of what the courts do in fact, dissenting opinions always have the law wrong.⁴⁵

41. Richard Posner contends that this "circularity" objection has force only for the judges of a jurisdiction's highest court; other judges can resolve questions of law by predicting what the judges of a higher court will do. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 224 (1990).

None of the opinions by Judge Posner that I have read, however, has noted which Justices of the Supreme Court are likely to cast swing votes on an issue and then offered an assessment of how John Paul Stevens or Sandra Day O'Connor is likely to vote in fact. If Judge Posner had taken this predictive tack, I would have been far less happy about paying part of his salary than I have been. For further discussion of the objection that Holmes' definition is useless to a judge, see *infra* text accompanying notes 66-71.

42. Judges in some sorts of cases do consider how other judges would resolve legal issues. A federal judge in a diversity case, for example, is expected to decide substantive state law issues as state court judges would decide them. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

43. Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 932 (1951).

44. *Id.* Some recent writings on client counseling have gone beyond Hart and have challenged even the assumption that a lawyer's principal goal should be to advance the client's interests. See, e.g., William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469, 470 (1990).

When lawyers predict judicial rulings, they frequently view law, not as what they predict, but as one *predictor* of what the courts will do. Law, moreover, is not the only predictor. "Don't chew gum when we go to court," a lawyer may tell a client, fearing that gum-chewing, like prior decisions, will predict what a judge will do.

45. That is, unless the dissenting judges are "predicting" either a change of heart on the part of the majority or a reversal of its ruling by an outside agency. See RONALD DWORKIN,

C. *Other Games*

If law is a prediction of what the courts will do in fact, perhaps the rules of baseball are a prediction of what the umpire will do in fact. However, like H.L.A. Hart, I doubt that they are.⁴⁶ I have seen people play baseball without an umpire, and they have followed the rules.

D. *Kangaroo Courts, Nazi Courts, and Massachusetts Courts: Which Courts Count?*

Holmes' definition of law purported to be descriptive, but much normativity lies buried within the word "court." Power alone does not make a court. Holmes recognized this fact when he observed that some of a sovereign's commands are enforced by agencies other than courts.⁴⁷ Yet Holmes never explained what defines a court or what distinguishes courts from other power-wielding agencies inside and outside government.

I might arm a group of law students and, with them, capture Micanopy, Florida. One wonders whether, from a Holmesian perspective, my decrees and judgments would qualify as law until the Governor of Florida mobilized the National Guard and recaptured the town. Some positivists doubtless would carry their concept of law to the point of calling my decrees "the law of Micanopy for the moment." Their next step—only slightly less plausible—might be to treat the commands of a bank robber as law.⁴⁸

A bank robber, however, is not a court. I probably am not a court even when cooperative students have captured a village hall and declared me Exalted Justice of the Provisional Revolutionary Tribunal of Micanopy. A lynch mob is not a court, and Saddam Hussein is not a court.⁴⁹ The word "court" is not self-defining. If this word implies a

TAKING RIGHTS SERIOUSLY 211-12 (1977); Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302, 1304-05 (1991) (book review) (observing that Holmes-like definitions of law leave no room for the common practice of criticizing judicial behavior for its departure from law).

46. See HART, *supra* note 7, at 40; see also H.L.A. Hart, *Scandinavian Realism*, 1959 CAMBRIDGE L.J. 233, 237 (stating that a declaration that "[t]his is a valid rule of law" is a statement of recognition, not of prediction); Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967).

47. See *Holmes on Austin's Theory of Law*, in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 36, 37 (Harry C. Shriver ed., 1936).

48. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958) ("Law surely is not the gunman situation writ large. . . ."); DWORKIN, *supra* note 45, at 19 ("We make an important distinction between law and even the general orders of a gangster.").

49. In 1934, following the "Roehm purge" in which a number of Nazis opposed to Adolf

role, a procedure, a task, a measure of acceptance, or some other indication of legitimacy, Holmes plainly left the work of defining courts (and so of defining law) undone.⁵⁰ The uncompleted work, moreover, was apparently a project of normative analysis rather than of power-focused description.⁵¹

E. *Is Unenforced Law an Oxymoron?*

Positivism denies that unenforced law counts as law. This position may seem plausible in some situations. In other situations, however, it departs sharply from ordinary understanding.

Consider initially Section 18-6-501 of the Colorado Criminal Code, which provides, "Any sexual intercourse by a married person other than with that person's spouse is adultery, which is prohibited."⁵² The statute does not say that adultery is a felony, a misdemeanor, or a petty offense. It imposes no penalty for the act. When a person commits adultery in Colorado, the best prediction of what the courts will do in fact is "nothing." From a positivist perspective, adultery is therefore lawful in Colorado. The law's actions speak louder than its words, and Colorado's purported prohibition of adultery is double-talk.

Similarly, a sign on the highway may proclaim that the speed limit is 55 miles per hour. Every motorist may know, however, that patrol officers do not arrest people for speeding unless they exceed the posted limit by at least five miles per hour. When a motorist drives at 58 miles

Hitler were killed, Hitler announced that during the time of the purge "the supreme court of the German people . . . consisted of myself." See Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 650 (1958) (citing N.Y. TIMES, July 14, 1934, at 5 (late city ed.)).

50. Lawyers have advanced a variety of process-focused concepts of law. Daniel Webster thought it a matter of definition that law would hear before it condemned, proceed upon inquiry, and render judgment only after trial. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518, 581 (1819) (argument of D. Webster for plaintiffs in error, Mar. 10, 1818), reprinted in 5 DANIEL WEBSTER, THE WORKS OF DANIEL WEBSTER 487-88 (1851). Lon Fuller maintained that a system of law must respect a number of principles designed to ensure a fair opportunity to comply with its rules. See LON L. FULLER, THE MORALITY OF LAW 33-94 (rev. ed. 1969) (described *infra* in text accompanying note 112). Webster, Fuller, and others have identified some of the circumstances that bear on the recognition of law, but I believe that the process of law-recognition is too complex to be reduced to a definition or a formula. See *infra* text accompanying notes 137-81.

51. Positivists before and after Holmes—John Austin and H.L.A. Hart in particular—have denied that normative analysis is needed. They have contended that a sociological concept (a socially identified "sovereign" or a socially identified "rule of recognition") can do the work that Holmes failed to do. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 13, 133 (1954); HART, *supra* note 7, at 89-93.

52. COLO. REV. STAT. ANN. § 18-6-501 (West 1990).

per hour on the highway, the best prediction of what the courts will do in fact is “nothing.” From a Holmesian perspective, the speed limit—the *real* speed limit—is 60, not 55.⁵³

When governmental officials—the state legislature or the state highway patrol—unequivocally decide to refrain from sanctioning a violation of a formal legal prohibition, one may cheer the realism of Holmes’ prediction theory. Years before Roscoe Pound suggested a distinction between the “law in the books” and the “law in action,”⁵⁴ Holmes emphasized that formal law can differ from the law that affects people’s lives.⁵⁵ Taking Holmesian positivism seriously becomes difficult, however, when nonenforcement is ad hoc and the product of ignorance, limited economic resources, whim, mercy, kindness, or corruption.

For example, someone who murders a solitary homeless person in an alley at 3:00 a.m. is likely to get away with it. The best prediction of what the courts will do in fact is “nothing.” Presumably the killing is unlawful, yet if Holmes’ definition of law were taken literally, it would not be. Perhaps the law in this case is not what a court is likely to do in fact but what a court *would* do if public officials knew all the relevant facts, were honest and principled, and had sufficient resources to capture the killer and prove her guilt.⁵⁶ Such an elaboration of Holmes’ concept of law, however, departs from the bad-man perspective. A bad man does not care why legal pronouncements are unenforced so long as they are. Corruption and a generalized policy of nonenforcement are all the same to him.

In defining law, even the simple case of undetected crime may require one to focus on ideals (the ideal of general applicability, for example) rather than on the deployment of power in fact. In ordinary usage, an official’s ignorance of the facts does not alter the law. Bribing a judge might justify a prediction of what the judge’s court would do, but an occasional act of bribery does not amend the law. A prosecutor

53. The real speed limit for people not suspected of selling drugs, that is. *See* *Whren v. United States*, 517 U.S. 806 (1996).

54. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

55. Pronouncing even consistently unenforced law a nullity, however, goes too far. The Colorado statute concerning adultery may not have affected the incidence of this behavior, but some people do drive at 55 miles per hour. I have passed them on the highway myself.

Of course neither Pound nor Holmes invented the distinction between theory and practice; each simply emphasized this distinction in an arresting way.

56. Holmes may have had something like this refinement of his definition in mind when he said that predictions can be “generalized and reduced to a system” and when he referred to “this body of dogma or systematized prediction which we call the law.” Holmes, *supra* note 2, at 459. Hans Kelsen insisted that the relevant concept was “theoretical” prediction, not “practical” prediction. *See* KELSEN, *supra* note 7, at 167-68.

might decline to prosecute a repentant first-offender, but an occasional act of grace does not change the law. Perhaps, despite constitutional provisions to the contrary, a sufficiently generalized revision of law enforcement policy can be seen as amending the law. Even if it can, however, someone who wants to know the law and nothing else must know more than what the courts will do in fact.⁵⁷

F. *How Many Divisions Has the Superior Court?*

The divergence of Holmes' definition of law from any ordinary meaning of the term becomes clearer when one asks why Holmesian positivism focuses on predicting the behavior of courts and not the behavior of other governmental agencies. Some observers apparently have viewed Holmes' reference to the courts as incidental. Officialdom frequently uses courts to direct the use of coercive power, but from the bad man's perspective, power alone determines the meaning of the law. Richard Posner, for example, paraphrases Holmes without speaking of courts:

The state has coercive power, and people want to know how to keep out of the way of that power. So they go to lawyers for advice. All they want to know is whether the power of the state will come down on them if they engage in a particular course of action. . . . Law is . . . simply a prediction of how state power will be deployed in particular circumstances.⁵⁸

Similarly, Karl Llewellyn declared that "the focus, the center of law, is not merely what the judge does, . . . but what *any* state official does, officially."⁵⁹ Holmes' focus on the judiciary, however, was far from incidental; it was a critical part of his positivism.

Before Holmes wrote *The Path of the Law*, he and a like-minded scholar, John Chipman Gray,⁶⁰ had published separate papers criticizing

57. David Luban observes: "There is no hint in *Path* or elsewhere that Holmes understood that risk-benefit analysis by a genuinely bad man 'who cares only for the material consequences' would consider enforcement probabilities, as well as enforcement outcomes. If Holmes had appreciated this point, I suspect he would have seen straightaway that the Bad Man Thesis is preposterous . . ." Luban, *supra* note 16, at 1571.

58. POSNER, *supra* note 41, at 233.

59. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 456 (1930); see also JOHNSON, *supra* note 4, at 141 ("[T]o Holmes . . . the law . . . was basically a statement about when the state would use its overwhelming force to coerce its citizens.").

60. Gray, a member of the Harvard Law School faculty, was also a founder of one of Boston's most prominent law firms, Ropes and Gray. In 1866, Gray and his partner, John Ropes,

what was then the most prominent positivist definition of law. John Austin had defined law as the general command of a sovereign,⁶¹ and Holmes and Gray contended that Austin's definition was too broad.⁶² Members of the legal profession did not concern themselves with all of a sovereign's commands. Lawyers considered only those commands that came to the courts for enforcement, and law was a matter of what courts, not other agencies, did. Well before Holmes published *The Path of the Law*, he wrote, "Courts . . . give rise to lawyers, whose only concern is with such rules as the courts enforce. Rules not enforced by them, although equally imperative, are the study of no profession."⁶³ Gray objected that if law included every command of the sovereign, it would encompass even "colonel-made and postmaster-made law."⁶⁴

invited Holmes to contribute to a new law journal that they would edit, *The American Law Review*. See G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 95, 103, 113-14 (1993). Their invitation marked the beginning of Holmes' career as a legal scholar. Holmes became co-editor of *The American Law Review* in 1870. See *id.* at 103. When, in 1905, Justice Holmes reluctantly agreed to hire a law secretary each year, Gray selected Holmes' secretaries. See SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 275, 282 (1989). Following Gray's death in 1915, Felix Frankfurter assumed this responsibility. WHITE, *supra*, at 313.

61. See 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 177 (Robert Campbell ed., 5th ed. 1875). According to Austin, a command required a threat of sanction, and a sovereign was a person or group that was habitually obeyed without habitually obeying anyone or anything else. See AUSTIN, *supra* note 51, at 13-15, 193-94.

62. Indeed, Holmes regarded Austin's definition as both too broad and too narrow. It was too narrow because it failed to include customary international law. Holmes maintained that courts enforce the provisions of customary international law despite the fact that these provisions do not embody the commands of an identifiable sovereign. *Holmes on Austin's Theory of Law*, *supra* note 47, at 37-38. But see *In re Western Maid*, 257 U.S. 419, 432 (1922) (Holmes, J.) ("When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.").

63. *Holmes on Austin's Theory of Law*, *supra* note 47, at 37; see also Oliver Wendell Holmes, Austin and the Nature of Law, in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS, *supra* note 47, at 21, 24-25 ("A precedent may not be followed; a statute may be emptied of its contents by construction. . . . [I]t is not the will of the sovereign that makes lawyers' law, even when that is its source, but what a body of subjects, namely, the judges, by whom it is enforced say is his will.").

64. John C. Gray, *Some Definitions and Questions in Jurisprudence*, 6 HARV. L. REV. 21, 25 (1892); see also *id.* at 24 ("The power . . . of a man to have the aid of the courts in carrying out his wishes on any subject constitutes a legal right of that man, and the sum of such powers constitutes his legal rights."). Gray later declared that "rules for conduct which the courts do not apply are not Law; that the fact that the courts apply rules is what makes them Law; that there is no mysterious entity 'The Law' apart from these rules; and that the judges are rather the creators than the discoverers of the Law." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 115-16 (1909).

Whatever the situation may have been in Holmes' time, the legal profession today concerns itself with more than the law enforced by courts.⁶⁵ No one doubts that administrative law—even "colonel-made and postmaster-made law"—qualifies as law.

Thomas Grey argues, however, that the objection that the Holmesian definition of law is useless to a judge overlooks the definition's original purpose. This definition, Grey says, was not intended to be of use to a judge.⁶⁶ Holmes never meant his predictive positivism to be "a general scientific or conceptual truth about the nature of law."⁶⁷ Holmes defined law for practicing lawyers alone.

Grey's argument is intriguing but unpersuasive. If Holmes initially sought to describe law only from the perspective of practicing lawyers, he later forgot that goal. Holmes used positivist, predictive language too often and in too many contexts for anyone to doubt that he viewed this language as expressing "a conceptual truth about the nature of law." When, for example, Justice Oliver Wendell Holmes wrote for the Supreme Court, "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts,"⁶⁸ he was not simply demarking the concern of a specialized profession. Similarly, when Holmes defined "right" as "the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it,"⁶⁹ he was describing what a right meant to someone who imagined that she had one.⁷⁰ Holmes' bad man was not a lawyer; he was a consumer of law. Holmes' definition of law was for him.⁷¹

65. Robert Gordon argues that Holmes' claim concerning the legal profession's narrow focus on courts was untrue even when Holmes made it. See Robert W. Gordon, *Holmes' Common Law as Social and Legal Science*, 10 HOFSTRA L. REV. 719, 734-35 n.112 (1982).

66. Grey, *supra* note 24, at 828.

67. *Id.*

68. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

69. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

70. Similarly, when Holmes said, "[A]ll law means I will kill you if necessary to make you conform to my requirements," Letter from Oliver Wendell Holmes to Harold J. Laski, Sept. 7, 1916, in 1 HOLMES-LASKI LETTERS 16 (Mark D. Howe ed., 1953), he was not speaking only of what law meant to practicing lawyers.

71. If Holmes initially meant his definition of law as a description of the concerns of lawyers rather than a more ambitious statement of what law is and how it works, he probably had forgotten this objective by the time of *The Path of the Law*, as he certainly did later. The opening lines of Holmes' essay support Grey's thesis: "When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court." Holmes, *supra* note 2, at 457. The remainder of Holmes' essay, however—including his articulation of the alternative theory of contract and his proposal to banish moral terminology from the law—reveals that he was attempting to develop "a conceptual truth about the nature of law."

Holmes wrote:

[I]f we take the view of our friend the bad man we shall find that he does not care two straws for . . . axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.⁷²

Holmes should have visited with the bad man longer. Contrary to what this scoundrel told Holmes, he did not care two straws for what the Massachusetts or English courts would do in fact. He cared what the *sheriff* would do. The sheriff, not the courts, had the guns, the padlocks, the battering rams, the handcuffs, the nightsticks, the dogs, the deputies, and the jails. What the courts did might predict what the sheriff would do, just as axioms and deductions might predict what the courts would do. In the end, however, the bad man was concerned about the sheriff. If, after the courts had spoken, the sheriff would take a bribe and permit the bad man to flee to Rio, the bad man would laugh at the axioms, the deductions, the courts of Massachusetts, and the courts of England all together.

A better positivist than Holmes therefore would have defined law differently: "The prophecies of what the sheriff will do in fact, and nothing more pretentious, are what I mean by the law." If Holmes had framed his "power is everything" thesis in this more precise language, however, no one would have proclaimed *The Path of the Law* "the best article-length work on law ever written."⁷³ Law plainly is not what the

The influence and reputation of *The Path of the Law* certainly rest on the perception that the essay says something about law in general. The work has not attracted high praise merely because Holmes recognized that lawyers, in their professional lives, are concerned with predicting the decisions of courts.

72. Holmes, *supra* note 2, at 460-61. Well before *The Path of the Law*, Rudolf von Jhering had advanced the "bad man" metaphor. See RUDOLF VON JHERING, LAW AS A MEANS TO AN END 33 (Isaac Husik trans., 1913) (originally published in two volumes as *Der Zweck im Recht*, 1877 and 1883). Jhering articulated an evolutionary, Darwinian view of law much like Holmes', and Holmes in fact read Jhering's work while writing *The Common Law*. Mathias Reimann calls it remarkable that Holmes failed to acknowledge the similarity of the two men's ideas. See Mathias W. Reimann, *Holmes's Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. 72, 101-05 (Robert W. Gordon ed., 1992). Holmes, however, was "notorious for not giving credit to his intellectual forbears and for being petty in his insistence on the primacy of his own contributions." Touster, *supra* note 5, at 687; see also WHITE, *supra* note 60, at 113 ("Holmes was loath to acknowledge influences on and antecedents of his work . . .").

73. See *supra* text accompanying note 5 (quoting Richard Posner).

sheriff will do in fact, for the sheriff may act unlawfully. For example, the sheriff may disregard the orders of a court.

Courts may act unlawfully too. Just as law-abiding sheriffs take their law from the courts, law-abiding judges take theirs from the statute books and from other authoritative sources (at least when these sources speak clearly). Once one recognizes that courts can act unlawfully, the Holmesian definition of law collapses. Whatever law may or may not be, it is not a prediction of what the courts will do in fact.

Holmes did not win his quarrel with John Austin. No one maintains today that law includes only rules enforced by courts and not rules enforced by other agencies. Nevertheless, Holmes' focus on the courts proved fortuitous. "It is emphatically the province and duty of the judicial department to say what the law is," wrote Chief Justice John Marshall in *Marbury v. Madison*.⁷⁴ This normative proposition lent color to Holmes' purportedly hard-edged, descriptive definition. Holmes' concept of law assumed a norm of American government and indeed of all civilized governments: Even the bad man looked to the courts to settle his rights. Less incorrigible than Holmes portrayed him, this shadowy figure submitted his disputes, not to whoever had the guns, but to decisionmakers characterized by their disinterest and their willingness to hear both sides. The implicit normativity of Holmes' court-based definition made its defects less evident than they would have been if Holmes had spoken directly of sheriffs, generals, or other officials with real firepower.⁷⁵

III. THREE MOTIVES FOR LAW OBSERVANCE: WHY THE BAD MAN, MOTHER TERESA, AND THE REST OF US SOMETIMES OBEY THE LAW

A. *Material Consequences and the Vaguer Sanctions of Conscience*

The bad man has crept into the collective unconscious of the legal profession. When I doze off, I may awaken to catch him pushing my pen.

74. 5 U.S. (1 Cranch) 137, 177 (1803).

75. In Alexander Hamilton's classic language, "[T]he judiciary, from the nature of its functions, will always be the least dangerous [branch of government]. . . . [It] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST NO. 78 (Alexander Hamilton).

In 1986, for example, the Supreme Court held in *Batson v. Kentucky*⁷⁶ that prosecutors may not use peremptory challenges to exclude prospective jurors from criminal cases on the basis of race.⁷⁷ When I discussed this case with my law school class, my students and I devoted most of an hour to listing the loopholes of *Batson*. The Supreme Court's requirement that a defendant establish a "prima facie case" of discrimination apparently could not be satisfied by showing that a prosecutor had excluded one or two African-Americans from a jury.⁷⁸ In practice, the prosecutor might therefore have one or two "free shots"—enough to eliminate all prospective minority-race jurors in many cases. Moreover, if a defendant succeeded in establishing a prima facie case of discrimination, the prosecutor could rebut it by offering racially neutral explanations for her challenges.⁷⁹ Such explanations might not be difficult to discover. For example, one prospective juror might have failed to maintain eye contact with the prosecutor,⁸⁰ and another might have stared at the prosecutor too long.⁸¹ These ways of evading the apparent holding of *Batson* were only the beginning.⁸² By the end of the class, the conclusion seemed plain: any prosecutor worth her salt could drive a truck through the loopholes of the Supreme Court's decision. *Batson* was like the Colorado statute forbidding adultery; it was mostly posturing and pretence. Perhaps the Supreme Court was more interested in ending the appearance of racial discrimination than in changing the reality.

Following the class, a student who worked in a prosecutor's office said to me, "You may be correct, but that decision has changed things a lot downtown." I then recognized that Oliver Wendell Holmes had tricked me again. I had forgotten what law was about. Montesquieu called his classic eighteenth century study *The Spirit of the Laws*,⁸³ yet somewhere along the way I had ingested Holmes' *The Spirit of the Loophole*.⁸⁴ I had viewed the *Batson* decision from the perspective of

76. 476 U.S. 79 (1986).

77. See *id.* at 89.

78. See *id.* at 97.

79. See *id.*

80. See *United States v. Cartledge*, 808 F.2d 1064, 1071 (5th Cir. 1987) (holding this explanation adequate).

81. See *United States v. Mathews*, 803 F.2d 325, 331-32 (7th Cir. 1986) (holding this explanation adequate), *rev'd on other grounds*, 485 U.S. 58 (1988).

82. For a list of other ways to evade *Batson*, see Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 163-211 (1989).

83. MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cobler et al. trans., 1989).

84. David Dolinko objects to this reference to *The Spirit of the Loophole*. He writes that it is unfair "to insinuate that Holmes actually wanted people in general to view law as a 'bad

a bad man—a prosecutor who wanted to get away with whatever he could. If my student could be believed, many prosecutors were not so incorrigible.⁸⁵

Before *Batson*, the Supreme Court told prosecutors, “As long as you believe that African-Americans are less likely than other prospective jurors to favor your position in a case, you may challenge them.”⁸⁶ Many prosecutors did. In *Batson*, however, the Supreme Court declared that challenging African-Americans for tactical reasons was unconstitutional, and many prosecutors stopped. The difference between the pre-*Batson* regime and the post-*Batson* regime was substantial, yet I had missed it because I had stared too hard at the decision’s teeth. The “bad man” prosecutor and the loopholes of cases like *Batson* plainly merit attention, but the “good person” prosecutor merits notice as well. The Holmesian perspective cuts off half the action. It endeavors to make law less than it is.⁸⁷

man’ would.” Dolinko, *supra* note 26, at 429. Viewing law as a bad man would, however, is what Holmes proposed: “If you want to know the law and nothing else, you must look at it as a bad man. . . .” Holmes, *supra* note 2, at 459.

To be sure, Holmes did not contend that anyone should *be* a bad man or should *act* as a bad man would. To reiterate, my argument is that “the bad man has crept into the collective unconscious of the legal profession.” Once people internalize the “bad man” perspective, the assumption that easily evaded law is *not* law becomes routine. Because that is what Holmes’ definition says, it encourages the view that taking advantage of loopholes is unproblematic and that nearly everyone will do so. Yet I do not suggest that Holmes or anyone else *wanted* people to behave in this fashion. Virtuous people do many things that the law—the *real* law—does not require.

To put the matter another way, although Holmes did not offer his definition of law for the purpose of telling his audience how to behave, one who internalizes this definition may not make the nice distinction between law as coercive power and law as a source of moral obligation. She may instead assume that the two things are coextensive.

85. I suspect that the O.J. Simpson case, which indicated that race sometimes can be a more powerful predictor of jurors’ views than many lawyers had realized, and the Supreme Court’s near evisceration of *Batson* in *Purkett v. Elem*, 514 U.S. 765 (1995) (allowing a judge to accept the explanation “mustaches and . . . beards look suspicious to me”), have made trial lawyers less willing to take *Batson* seriously than they were in the years immediately following the decision. See LAWRENCE SCHILLER & JAMES WILLWERTH, *AMERICAN TRAGEDY: THE UNCENSORED STORY OF THE SIMPSON DEFENSE* 193-94, 258-60 (1996) (describing Johnnie Cochran’s discriminatory jury selection in the O.J. Simpson criminal trial).

86. See *Swain v. Alabama*, 380 U.S. 202 (1965).

87. H.L.A. Hart wrote of Holmes’ “bad man” view:

Why should not law be equally if not more concerned with the ‘puzzled man’ or ‘ignorant man’ who is willing to do what is required, if only he can be told what it is? Or with the ‘man who wishes to arrange his affairs’ if only he can be told how to do it? It is of course very important, if we are to understand the law, to see how the courts administer it when they come to apply its sanctions. But this should

B. *Do Good People Need Law?*

Holmes had gone wrong at the first turn, and I had followed him. Contrary to Holmes' apparent suggestion, good people do look to law. In assessing the meaning and function of law, they cannot be set aside on the ground that they "find [their] reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."⁸⁸

Ironically, the belief that human beings possess an innate moral sense is the defining characteristic of the natural lawyer, not of the skeptic or the positivist. John Locke maintained that people would recognize core obligations to others even in a state of nature (a state without positive law).⁸⁹ For an astonishing moment, Holmes appeared to join him. A true skeptic might better have announced that moral sentiments are not innate; "the vaguer sanctions of conscience" are themselves the product of social institutions like law. Rather than focusing exclusively on sanctions, this skeptic might have painted a picture of the ways in which law shapes preferences, attitudes, and "the vaguer sanctions of conscience."

Indeed, Holmes had outdone Locke. Few, if any, natural lawyers have maintained that good people do not need law. These theorists often have noted explicitly that people who do not need sanctions need guidance.

Neither Socrates nor Aristotle nor Cicero nor Aquinas nor Locke nor Blackstone contended that natural law was all law; the realm of natural

not lead us to think that all there is to understand is what happens in courts.

HART, *supra* note 7, at 39.

In *Sherman v. Community Consol. Sch. Dist.*, 980 F.2d 437 (7th Cir. 1992), Richard Sherman, an elementary school student, and his father challenged an Illinois statute that declared, "The Pledge of Allegiance shall be recited each school day by pupils in [public] elementary educational institutions." The defendants argued that Illinois had not made recitation of the Pledge compulsory; they noted that the statute provided no penalty for noncompliance. *See id.* at 439. Judge Easterbrook's opinion for the Seventh Circuit replied:

Many people obey laws just because they represent the will of the majority expressed through democratic forms. . . . They revere law for the sake of civility, harmony, and consideration of others. . . . How ironic if Richard Sherman's first experience with law were to teach him that the legal sanction expresses the full meaning of a rule. Then the lesson of the Pledge of Allegiance would be cynicism rather than patriotism. Looking at the law through the lens of penalties is useful for many purposes, but not when the task is to teach civic virtue.

Id. at 442.

88. Holmes, *supra* note 2, at 469.

89. *See* JOHN LOCKE, *Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 370-71 (1960).

law was limited to a few core principles.⁹⁰ The distinction between acts that were *mala in se* (or contrary to natural law) and acts that were merely *mala prohibita* (appropriately forbidden although not inherently wrongful) was central to their jurisprudence. Within the realm of things *mala prohibita*, even a saint could not find the reasons for her conduct solely in the sanctions of conscience. Mother Teresa might not stop at an intersection if the authorities had posted no stop sign there.

Moreover, reasonably good people may need guidance even in marking the boundaries of things *mala in se*. Although John Locke maintained that people would sense obligations to others in a state of nature, he also contended that self-interest would lead them to underestimate the extent of their responsibilities: "Men being partial to themselves, Passion and Revenge is very apt to carry them too far, and with too much heat, in their own Cases."⁹¹ Only the formation of a civil society could satisfy the need for "a known and indifferent Judge."⁹² Similarly, Blackstone maintained that human beings could discover the law of nature by considering what principles would "tend the most effectually to [their] own substantial happiness."⁹³ Blackstone added, however,

[I]f our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, . . . we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.⁹⁴

Perhaps Holmes recognized in a backhanded way that law can work partly through mechanisms other than force. His depiction of the "good man" included a baffling phrase: the good man "finds his reasons for conduct, *whether inside the law or outside of it*, in the vaguer sanctions of conscience."⁹⁵ Perhaps Holmes' reference to the possibility of acting "inside the law" while still finding the reasons for one's conduct in "the vaguer sanctions of conscience" was meant to acknowledge that, at least

90. See Alschuler, *supra* note 37, at 24-27.

91. LOCKE, *supra* note 89, at 369.

92. *Id.*

93. 1 WILLIAM BLACKSTONE, COMMENTARIES *41.

94. *Id.* Blackstone advanced this argument to explain why divine revelation as well as natural law was needed. People who do not take their guidance from Scripture, however, may take it from Locke's known and indifferent judge. Following the *Batson* decision, some prosecutors in Chicago did.

95. Holmes, *supra* note 2, at 459 (emphasis added).

in the realm of things *mala prohibita*, no one can rely on conscience alone. People who find their reasons for conduct both “inside the law” and “in the vaguer sanctions of conscience” may be people who would comply with legal requirements even if disobedience would incur no penalty. If, however, this interpretation of Holmes’ cryptic phrase is accurate, one wonders why these good people should be disregarded and why “[i]f you want to know the law and nothing else, you must look at it as a bad man.” To the extent that law influences people apart from its threat of sanction, you must ask about more than the threat of sanction if you want to know the law.

C. *The Excluded Middle: Law Observance and Mutuality*

Whether or not Holmes acknowledged in a phrase that law operates partly through noncoercive mechanisms, his good-man, bad-man typology missed a central reason for obedience to law. Few people are motivated entirely by concern for others or entirely by a fear of sanctions. These mid-range consumers are likely to be affected by both of these motivations and by a third as well—a sense of reciprocity or of mutual obligation. People who are neither totally selfless nor totally selfish may willingly assume a share of the burdens of living in society, but they may balk at assuming a larger than proportional share. The willingness of these consumers to comply with law may depend in part on whether they sense that benefits and burdens are equitably shared.⁹⁶

Somewhere in the psychology of most of us may be an implicit “return-for-giving” or “giving-receiving” ratio. Some people—a

96. See LAWRENCE G. BECKER, RECIPROCITY 260-62 (1986); FRANK A. COWELL, CHEATING THE GOVERNMENT: THE ECONOMICS OF EVASION 108 (1990) (“[A] person’s propensity to dodge taxes seems to be strongly affected by the number of other people who are already doing the same.”); J.C. Baldry, *Tax Evasion Is Not a Gamble: A Report on Two Experiments*, 22 ECON. LETTERS 333 (1986) (presenting empirical evidence that one’s willingness to evade taxes depends on moral considerations independent of expected economic return); Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 334 (1980) (reporting a positive correlation between one’s disposition to obey the law and the belief that respected peers obey it); Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J. ECON. ORG. 390 (1994) (observing that although most “[e]conomic analysis of corruption postulates that rational actors compare the benefits and expected costs to behaving corruptly,” the perceived likelihood of corrupt behavior by others influences their conduct as well); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 354 (1997) (“[A] person’s beliefs about whether other persons in her situation are paying their taxes plays a much more significant role in her decision to comply than does the burden of the tax or her perception of the expected punishment. . . .”); HERBERT MORRIS, *Persons and Punishment*, in ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 31, 33-34 (1976).

few—may give regardless of whether they receive anything in return. These people are called saints. Others may take and never give. These people are called Holmesian bad men. Most consumers of law, however, are neither saints nor bad men. Some may give two, three, or ten times what they receive, yet even these people are likely to cease giving when they sense that the “return-for-giving” ratio has grown too far out of line. Law is one of the social institutions that helps to keep the “return-for-giving” ratio in balance.⁹⁷

Several years ago, Adam moved to a neighborhood in Chicago in which parking regulations were seldom enforced. He frequently found his way and his vision blocked by unlawfully parked, unticketed cars. As Adam grew accustomed to the realities of life in this neighborhood, his own parking behavior changed.

Adam still does not park in traffic lanes, in other people’s driveways, beside fire hydrants, or in spaces reserved for the handicapped. When the only available parking space is too close to an intersection, however, Adam takes it. Adam was a nicer person and a better citizen when he lived in Micanopy, Florida.

Adam was also happier. When he could improve other people’s lives (or, more modestly, facilitate their driving and parking) with confidence that most of them would do the same for him, he felt better about himself and his community.

The lack of parking-law enforcement in Adam’s Chicago neighborhood has affected his behavior—but Adam is not a Holmesian bad man. Even today, he does not get away with all that he can. Moreover, he would desist from his lawlessness (he really would) if his neighbors would desist from theirs. When Adam must endure the burdens of life among the Holmesians, however, he thinks himself a fool not to capture a portion of the benefits. Neither “the vaguer sanctions of conscience” nor the predicted “material consequences” of parking violations have induced law observance by Adam’s neighbors, and Adam is unwilling to do much more than his share. He would prefer a regime of mutual cooperation to one of “every person for himself,” but he prefers a regime of every person for himself to one of “cooperation for suckers.”⁹⁸ In Adam’s neighborhood in Chicago, the bonds of the social compact have weakened.

97. The concept of “return-for-giving” differs from tit-for-tat exchange in a marketplace. Most notably, the psychological measure of equivalence may be effort as much as (or more than) wealth.

98. Game theorists will recognize elements of “the prisoner’s dilemma.” As the next paragraph emphasizes, however, some of Adam’s motivations lie outside the game.

Adam does not carry the claim (or rationalization) that "everybody does it" as far as he might. Although he may take the parking space near the crosswalk, he does not take the one marked handicapped even if many of his neighbors would. Were Adam a bad man concerned only for the "material consequences" of disobeying the law, however, the handicapped would have one less space. Sometimes the "vaguer sanctions of conscience" triumph over both Adam's economic calculation of self-interest and his concern that he may be doing more than his share.⁹⁹

And sometimes only the threatened material consequences of non-compliance induce Adam to obey the law. Neither concern for others nor a more conditional sense of reciprocity could induce Adam to slow to 25 miles per hour while driving on a major highway past a gas station and a general store. Adam nevertheless does slow in Wilson, Wyoming, because he has been told that this "speed trap" finances its government largely through high-priced traffic tickets issued to nonresidents.

While the vaguer sanctions of conscience may keep Adam from parking in handicapped zones, threatened material consequences may keep him from speeding in Wilson, Wyoming. With many issues of law observance, however, Adam's conduct is influenced by the conduct of others. Sanctions matter to Adam less because his own principal reason for law observance is the fear of punishment than because sanctions applied to others reinforce his sense of reciprocity and mutual obligation. Adam, like other *pretty* good people, does need law. A definition of law that leaves out what law means to Adam is woefully incomplete.

IV. THE SEPARATION OF LAW AND MORALS

Holmes announced in *The Path of the Law* that one of his goals was to "dispel a confusion between morality and law."¹⁰⁰ He added, "When I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law."¹⁰¹ Legal positivists from John Austin to Holmes (and Holmes' alter ego, John Gray) to Hans Kelsen to H.L.A. Hart have, despite their differences, treated the separation of law and morals as the defining

99. A sense of reciprocity of a different sort may influence Adam's decision not to take the space marked handicapped, for Adam can envision himself as a handicapped person in need of that space. Empathy and "the vaguer sanctions of conscience" may themselves draw upon psychological concepts of reciprocity.

100. Holmes, *supra* note 2, at 459.

101. *Id.*

characteristic of positivism.¹⁰² Lon Fuller and other critics of positivism have accepted the positivists' formulation of the issue, although they have maintained that law and morals cannot be separated.¹⁰³

An observer of the debate between positivists and their critics might ask, "What are these people talking about?" Or even, "Is everybody who writes about jurisprudence crazy?" In one clear sense, everyone separates law from morality, and in another clear sense, no one does.

The nonpositivists recognize that law can be unjust—that law and morality are sufficiently distinct to permit the moral criticism of law.¹⁰⁴ The critics of positivism also recognize that morality may require actions not demanded by law (for example, caring for infirm parents or showing up for a date). Moreover, the positivists—Holmes included—have recognized that moral sentiments influence the content of law. *The Path of the Law* observed, "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."¹⁰⁵ In one sense, then, law plainly is separate from morals, and in another sense it plainly is not. Moral sentiments shape law, but law can be immoral.

Someone unable to identify the issue in dispute might become even more baffled upon reading the Hart-Fuller debate, an event considered a notable scholarly watershed when it happened forty years ago. In this debate, H.L.A. Hart, a positivist, conceded the accuracy of most arguments advanced by the positivists' critics. Hart responded, however, that none of the critics' arguments established a "fused identity between law as it is and as it ought to be."¹⁰⁶ Yet Hart did not identify anyone

102. See, e.g., AUSTIN, *supra* note 51, at 184 (note); H.L.A. Hart, *The Separation of Law and Morals*, 71 HARV. L. REV. 593, 593-94, 599, 601 (1958); KELSEN, *supra* note 7, at 15; cf. Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139, 140 (1982) ("Positivism denies what natural law theory asserts: namely, a necessary connection between law and morality.").

103. See, e.g., Lon L. Fuller, *Human Purpose and Natural Law*, 3 NAT. L.F. 68, 75 (1958); John T. Noonan, Book Review, 7 NAT. L.F. 169, 172 (1962). See generally LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 1-42 (1940).

104. Even the declaration of classical natural lawyers that "an unjust law is no law at all," AUGUSTINE, *ON FREE CHOICE OF THE WILL* [DE LIBRO ARBITRIO] 8 (Thomas Williams trans., 1993), is compatible with this view of the nonpositivists' position. The natural-law declaration uses the word "law" twice in inconsistent senses. First, when one calls something an unjust law, one does call it a law. This initial usage refers to positive law. Then, when one says that an unjust law is "not law," one means that the positive law may not be law in the sense that people should regard it as obligatory. The natural lawyer thus asserts the same separation between positive law and moral law (or morality) that the positivists assert when they purport to criticize him.

105. Holmes, *supra* note 2, at 459; see also HART, *supra* note 7, at 7-8.

106. Hart, *supra* note 102, at 615. The quoted language appears in response to one criticism of positivism. Hart's response to most other criticisms, however, was in substance the same.

who had contended that law was always moral—that positive law had fused into just what it ought to be in every jurisdiction from China to Nigeria to Iraq.

Insisting on the “inner morality” of even “bad laws,”¹⁰⁷ Lon Fuller’s entry in the debate did not dispel the confusion.¹⁰⁸ Fuller’s position was, however, less odd and less dramatic than his insistence on the inseparability of law and morality might have made it seem. Fuller’s principal argument was that one often cannot describe positive law—cannot make statements about what the law *is*—without invoking moral norms.¹⁰⁹

The norms to which Fuller referred concerned both the law’s procedural prerequisites and its substantive content. When Fuller spoke of the “inner morality of law,” he referred mainly to procedure. For example, a Nazi accused of war crimes might protest that he had complied with the applicable law of the German state. One familiar response to this sort of defense invokes natural law: A higher law than that of the Third Reich warned the defendant of the wrongfulness of his conduct. Fuller suggested, however, that before turning to natural law, one should consider more closely the meaning and accuracy of the defendant’s assertion of compliance with positive law.

Perhaps the defendant’s conduct, although contrary to a published German statute, was ratified after the fact by the Führer himself. The settled rule in Germany was that even secret orders of the Führer could countermand statutory law.¹¹⁰ If a war crimes tribunal were to ask how the German courts would have viewed the accused war criminal’s conduct, the answer would be plain; once the Führer had ratified this conduct, the German courts would have treated it as lawful.

That the Führer had approved the defendant’s conduct after the fact, however, would have no bearing on the defendant’s argument. The defendant maintained that punishing him for a lawful act would be *unjust*, and the word “law” can be sensibly employed in this sort of moral discourse only if the word has a meaning that makes it relevant to this discourse. In the context of the argument advanced by the accused war criminal, a dictator’s secret, post-hoc order could not qualify as law. This order might have supplied the rule of decision for

107. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632 (1958).

108. Remarkably, Fuller began his paper by praising Hart for clarifying the issue. *Id.* at 630-33.

109. See FULLER, *supra* note 50, at 97; see also ADOLPH REINACH, *THE APRIORI FOUNDATIONS OF THE CIVIL LAW* 7 (John F. Crosby trans., 1934) (“The structure of positive law can only become intelligible through the structure of the non-positive sphere of law.”).

110. See Fuller, *supra* note 107, at 652.

the German courts, but even if a war-crimes tribunal were to accept conformity to German law as a defense, it could properly remain indifferent to a rule of decision supplied only by the Führer's post-hoc ratification.¹¹¹

Rather than yield to the rule of decision of the Nazi courts, a war-crimes tribunal could have defined "German law" in a way that served its purpose—to impose only just punishment. Fuller attempted to generalize this insight, maintaining that a system of law requires rules announced in advance, consistent with one another, understandable, capable of being obeyed, and adhered to by the agencies charged with administering them.¹¹² A rule with these procedural characteristics might be immoral, but if it met the requisites of "law," one might speak paradoxically of the "inner morality" of even immoral law.

Fuller also noted that statements concerning the content of law typically depend upon moral norms. A nice illustration was provided by James Herget, who asked whether the Constitution empowers Congress

111. That the Führer's order was retroactive makes this case easy. After-the-fact approval had no bearing on the moral quality of the defendant's act at the time it occurred. (Almost every legal system, however, including our own, does treat some retroactive pronouncements as "law.") One can imagine substantially more difficult issues of law-identification: The defendant's act contravened a published statute, but the Führer had secretly authorized and commanded this act in advance. Or a new rule authorizing the defendant's act had openly amended prior law, but the defendant was unaware of the new rule. Or the published "law" upon which the defendant relied was vague and open-ended although unquestionably valid from the perspective of the German government. For example: "Every citizen is obliged to cooperate in eradicating the enemies of National Socialism." Or, "The will of the Führer is the law of the Volk." Or, "Once, no punishment without law. Now, no crime without punishment." Or, "That person will be punished who commits an act which the law declares to be punishable or which deserves punishment according to the fundamental principle of a penal statute or the healthy sentiment of the Volk." See Markus D. Dubber, *John H. Langbein, C.J.A. Mittermaier, and the Jury: An Historical Note on Transplanting Procedural Justice* (1992) (manuscript at 21, 23) (quoting Nazi statutes, administrative guidelines, and unofficial mottos).

112. See FULLER, *supra* note 50, at 33-94. Fuller did not maintain that every departure from the listed principles rendered a government lawless, only that sufficiently serious deficiencies in one or more categories would do so. My own view is that the characteristics listed by Fuller bear on the recognition of law but are not definitive.

To some degree, Fuller's views echoed Blackstone's. Differentiating between natural law and positive or "municipal" law, Blackstone defined municipal law as "a rule of civil conduct prescribed by the supreme power in a state." 1 WILLIAM BLACKSTONE, COMMENTARIES *46 (emphasis eliminated). He declared that, to be a "rule," a directive must be general. "[A] particular act of the legislature to confiscate the goods of Titius . . . does not enter into the idea of a municipal law." *Id.* at *44. In addition, a rule cannot be simply "advice or counsel." It must bind "the unwilling." *Id.* The rule also must be "notified to the people who are to obey." *Id.* at *45. "Lastly, acts of parliament that are impossible to be performed are of no validity. . . ." *Id.* at *91.

to establish an air force.¹¹³ Almost every lawyer would answer this question yes, and the statement that the Constitution empowers Congress to establish an air force is a statement of positive law. The text most directly relevant to this question, however, says only that Congress may “raise and support Armies,” “provide and maintain a Navy,” and “make Rules for the Government and Regulation of the land and naval Forces.”¹¹⁴ If any of the framers of the Constitution of 1789 anticipated an air force, they knew better than to say so.

Every good law student knows the sort of opinion that a pacifist judge might write to deny Congress the power to establish an air force: “The Constitution provides only for an army and navy, and the function of the judicial branch is to apply the Constitution as it is written, not to keep the Constitution in tune with the times. The Framers of the Constitution specified procedures for amending the document, and the original meaning of the words ‘land and naval forces’ is plain. Even if this court were to take a ‘nonoriginalist’ perspective, moreover, our decision would be no different. We would hesitate to authorize any action that might make our nation more willing to go to war. We believe that Congressional powers that can lead to the killing of innocent people should not be extended beyond their terms.”

A good law student also knows that such a judicial opinion would be inappropriate. It would be inappropriate, not because the moral views of its author are plainly unjustified, but because this author would have failed to follow the law. To conclude that this judge disregarded the law, however, one must invoke conventions and understandings that are as much normative as linguistic: “like cases should be treated alike” and “an authoritative text should be interpreted in light of the evident objectives of its framers.” These normative-interpretive conventions are strong enough to require judges to supply words not included in the constitutional text. They are strong enough to permit the law student to conclude with confidence, “The Constitution allows Congress to establish an air force. Even a judge who believes that maintaining an air force is immoral must, if true to his oath of office, recognize the air force’s constitutionality. I have been to law school and I can make the argument to the contrary, but the argument to the contrary is pettifoggery.”

The normative conventions governing judicial interpretation of the Constitution may differ from equally strong conventions governing the interpretation of other laws.¹¹⁵ Someone who sabotaged the engine of

113. See JAMES HERGET, *AMERICAN JURISPRUDENCE 1870-1970: A HISTORY* 256 (1990).

114. U.S. CONST. art. I, § 8, cls. 12, 13, 14.

115. My use of the term “normative-interpretive convention” implies a social understanding

an Air Force bomber probably would not violate an eighteenth-century penal statute forbidding interference with operations of the "land or naval forces." In the construction of penal statutes, norms of clear warning, of limiting official discretion, and of giving the benefit of the doubt to defendants in matters of law and fact often appear stronger than those of treating like cases alike and of implementing the general purposes of law-givers.¹¹⁶

Normative conventions can direct answers to questions of positive law even when the words are not there, and they also can direct a judge to disregard the literal meaning of words that are there.¹¹⁷ Blackstone illustrated both sorts of interpretation with cases that he drew from Pufendorf.¹¹⁸ A statute forbidding anyone to "lay hands" on a priest forbade injuring a priest with a weapon as well as with one's hands, and a law of Bologna declaring "that whoever drew blood in the streets should be punished" did "not . . . extend to the surgeon who opened the vein of a person that fell down in the street with a fit."¹¹⁹ Blackstone observed that "the most universal and effectual way of discovering the true meaning of a law . . . is by considering the reason and spirit of it, or the cause which moved the legislator to enact it."¹²⁰ He added, "[T]here should be somewhere a power . . . of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed."¹²¹ Just as normative conventions may require courts to disregard words that are there and to supply words that are not, they shape and dictate the judicial interpretation of words that bear more than one meaning.

subject to negotiation and change. It does not imply that such an understanding is always arbitrary—merely a matter of convention and neither right nor wrong.

116. Blackstone wrote, "Penal statutes must be construed strictly. Thus [a] statute . . . having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy [and so should be subject to execution], the judges conceived that this did not extend to him that should steal but one *horse*." 1 WILLIAM BLACKSTONE, COMMENTARIES *88. Consider, however, the case of laying hands on a priest noted in the next paragraph in text.

117. A philosopher might criticize my use of concepts like "literal meaning" and "words that are not there." What makes some meanings "literal" and others "figurative" is unclear; all meanings conveyed by symbols are in some sense figurative. When words convey a meaning that also can be expressed in other words, moreover, those other words always *are* there or, if one prefers, always *are not*. My language does adequately indicate the implicit normativity of most descriptions of positive law, and that is its only purpose.

118. The jurist and historian Samuel von Pufendorf published his *De Jure Naturae et Gentium* in 1672, a century before Blackstone published his *Commentaries*.

119. 1 WILLIAM BLACKSTONE, COMMENTARIES *59, *60 (spelling and punctuation modernized).

120. *Id.* at *61 (spelling and punctuation modernized).

121. *Id.* (spelling and punctuation modernized).

Perhaps even more clearly than interpretations of authoritative texts, common law rules and customs cannot be discovered empirically but must be constructed normatively. For example, if a buyer were to assert a custom that sellers must always pay for delivery, a seller might respond, "No, the custom is different. It is that sellers always pay for delivery except when it will occur in Micanopy, Florida, between 3:00 and 4:00 p.m. on March 28, 1999." Neither the buyer's description of the relevant custom nor the seller's would be inconsistent with prior transactions or decisions. The buyer might respond to the seller's claim, "But the custom you describe would be unprincipled and crazy." This response would carry the dialogue from description to normativity. Every pattern of decisions is subject to multiple descriptions (including the odd sort of description advanced by the Micanopy seller). The choice among these competing descriptions requires normative judgment.¹²²

The assertion that normative interpretation is unavoidable does not mean that law and morality are coextensive. One can recognize that the Constitution authorizes military forces—even an air force—while criticizing the Constitution for doing so. The process of interpretation, however, remains normative at least in part. The tangle of is and ought cannot be entirely unravelled. The analysis of the interpretive process in which Lon Fuller (and before him Blackstone and Pufendorf) engaged does not exhibit the soft, wishful identification of the "is" and the "ought to be" that positivists have attributed to their critics.¹²³

122. See Richard Craswell, *Do Trade Customs Exist*, in JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW (forthcoming, Jody Krauss & Steven Walt eds., 1997) ("appeals to custom in commercial law often turn out to be appeals to a kind of 'moral reflection' "); NELSON GOODMAN, FACT, FICTION, AND FORECAST 72-83 (4th ed. 1983) (asking how human beings recognize "lawlike" statements).

123. Jeremy Bentham scornfully attributed this fuzzy-mindedness to Blackstone. See Jeremy Bentham, *A Fragment on Government*, in 1 WORKS 221, 287 (John Bowring ed., 1859) (c1. IV, 19th para.). He also wrote, "[I]n the eyes of lawyers—not to speak of their dupes—that is to say, as yet, the generality of non-lawyers—the *is* and the *ought to be* . . . were one and indivisible." Jeremy Bentham, *A Commentary on Humphreys' Real Property Code*, in 5 THE WORKS OF JEREMY BENTHAM 389 (John Bowring ed., 1843). John Austin also spoke of "the prevailing tendency to confound what is with what ought to be law." He declared that this "abuse of language is not merely puerile, it is mischievous." JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 184, 185 (4th ed. 1954); see also Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931).

David Dolinko offers two criticisms of this Part:

First, most of the norms that Professor Alschuler talks about are not "moral" norms in any ordinary sense of "moral." Second, even if they are, the most that has been established is a link between law and *the moral norms this society accepts*, not a link between law and "true" morality. Yet the latter sort of link is what classic

"natural law" positions depend upon.

Dolinko, *supra* note 26, at 435.

Dolinko's second point is correct. This Part considers only the relationship between law and morality, not the nature of morality. It does not attempt to justify the classic natural law position. As Dolinko surmises, I do accept the view that some moral statements describe external reality, and a few footnotes of this Article even offer hints of how an argument for moral realism might be constructed. *See infra* notes 145 & 188. I have not made the case for moral realism here, however, and I do not think it necessary to do so. This Part is as much sociological as it is metaphysical; its argument is that our thought and language often make it impossible to describe law without invoking concepts of what law ought to be. For a thorough and, in my view, persuasive defense of the stronger claim of moral realism, I commend Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, and Michael Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992).

Dolinko's first point, in my view, is less convincing:

(1) Dolinko contends that principles forbidding secret law, internally inconsistent law, and incomprehensible law are simply principles of efficiency. These principles are designed to facilitate the business of governing conduct through rules in the same way that avoiding poisons that induce vomiting facilitates the business of poisoning. Spurning Lon Fuller and embracing H.L.A. Hart, Dolinko contends that these principles do not reflect any "inner morality" of law. *See Dolinko, supra* note 26, at 424 (quoting FULLER, *supra* note 50, at 42).

Consider, however, the relationship between the secrecy of law and the justice or injustice of the law itself. For a tyrant to punish a person for smiling in public would be unjust, yet the punishment of this cheerful person would be worse if the tyrant had kept the law against smiling a secret. Making *any* law available to the people who must comply with it makes this law morally better (or less awful) in a way that avoiding ineffective poisons does not make poisoning morally better (or less awful). Punishing someone for violating a secret law is itself unjust, and the injustice does not depend on the secret law's content.

The secrecy of a law may indeed impede a lawgiver's objective. Whether it does or not, however, someone who is punished for disobeying a law that she had no opportunity to obey is treated unfairly. Indeed, impeding the lawgiver's objective might be desirable; one could consistently cheer the frustration of a lawgiver's objective while booing the injustice of punishing someone for violating an inaccessible law. In short, Lon Fuller's condemnation of secret law does indeed rest on "moral" norms in the ordinary sense," not merely on principles of efficiency in implementing a lawgiver's will.

(2) Dolinko's characterization of even his attempted *reductio ad absurdum* does not seem to me persuasive. He writes:

An auto mechanic who ignores the principles of good craftsmanship appropriate to his occupation—principles like "Always tighten the lug nuts fully after replacing the tires"—would also be open to moral condemnation (when, for example, his customers die because their wheels fall off while they are driving). But this does not make "Tighten the lug nuts fully" into a *moral* principle.

Id. at 436.

In the context Dolinko suggests, however, "tighten the lug nuts" is not just a principle of good craftsmanship. Just as "don't shoot your neighbor" is sometimes the operational equivalent of "don't kill your neighbor," so "tighten the lug nuts" may be the operational equivalent of "don't kill your neighbor" (and of other unquestionably moral propositions, including "do what

you have agreed to do and what you have pocketed someone's money for doing"). When the mechanic's willful or reckless failure to tighten the lug nuts causes death, a judge may lock her up, and when the mechanic's cellmate asks, "What are you in for?" the mechanic may appropriately reply, "Failing to tighten the lug nuts."

Even when principles of good craftsmanship are not the equivalent of "Thou shalt not kill," they often have an ethical foundation and express a worthy ethical principle. James Gordley describes the classic Aristotelian understanding of the close relationship between function and virtue, Gordley, *supra* note 38, at 450, and the legal profession has long declared "competence" (or good craftsmanship) an ethical responsibility of lawyers. See ABA MODEL RULES OF PROFESSIONAL CONDUCT R.1.1 (1996).

(3) Although the Constitution speaks only of Congress' power to establish land and naval forces, it implicitly gives Congress the power to establish an air force. I contend that well understood normative-interpretive conventions justify this description of positive law. As Dolinko observes, I mention two of these conventions: "Like cases should be treated alike," and "An authoritative text should be interpreted in light of the evident objectives of its framers."

Either of these principles combined with the constitutional text might be sufficient to justify the judgment that Congress may establish an air force. I do not understand how Dolinko can know which principle "does all the work." As he observes, it might be possible to write an opinion mentioning only one of these principles, but it also might be possible to write an opinion mentioning only the other. Dolinko concludes that "the framers' objectives" principle does it all, and he says without further elaboration, "[T]hat norm is surely not 'moral' at all." Dolinko, *supra* note 26, at 437.

I think that it is. Whether to adhere to the literal meaning of the Constitution or to advance its framers' larger purposes is a *normative* rather than a purely linguistic question—a question of what *kind* of fidelity a judge owes to the settling power of others. Dolinko recognizes that "doing the right thing" includes "acting in conformity to law." Dolinko, *supra* note 26, at 429. That principle—evidently a moral principle—includes judges. A judge who disregarded the objectives of the framers in order to advance his own pacifist views would merit moral censure, and the principle that "an authoritative text should be interpreted in light of the evident objectives of its framers" is thus a moral as well as a linguistic principle.

The fact that Dolinko and I disagree about how to characterize the "evident objectives" principle (and many others) reveals that separating the "is" from the "ought" (and the "linguistic" from the "moral") is not easy. We lack practice at the task because we usually see no reason to do it. In ordering our experience, we typically speak of all of these things without pausing to notice which is which. We may even combine description and evaluation in a single word: "He gave her a vicious glance." In that sense, our inability to agree on what qualifies as a moral principle may underscore the practical compounding of the "is," "ought," "linguistic," and "moral" that I emphasize in this section.

(4) Although Dolinko denies that the principle of treating like cases alike has any bearing on Congress' power to establish an air force, he does not, and probably could not, deny that this principle influences judicial interpretation in other settings. Yet he also regards this principle as "not 'moral' at all":

One can view the principle as simply one of the "norms of sound practical reasoning"—a norm of rationality, not specifically moral in nature. Moreover, which respects counts as "relevant" will depend on norms independent of the "like cases" principle. If in a given application these supplementary norms are not themselves moral in nature, neither is the "like cases" principle.

V. WHY DEFINE LAW?

An armchair sociologist wishing to describe how Americans use the word "law" might conclude, "Law consists of constitutions, statutes, ordinances, administrative regulations, administrative rulings, and judicial decisions. That's about it." This observer might declare, "Those things published by the West Publishing Company of St. Paul, Minnesota, and nothing more pretentious, are what I mean by the law."

This sage's effort to define law from the ground up might stumble over a few factual scenarios. Do voluntary sentencing guidelines from which a judge may depart without stating any reason qualify as law? When a prosecutor violates a supervising prosecutor's directive not to enter a plea agreement in a robbery case and then is fired, does the supervisor's directive count as law? If so, does the supervisor's directive to be at work by 9:00 a.m. qualify as law as well?

When challenged to answer these questions, the armchair sociologist might respond: "I know what the relevant rules, customs, and practices are, and I understand their consequences. Why does it matter whether

Id. at 435, 437.

Again I disagree. Come with me to visit an isolated tribe, the Wayward, and while there, consider the equality claim of Jotham, eldest son of Uziah.

From our own social perspective, the Wayward system of primogeniture (in which a landowner's estate passes on his death to his eldest son) is unjust. Among its defects is its denial of equality to women. Imagine, however, that the Wayward have consistently adhered to their system of primogeniture in every case except one: when Uziah died, the tribal council awarded his estate, not to Jotham, but to Jotham's younger brother Obed. The council announced no general reform of its system of land tenure in Jotham's case, and it announced no general qualifying principle in the form of, "The father's land shall be given to the eldest son except" The council gave no reason whatever for its action.

Despite the underlying unfairness of the rule of inheritance that Jotham invokes, I would accept his claim that he has been denied equal treatment and treated unjustly. Just as secret law is unfair regardless of what the law may say, the equality principle is independent of the norms that shape it. It is, moreover, a principle of justice, not just a rule of practical reasoning. People denied equal treatment are treated *unfairly*, even if the unfairness consists simply in government's failure to adhere to rules that it applies to everyone else. The deep skepticism of twentieth century lawyers, however, has led them to disparage even this foundational moral principle. *See, e.g.,* POSNER, *supra* note 41, at 42; Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

(5) Some of this section's efforts to demonstrate the interrelationship between the "is" and the "ought" seem to have escaped Dolinko's criticism—for example, the claim that a war crimes tribunal should, on normative grounds, exclude post-hoc ratification by the Führer from its concept of positive German law, and the claim that one cannot avoid normative judgment in choosing among the many factually accurate descriptions of decision-patterns and commercial customs in Micanopy, Florida. Even if Dolinko were correct that "most" of the norms discussed in this section "are not 'moral' norms in any ordinary sense," the unchallenged portions of the section might be sufficient to establish that describing positive law often cannot be done without invoking moral norms.

I call them law or not? If forced to resolve the issue, I will say that none of these things are law simply because there is no consensus that they are. In the absence of such a consensus, musing about the issue seems pointless. Every interpretive community may use the word 'law' as it likes (if it uses the word at all).¹²⁴ I have never heard anyone in America refer to voluntary sentencing guidelines as 'law.' In America, law means constitutions, statutes, ordinances, administrative regulations, administrative rulings, and judicial decisions. That's about it."

John Noonan once wrote that if anyone asks you, "What is law?," your first response should be, "Why do you want to know?"¹²⁵ Efforts to define law from the ground up are likely to seem dissatisfying (and insufficiently "theoretical") because the primary reason for seeking a definition of law (at least among legal theorists) is not to explain how this term is used in everyday discourse. The theorists have devoted their ink (lots of it) to the question because, in their view, the answer matters. They believe that the difference between "law" and "not law" has consequences.

In fact, calling a directive "law" privileges it. Someone who has issued a directive and wants it to be obeyed usually would prefer her audience to treat the directive as though it were "law." A command that qualifies as law usually has a stronger claim to obedience than a command that does not. Law has a different *moral* status than "not law."

Most law-defining theorists have asked explicitly or implicitly, "What commands should one recognize as law and therefore obey (or treat as presumptively worthy of obedience)?" If, however, the principal reason for defining law is to identify an institution whose directives are entitled to obedience most of the time, the positivists seem to have confounded law and morals more than the natural lawyers. Without always recognizing it, these positivists have struggled to get their ought from an is.¹²⁶

124. See, e.g., *Trimble v. Seattle*, 231 U.S. 683, 688 (1914) (Holmes, J.) ("Words express whatever meaning convention has attached to them."). Accord STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980).

125. JOHN NOONAN, *PERSONS AND MASKS OF THE LAW* ix (1976).

126. See Fuller, *supra* note 49, at 632 ("There is . . . no frustration greater than to be confronted by a theory which purports merely to describe, when it not only plainly prescribes, but owes its special prescriptive powers precisely to the fact that it disclaims prescriptive intentions."); *id.* at 656 ("[W]e have an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it.").

The positivists' task is not inherently impossible. In philosophers' language, moral judgments "supervene" upon factual judgments. In other words, moral judgments are always judgments *about* facts. Two factual situations cannot differ from each other only in terms of some moral quality; they must always differ in ways that one might, in principle, describe in nonevaluative terms. Whenever something differs from something else in a moral quality, it must differ in one

Although John Austin, Hans Kelsen, and H.L.A. Hart implicitly or explicitly addressed the question of obligation,¹²⁷ some recent positivist

or more other characteristics as well.

Imagine, then, a moral quality called "entitled to obedience," and imagine that this moral quality supervenes upon one and only one set of facts (or that all situations upon which it supervenes share a common characteristic). A person might define "law" by describing this set of facts (or this characteristic) in nonevaluative language. Such a definition would identify an "is" and an "ought" at the same time. The definition would describe in nonevaluative terms all factual circumstances upon which the moral quality, "entitled to obedience," supervenes. It would call these factual circumstances "law." In theory, a positivist definition of law could therefore address the normative question of obligation.

Now, however, consider a different world, one that the next section of this Article will contend is our own. In this world, any of a very large number of circumstances tends to obligate, and any of a very large number of circumstances tends to excuse obedience (or even to demand disobedience). Imagine, further, that these circumstances can be combined in nearly infinite varieties. Suppose, for example, that the pronouncements of a democratic government have a stronger claim to obedience than the pronouncements of a monarch, that rules that apply to everyone have a stronger claim to obedience than rules that apply to an individual or to a small group, that rules that are usually enforced have a stronger claim to obedience than rules that are rarely enforced, that rules that have been published have a stronger claim to obedience than rules that have not, that rules that deliberately disadvantage people on the basis of race or other accidents of birth have a weaker claim to obedience than rules that do not, and on and on. In this tangled world, no *manageable* definition of law could specify the directives upon which the moral quality, "entitled to obedience," supervenes.

No one in fact has offered a definition of law that purports to resolve comprehensively the question of obligation. Some positivists, however, have undertaken a less ambitious task—specifying circumstances that *presumptively* entitle governmental pronouncements to obedience. At least initially, this task seems too easy. When many circumstances tend to obligate, one can pack as many or as few of them as one likes into a "presumptive" definition, especially if one is willing to depart from conventional understandings of the word "law." For example: "By law, I mean all pronouncements that are intended by the public officials who promulgate them to promote the welfare of society as a whole." "By law, I mean all authorized pronouncements of reasonably democratic governments." "By law, I mean societal rules that have been announced in advance, that are general in form, and that are enforced largely through procedures affording hearings before impartial tribunals." "By law, I mean all governmental rules that have been authorized by written or unwritten constitutions recognized by most members of a society as authoritative." Anyone can list a set of mildly motivating circumstances and call herself a theorist. When one is seeking a presumption and not an answer, being a theorist should be a snap. That so many people have botched the job therefore seems surprising.

127. John Austin at least hinted that the purpose of his definition of law was to address the normative question of obligation. Austin criticized Blackstone's declarations that the laws of God were superior in obligation to other laws and that human laws were invalid if contrary to them. He wrote, "[T]he meaning of this passage of Blackstone, if it has a meaning, seems . . . to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law *is a law*. . . ." JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 185 (Library of Ideas ed., 1954). From Austin's perspective, then, the point of calling a directive "law" was apparently to establish that this directive was "obligatory or binding." Why Austin, who did not in fact believe that all positive law was to be obeyed and who was a religious man himself, quarreled with Blackstone

writers have given up the normative ghost and have advanced what Philip Soper calls "a remarkably counterintuitive claim"¹²⁸—that there is no *prima facie* obligation to obey the law.¹²⁹ Moreover, unlike most other positivist writers, Holmes' goal was not to address the question of obligation. His implicit message was tougher—that the question of obligation was not worth asking. Law was simply an exercise of power so that one could not sensibly ask what commands should be obeyed. Sanctions and only sanctions made law.¹³⁰ To speak of a moral duty to obey was pretence—one more effort of human beings to envision themselves as personal friends of God.¹³¹

concerning the resolution of this issue is unclear. When the commands of God direct one thing and the commands of the king and parliament another, Whom to obey does not seem a disputable issue.

Although Austin apparently concluded that his positivist definition identified obligatory commands, both Hans Kelsen and H.L.A. Hart rested their criticism of Austin on his failure to address the question of obligation. See HANS KELSEN, AN INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY 43 (§ 24) (translation of the first edition of *Reine Rechtslehre* or *Pure Theory of Law* by Bonnie and Stanley Paulson) (1992) ("[T]he Pure Theory of Law launches its critique of the received academic opinion by bringing the concept of obligation emphatically to the fore"); HART, *supra* note 7, at 6 ("The most prominent general feature of law . . . is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory.").

Hart observed that commands backed by force do not obligate; they merely oblige. Hart's own positivist concept of law deemphasized force, emphasizing instead the acceptance of law-identifying rules ("rules of recognition") by government officials. See HART, *supra* note 7, at 89-93, 97-107. As Philip Soper and others have demonstrated, one can no more get an "ought" from Hart's "is" than from Austin's, and Kelsen's positivist concept of law is even more clearly a non-starter. See PHILIP SOPER, A THEORY OF LAW 26-34 (1984).

128. SOPER, *supra* note 127, at 8.

129. See RAZ, *supra* note 7, at 233-61; ALAN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS (1979); ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 950 (1973). Some of these writers offer idiosyncratic concepts of law before concluding that there is no obligation to obey. Raz, for example, asserts that the principal defining characteristic of a legal system is a *claim* by public officials (even an insincere claim) that their directives are morally entitled to obedience. See RAZ, *supra* note 7, at 236-37. For the most part, the modern positivists who deny a general presumptive obligation to obey the law do recognize obligations to obey particular laws.

130. See SOPER, *supra* note 127, at 9 ("If law is only force, one does not need pages of discussion about the nature and extent of the obligation to comply: there is none."); Luban, *supra* note 16, at 1571 ("Holmes doubted that we have any moral obligation to obey the law, but that is only because he doubted that we have any moral obligations."). Although some writers have claimed that there is no link between "legal positivism" and "logical positivism," see POSNER, *supra* note 41, at 20 n.31, the sense that Holmes and the logical positivists shared of the emptiness of moral discourse apparently led Holmes to his power-focused concept of law. See, e.g., A.J. AYER, LOGICAL POSITIVISM 22-23 (1959).

131. See Novick, *supra* note 24, at 721 (quoting a letter from Holmes to Alice Stopford

Just as Holmes' goal was not to address the question of obligation, his goal probably was not to describe how the word "law" is used in everyday discourse. A list of only two reasons (the normative and the sociological) for seeking an answer to the question "What is law?," however, does not exhaust the possibilities. If one really were a bad man, for example, or if one were a lawyer advising clients, Holmes' answer would become plausible. Perhaps Steve Allen's character "the Question Man" could identify the question to which Holmes' definition is the answer.¹³²

VI. WHAT IS LAW?

An appropriate definition of law for most purposes might be exactly the opposite of Holmes': Law consists of those societal settlements that a good person should regard as authoritative.¹³³ This definition begs

Green, Feb. 7, 1909: "I said to a lady at dinner the other night that morals were a contrivance of man to take himself seriously, which means that the philosophers . . . make them an end in themselves, an absolute matter, and so an excuse for their pretention to be on the ground floor and personal friends of God."). Although Holmes romanticized a soldier's duty to obey orders, he did so only because the soldier's unquestioning obedience could manifest an existential commitment to invest his life with meaning. For Holmes, duty did not reflect any genuine sense of obligation to others or any external moral constraint. *See* Holmes, *supra* note 20, at 87-91.

132. Noting that the question, "What is law?," is too general, Philip Soper focused on the normative question, "What is law that I should obey it?" SOPER, *supra* note 127, at 1-7. Commenting on Soper's work, Steven Burton observed that one also might ask: "What is law that it is prudent to obey it?" "What is law that it will be effective?" "What is law that it is justiciable?" "What is law that a student should learn it?" As Burton noted, the answers to these questions might not identify the same phenomenon. Steven J. Burton, *Review Essay: Law, Obligation, and a Good Faith Claim of Justice*, 73 CAL. L. REV. 1956, 1979-80 (1985). Holmes' definition probably works best as an answer to the question, "What is law that a lawyer should describe it to a client?" Indeed, Holmes initially posed something like this narrow question but then apparently lost sight of it. *See supra* text accompanying notes 66-71. Even from a practicing lawyer's perspective, however, Holmes' definition of law seems incomplete. *See supra* note 42. And Holmes' definition does not quite capture the perspective of a bad man either. *See supra* text accompanying notes 72-75.

133. *See* JOHNSON, *supra* note 4, at 152 ("Holmes had it backwards. The primary focus of the lawmaker's interest is not the bad person but the good ones who want to do the right thing.").

Some notes on the definition in the text:

(1) The word "settlement" seems preferable to words like "command" and "directive." This word is broad enough to encompass several types of law whose distinctiveness was emphasized by H.L.A. Hart—commands of the sort found in criminal codes; rules facilitating private ordering through wills, marriages, contracts and the like; and rules governing dispute resolution and the creation and alteration of law.

For example, a state constitution might declare that the legislative power shall be vested in a General Assembly. This declaration, although undoubtedly a law, would not directly command anyone to do something or to refrain from doing something. Perhaps it would implicitly direct

rather than answers the question of obligation, but the question it begs may be the right one—one that lies at the root of most theoretical

people to treat the enactments of the General Assembly as “law.” Viewing this declaration as a “settlement,” however, seems easier than viewing it as a “command.” See HART, *supra* note 7, at 28, 95.

(2) For the most part, Americans view only governmental pronouncements as law. The phrase “societal settlements” is somewhat broader. This phrase leaves open the possibility that custom may qualify as law in some societies and perhaps even in today’s international community. Treating directives that are neither “societal” nor “governmental” as law would seem odd (parental commands, for example, or the rules and regulations of a private university). Nevertheless, when the goal is to address the question of obligation, the conventional limitation of the concept of law to governmental or societal settlements may not be very helpful.

(3) David Dolinko’s commentary persuades me that the word “authoritative” may be somewhat too weak. See Dolinko, *supra* note 26, at 430. Because the purpose of the suggested definition is to direct attention to the issue of obligation, it might be better to use a word like “binding,” “controlling,” or, perhaps best of all, “obligatory.” I mean to include only settlements more authoritative than, say, the rules of etiquette.

This clarification seems to resolve a difficulty that Dolinko notes. See *id.* at 430-31. A good person ought to do many things, and social customs may encourage her to do them. These virtuous things may include donating to charity, taking an interest in public affairs, brushing her teeth, and saying “excuse me” after bumping into someone. Presumably, however, no one believes that “societal settlements” make all of these things “obligatory.” I claim that some customs may qualify as law in some societies, but I do not suggest that every virtuous custom does.

(4) When the definition speaks of settlements that a “good person” should regard as authoritative, it declares that the appropriate perspective for determining what qualifies as “law” is that of a person who takes seriously her moral responsibilities to others. It emphasizes that the appropriate vantage point is not that of Holmes’ self-centered bad man. Everyone, however, should be a good person; that statement is close to a truism. David Dolinko is therefore correct that the definition could be broadened from “good people” to “everyone” without changing its meaning. See *id.*

(5) To some extent, the words “societal settlement” may incorporate the customary requirement that law be “general.” Very specific governmental commands (for example, a government officer’s directive to a subordinate to file a letter) are not usually seen as law. Although these specific orders may be given by officers who represent society, it would seem strange to describe them as “societal settlements” or as law. Some specific directives, however, may be seen as law: “I sentence you to ten years” or “Judgment for the plaintiff.” Unlike an official’s order to file a paper, these products of formal deliberative processes may be seen as embodying more than the conclusions of the people who voice them. Metaphorically (or mystically), they may be seen as “societal settlements” and as “law.” A defendant who refuses to obey a court’s judgment then may be regarded as violating the “law” embodied in the court’s command. The suggested definition does not resolve the question of how general law must be. Although the generality of a settlement is one of many circumstances that affect whether the settlement will be recognized as law, I am unsure that limiting the concept of law at the outset to general settlements advances rather than conceals the normative inquiry.

Note that even the least controversial elements of a conventional definition of law incorporate normative judgments—establishing, for example, a presumptive hierarchy of settlements in which the government’s commands outrank one’s parents’. Even my plainly question-begging definition of law may not beg enough questions.

efforts to define law.¹³⁴ The following discussion of obligation will carry this Article some distance from *The Path of the Law*, but criticism of Holmes' concept of law probably should be accompanied by an indication of what law does mean to good people.

Legal scholars generally have addressed the question of obligation in two stages. They have asked what rules qualify as law and then what circumstances justify the disobedience of law. Commonly, however, the scholars who have addressed the first phase of the inquiry (law recognition) have neglected the second (determining when disobedience is appropriate). Although these scholars have noted that civil disobedience sometimes may be justified, they have left the question of when this disobedience may be justified to others.¹³⁵ Similarly, those who have written about civil disobedience have neglected the law-recognition process. They apparently have viewed law recognition as a task presenting issues distinct from the normative issues they seek to address.¹³⁶

It seems appropriate, at least initially, to collapse the two related stages and to ask directly what purported social settlements a good person should respect—in other words, which purported social settle-

134. Noting this sentence, David Dolinko writes, "Precisely why it should be *less* objectionable to beg a really important question is, I'm afraid, a mystery." Dolinko, *supra* note 26, at 431. The purpose of begging the right question, however, is to focus attention in the right place. Addressing a question obliquely, and perhaps without a clear awareness of what one is doing, seems less likely to lead to understanding than addressing this question directly. A circle can therefore be virtuous.

Dolinko's commentary on this Part seems to suffer in fact from its failure to address the right question. This commentary neglects the preceding Part of the Article and John Noonan's critical question, "Why do you want to know?" Dolinko reveals that my suggested definition departs from some common understandings of the word "law." So it does—more than I realized before reading Dolinko's comments. As I have emphasized, however, my purpose in offering this definition is not to engage in armchair sociology or to define law from the ground up. Dolinko's criticism seems to me to provide additional support for this section's bottom line—that "no definition of law can be any good."

135. See, e.g., AUSTIN, *supra* note 51, at 159, 161, 260; HART, *supra* note 7, at 205-07 ("[T]he certification of something as legally valid is not conclusive of the question of obedience. . . . [H]owever great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny."); KELSEN, *supra* note 7, at 374. Efforts to define law become both easier and less helpful when scholars can defer difficult issues to a second, unaddressed stage of inquiry: "Yes, I called that command a law, but I never said that anyone was required to obey it." Definitions of law that address the question of obedience, but only in part, are likely to have a rootless quality.

136. See ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 49-52, 56-58 (1968); MORTIMER KADISH & SANFORD KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 174 (1973); Kent Greenawalt, *Promise, Benefit, and Need: Ties that Bind Us to the Law*, 18 GA. L. REV. 727, 729-30 (1984).

ments qualify as law.¹³⁷ The attempt to answer this question directly will reveal that it does not yield to a definition, a formula, or a rule of recognition. Moreover, the conventional bifurcation of the issue into "law identification" and "obedience to law" helps only slightly.¹³⁸ The degree of respect owed settlements that purport to be binding varies with countless circumstances.

For example, the respect owed a directive that on its face governs all members of a society may depend upon one's social role. In a debate with Stephen A. Douglas, Abraham Lincoln declared that if he were elected to the Senate he would vote to enact a fugitive slave law. "[A]lthough it is distasteful to me," Lincoln said, "I have sworn to support the Constitution."¹³⁹

At the time of Lincoln's statement, the most relevant provision of the Constitution was Article IV, Section 2, Clause 3. This clause provided that a slave who fled to a free state "shall be delivered up on Claim of the Party to whom [the escaped slave's] Service or Labour may be due." Had the delegates to the Constitutional Convention not agreed to this clause, there would have been no Constitution.

Article IV, Section 2, Clause 3 did not expressly require Congress to enact a fugitive slave law, but interpreting the clause as self-executing would have rendered it a dead-letter. Lincoln emphasized this point when he explained his own interpretation of the clause: "[T]here is a constitutional right which needs legislation to enforce it. . . . [Having sworn to support the Constitution,] I cannot conceive that I do support it if I withheld from that right any necessary legislation to make it practical."¹⁴⁰ Because a normative-interpretive convention required Members of Congress to supply words not there,¹⁴¹ Abraham Lincoln announced his willingness to support a fugitive slave law—a law that he considered repugnant.

137. The suggestion, again, is that often in everyday discourse and even more often in the discourse of legal theorists law *means* "settlements entitled to respect."

138. See SOPER, *supra* note 127, at 8-9 (recognizing the artificiality of the customary bifurcation of questions of law-recognition and political obligation but apparently leaving intact the customary bifurcation of questions of law-recognition and civil disobedience).

139. See CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 at 304 (Paul M. Angle ed., 1958) [hereinafter CREATED EQUAL].

140. *Id.*

141. For Lincoln, the relevant normative-interpretive convention was simply that the law in action should, if possible, correspond to the law on the books. *But see* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 42 (1984) (arguing against the judicial implication of remedies on the ground that largely toothless laws may be the products of political compromise); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 543 (1983) (same).

Surely no slave, however, owed any respect to the fugitive slave clause, and someone who was neither a slave nor a Member of Congress might have occupied a different position from both Lincoln's and the slave's. This person would have had options not open to a person in bondage. Most notably, if white, adult and male,¹⁴² he could have sought amendment of the fugitive slave clause through the political process.¹⁴³ Nevertheless, unlike Lincoln (if successful in his campaign to become a Senator), this person would not have sworn to respect the settlement embodied in Article IV, Section 2, Clause 3.

Especially with the benefit of hindsight, one might conclude that no member of American society should have respected the fugitive slave clause.¹⁴⁴ Returning an escaped slave to her master was so great an evil that Lincoln might better have refused to swear to support the Constitution, thereby disqualifying himself from serving in Congress.

142. Only six states allowed free African-Americans to vote at the close of the Civil War. See *Oregon v. Mitchell*, 400 U.S. 112, 156 (1970) (Harlan, J., concurring in part and dissenting in part).

143. Even if female and unable to vote, moreover, a dissenter not in bondage might have written *Uncle Tom's Cabin*.

144. William Lloyd Garrison contended prior to the Civil War that no one was obliged to obey this "covenant with death and an agreement with hell." STAUGHTON LYND, *CLASS CONFLICT, SLAVERY AND THE UNITED STATES CONSTITUTION* 154 (1967); see Faneuil Hall Mass Meeting on the Fugitive Slave Bill, *Emancipator and Republican*, Oct. 17, 1850 ("the citizens of Boston in Faneuil Hall assembled, law or no law, constitution or no constitution, pledge themselves to protect at all hazards fugitive slaves who have taken shelter in their city").

Commenting on a draft of this Article, Frank H. Easterbrook questioned William Lloyd Garrison's judgment:

The point is not simply that the Union could not have been formed without the Clause—and that the fate of slaves would have been worse had the South become a separate nation. It is that, . . . at the margin, non-enforcement of the Clause after the formation of the Union could have made slaves worse off. If escaping slaves are not returned, then owners will take measures to prevent escape. There will be additional manacles, taller fences, meaner guards, and so on. . . . Returning an escaped slave is a terrible thing, but an approach to law that ignores the consequences of *not* returning slaves is a terrible thing too.

Letter from Frank H. Easterbrook to author (Feb. 7, 1993).

My own view is that Easterbrook's argument in favor of returning slaves to their owners would have merited consideration in the ante-bellum period, but not so much consideration that someone might have accepted it. I hope that Judge Easterbrook, transported by a time machine to Portsmouth, Ohio in 1850, would not in fact have sent Eliza back to Legree.

Assessing long-range consequences is problematic. It often may be appropriate to do what appears to be "the right thing" in the situation at hand and to hope that one's decency will not backfire. Almost any well-intentioned choice *can* backfire, but one who takes literally the physician's (and the conservative's) admonition to "do no harm" can rarely act at all. In blending faith and reason into judgment, one often must proceed in the face of uncertainty.

Or, even better, Lincoln might have sworn to support the Constitution and then not done so.¹⁴⁵ Nevertheless, different roles in society plainly give rise to different obligations to treat purported settlements¹⁴⁶ as binding.¹⁴⁷

145. This choice would have denied the fugitive slave clause even the power to keep decent people out of office. Perhaps the threat to deny places in Congress to people who would not swear to uphold the fugitive slave clause made the oaths of office of Members of Congress involuntary. Despite the fact that these oaths were required by the same authority that created the offices, ethical Members of Congress might not have regarded their oaths as binding. Moreover, if the Members' disregard of their oaths (and of the Constitution) suggested a breach of faith with people who had agreed to this document only on the condition that it contain a fugitive slave clause (or with their successors-in-interest), a reasonable Member might not have considered that ethical difficulty decisive. Even apart from the conundrums posed by the efforts of one generation to bind successor generations, freeing slaves by snookering slaveholders is not evil.

The issue might be given a contemporary cast (as when Shakespeare is played in modern dress). To some extent, slaveholders resemble terrorists holding hostages, and the relevant "rules" might be similar to those governing hostage negotiations in an international community without (much) positive law. For example, a group of political terrorists claiming to be the rightful government of Dystopia might accept a treaty and promise their participation in a number of worthwhile international ventures. In return, the treaty might confirm the terrorists' right to hold hostages and to capture new ones until the year 2008. *Cf.* U.S. CONST. art. I, § 9, cl. 1. The treaty also could require various officials to take oaths to support it. Could a negotiator named Rambo properly agree to the treaty, take the required oath, accept benefits under the treaty, and still act to free the hostages if he discovered an escape route? Would it matter whether Rambo had never intended to honor his oath or instead had taken the oath in good faith and then decided that his pledge was wrong? Should Rambo have refused to take the oath, thereby ensuring that he would be discharged from his position and unable to free the hostages?

If you believe that this sort of question can be profitably discussed, you may accept the concept of "natural law" whether you know it or not. The question (again) takes as its initial assumption or baseline an international community without positive law—that is, a state of nature. Then it adds rules that purport to be positive law and asks whether, and to what extent, Rambo (or anyone else) should regard these rules as binding. Discussion of the issue thus presupposes concepts of right and wrong that exist independently of positive law and of the customs of particular communities.

146. David Dolinko objects to the term "purported settlement." "[W]hat is only 'purported,' " he says, "is not that the item under discussion (e.g., the fugitive slave clause of the Constitution) is truly a societal settlement, but rather that that settlement is truly binding, authoritative, or deserving of respect." Dolinko, *supra* note 26, at 431-32 n.69. When a settlement is not truly binding, authoritative, or deserving of respect, however, it does not truly settle things. It is merely a purported settlement. The fugitive slave clause, for example, purported to be a settlement, but various audiences had to determine the extent to which it was.

147. A President's duty is sometimes to disobey legislation that she considers unconstitutional—refusing, for example, to appoint the members of an unconstitutional commission. A person hired to type the President's or the commission's papers, however, does not have the same duty to judge the commission's constitutionality.

A government typist does have a duty—a legally enforceable as well as a moral duty—to resign or otherwise to withhold assistance if asked to type a paper facilitating flagrantly unconstitutional action (for example, a false application for a warrant to support a search whose

Two more commonly recognized determinants of the respect owed purported social settlements are the legitimacy or illegitimacy of the authority that has promulgated these settlements¹⁴⁸ and the justice or injustice of the settlements themselves. Even the interplay between these two core considerations may suggest that the question of obligation is complex and that respect for law requires painful choices. On the one hand, even the declarations of an essentially legitimate government may not merit obedience. The Constitution of the United States was ratified through what was (at the time) an extraordinarily democratic process.¹⁴⁹ The ratification occurred after public debate of the highest quality, and it established the most democratic nation-state on earth. Nevertheless, most of us now admire the dissenters who had the wisdom and courage not to respect the Constitution's fugitive-slave clause as "law."¹⁵⁰

On the other hand, even the declarations of a tyrant may have a claim—a moral claim—to obedience. If, for example, Joseph Stalin had posted stop-signs, set speed limits, and declared whether to drive on the right or the left-hand side of the road, a driver's regard, not for Stalin, but for the safety of her fellow citizens ought to have prompted obedience. (Concerted disobedience of traffic regulations designed to promote political change might have been appropriate, however.) Between the kinder, gentler pronouncements of tyrants and the inhuman pronouncements of legitimate governments lie a variety of purported societal settlements that sometimes confront good people with difficult choices.

Indeed, within a single government, some legitimate law-giving authorities may have more authority and greater settling power than others. In *Cooper v. Aaron*,¹⁵¹ the Supreme Court observed that "Article VI of the Constitution makes the Constitution the 'supreme Law

purpose would be to harass and embarrass a political opponent). A President and a government typist are both obliged to respect the Constitution, but their obligations to judge independently the constitutionality of their actions are not precisely the same.

148. This wide-ranging Article (it's about Holmes, remember) will not range widely enough to assess the circumstances that make some governments legitimate and others illegitimate. The Article will, however, say enough to indicate that the issue of governmental legitimacy, like the issue of law-recognition, is a matter of more-or-less rather than yes-or-no.

149. That probably no more than 20% of the adult population was eligible to vote on the question of ratification merely puts this achievement in perspective. See Thurgood Marshall, *Commentary: Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

150. No one today would claim that the fugitive-slave clause "bound" slaves. Did the clause bind freedmen whose families remained in slavery? Or freedmen whose *people* remained in slavery? Did it bind unenfranchised white women? Was the clause truly "law" for anyone?

151. 358 U.S. 1 (1958).

of the Land.' " Noting Chief Justice Marshall's statement in *Marbury v. Madison*¹⁵² that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"¹⁵³ the Court declared, "It follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land. . . ."¹⁵⁴

The Court thus equated its interpretation of the Constitution with the text of the Constitution itself.¹⁵⁵ In an extreme case, however, an opinion of the Court might contradict the constitutional text, and in this situation, a citizen (and, even more clearly, a President sworn to protect and defend the Constitution) ought to honor the text rather than the Court's opinion.¹⁵⁶ Both Thomas Jefferson and Andrew Jackson went further. As President, Jefferson pardoned people whom the federal courts had convicted of violating the Sedition Act, which the President considered unconstitutional. In a letter to Abigail Adams in 1804, Jefferson explained, "[N]othing in the Constitution has given [the judiciary] a right to decide for the Executive, more than the executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them."¹⁵⁷

In 1832 Andrew Jackson used similar language to explain his veto of a bill to recharter the Bank of the United States (a decade and more after the Supreme Court had upheld the Bank's constitutionality): "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others."¹⁵⁸ The apparent claim of Jefferson and Jackson was that Chief Executives (at least¹⁵⁹)

152. 5 U.S. (1 Cranch) 137 (1803).

153. *Id.* at 177.

154. *Cooper*, 358 U.S. at 18.

155. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 986 (1987); Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1078 (1987).

156. *But see* Weinberg v. Salfi, 422 U.S. 749, 765 (1975) (declaring in dictum that "the constitutionality of a statutory requirement [is] a matter which is beyond [the President's] jurisdiction to determine").

157. Letter from Thomas Jefferson to Abigail Adams, Sept. 11, 1804, in 8 THE WRITINGS OF THOMAS JEFFERSON 310, 311 (Paul L. Ford ed., 1897). In 1819, Jefferson reiterated this position: "Each of the three departments has equally the right to decide for itself what is its duty under the constitution, without any regard to what the others may have decided for themselves under a similar question." Letter from Thomas Jefferson to Spencer Roane, Sept. 6, 1819, in 12 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 139.

158. Andrew Jackson, *Veto Message, July 10, 1832*, in JAMES RICHARDSON, 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1145 (1911). Jackson added, "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both." *Id.*

159. Government typists do not take oaths to support the Constitution, but they are bound

should resolve constitutional issues without regard to opinions of the Supreme Court. Like the Supreme Court's assertion of judicial authority in *Cooper v. Aaron*,¹⁶⁰ this assertion of executive authority was excessive.

In a rare departure from ordinary practice, each of the nine Justices of the Supreme Court signed the Court's opinion in *Cooper v. Aaron*.¹⁶¹ The Court's claim of ultimate interpretive authority had strong provocation—Little Rock's "massive resistance" to the school desegregation decreed by *Brown v. Board of Education*.¹⁶² The hateful crowds, the troopers deployed by a governor to block a schoolhouse door, the federal paratroopers required to permit a few African-Americans to enter Central High—all suggest the fearful consequences of not according general settling power to Supreme Court interpretations of the Constitution.¹⁶³ Presidents and the rest of us sometimes must defer to the Court's rulings even when we take a different view of the Constitution, even when we have not been parties to lawsuits before the Court, and even when we have not ourselves been afforded opportunities to be heard. The Supreme Court may have gone overboard in *Cooper v. Aaron*, but Jefferson and Jackson were equally far from the deck on the ship's other side.¹⁶⁴

Decisions of the Supreme Court, however, often may have less settling power than legislative enactments. Every scholar who has examined the issue apparently agrees that *Brown* yielded little school desegregation; progress toward desegregation began only when Congress

by the Constitution nevertheless. One wonders to what extent Jefferson and Jackson would have had White House clerks observe the Constitution, not as it was understood by others, but as they understood it themselves. See *supra* note 147.

160. *Cooper*, 358 U.S. at 18.

161. See *id.* at 4.

162. 347 U.S. 483 (1954).

163. President Jackson's veto of the bank bill did not pose a risk of this sort of disruption, and one might reasonably distinguish a refusal to acquiesce in a ruling upholding a governmental action from a refusal to accept a judicial determination of unconstitutionality. Jackson might have vetoed the bank bill simply because he did not like it, and his "extra" assertion of a view of the Constitution different from the Supreme Court's did no harm. In that respect, Jackson's declaration of independence from the federal judiciary differed from that of Governor Orval Faubus of Arkansas. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 909-10 (1989-90).

164. In 1956, 101 Congressmen from the states of the old Confederacy (including all Southern senators except Lyndon Johnson, Estes Kefauver, and Albert Gore) signed the "Southern Manifesto." This manifesto declared that the decision in *Brown* was "unwarranted" and "a clear abuse of judicial power." *Brown* had substituted the Justices' "personal political and social ideas for the established law of the land." The manifesto pledged "to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution." See RICHARD KLUGER, *SIMPLE JUSTICE* 752 (1977).

embraced this goal in the Civil Rights Act of 1964.¹⁶⁵ As an empirical matter, doubters and dissenters proved more willing to accept a settlement produced in a political forum than to yield to one reached by a court. The Civil Rights Act of 1964 was shaped by representatives of all parts of the nation under the skillful leadership of a new President following the assassination of John F. Kennedy. Perhaps there were reasons—moral reasons—why this watershed event had greater settling power than the Supreme Court's decision in *Brown*.¹⁶⁶

To view Supreme Court decisions generically and to compare them with legislation or with the text of the Constitution, however, often may sweep too broadly. Abraham Lincoln argued that the Supreme Court's ruling in *Dred Scott v. Sanford*¹⁶⁷ bound the parties to that case and, in addition, that third parties should respect the Court's conclusion that Dred Scott remained a slave despite his presence on free soil.¹⁶⁸ Lincoln, however, refused to yield to the Court's broader holdings—first, that Congress' prohibition of slavery in federal territories deprived slaveowners of their property without due process of law and, second, that no person of African descent could ever be a citizen of the United States.¹⁶⁹ Although Lincoln declared in the Lincoln-Douglas

165. See, e.g., GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT CHANGE?* 55 (1991).

166. Some have suggested that America would have reached a stable, satisfactory resolution of the abortion issue a decade or more ago had the Supreme Court not "constitutionalized" this issue in *Roe v. Wade*, 410 U.S. 113 (1973). That is my sense of the situation. Prior to the decision in *Roe*, I was a reporter to the State Bar Committee on the Revision of the Texas Penal Code. Although Texas had substantial Catholic and Protestant populations opposed to abortion, our reporters' proposal for a permissive "therapeutic abortion" statute modeled after one already enacted in Colorado had encountered little opposition. Once our proposal had made its way through the State Bar Committee (a committee that the reporters had found recalcitrant on other issues), I was reasonably confident that the proposal would be enacted. Following a federal district court's invalidation of the Texas abortion statute in *Roe*, the committee and the Board of Directors of the Texas State Bar in fact substituted a still more permissive measure.

The weekend before *Roe*'s counsel, Sara Weddington, argued her case before the Supreme Court, I impersonated a judge at a moot court session in which Weddington tested her argument. Following this exercise, there was a discussion of strategy and then, following Weddington's departure, a more general discussion of *Roe* among the University of Texas Law School faculty members present. All of us agreed that, although Weddington had argued her case ably, she had no chance of victory in the Supreme Court. Every one of us would have bet the farm on it. Now, after a quarter-century of the bitter division wrought by *Roe*, I wish that we had been right. Nations that have increased the availability of abortion through legislation have avoided our wrenching, hate-generating conflict. See generally MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987) (describing European experience).

167. 60 U.S. (19 How.) 393 (1857).

168. See *CREATED EQUAL*, *supra* note 139, at 36.

169. Chief Justice Roger B. Taney, who had manumitted his own slaves decades before the decision in *Dred Scott*, wrote for the Court:

debates that his respect for the Constitution would lead him to support a fugitive slave law, he said that he would vote to prohibit slavery in the territories despite *Dred Scott*.¹⁷⁰

Lincoln noted that only defiance of the Supreme Court's decision could enable the Court to overrule it, and he added:

[D]ecisions apparently contrary to that decision, or that good lawyers thought were contrary to that decision, have been made by that very court before. It is the first of its kind; it is an astonisher in legal history. It is a new wonder of the world. It is based upon falsehood in the main as to the facts. . . .¹⁷¹

All of the circumstances that Lincoln mentioned bore on what settling power the *Dred Scott* decision should have. Chief Justice Earl Warren recognized that a decision's settling power depends on case-specific circumstances when he discouraged concurring and dissenting opinions in *Brown* and when, in circulating the first draft of his opinion to members of the Court, he noted that the draft had been "prepared on the theory that the opinion[] should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory."¹⁷²

The appropriateness of a person's disregard of a purported settlement depends not only on the character of the settlement but also on the form and extent of this person's defiance. Again, however, the issue of obedience does not yield to a formula. Martin Luther King's *Letter from Birmingham City Jail* declared, "One who breaks an unjust law must do it *openly, lovingly* . . . and with a willingness to accept the penalty."¹⁷³

[Blacks were] beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect. . . . The unhappy black race . . . were never thought of or spoken of except as property.

Scott, 60 U.S. (19 How.) at 407, 410.

170. Resistance to permitting an expansion of slavery in the federal territories was the principal issue in both Lincoln's 1858 Senatorial campaign and his Presidential campaign two years later.

171. CREATED EQUAL, *supra* note 139, at 36-37.

172. KLUGER, *supra* note 164, at 696.

173. Martin Luther King, Jr., *Letter from Birmingham City Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 289, 294 (James M. Washington ed., 1986). King wrote this letter in response to eight white clergymen who called his demonstrations "unwise and untimely" and urged him to end them. King drafted the letter partly on the edges of the Birmingham newspaper in which the clergymen's statement was published and partly on paper that his lawyer smuggled into jail. See David B. Oppenheimer, *Martin's March*, A.B.A. J., June 1994, at 55.

Others have echoed King's insistence that open, nonviolent disobedience coupled with an acceptance of the prescribed punishment is the only legitimate form of noncompliance with civil authority.¹⁷⁴ Some have added that although disobedience of an unjust rule itself can be appropriate, disobedience of another rule cannot.¹⁷⁵ On this view, the violation of a criminal trespass statute to protest a war of aggression would be improper if the protestor had no quarrel with the criminal trespass statute itself.

Harriet Tubman, however, a former slave who returned nineteen times to slave territory to lead over 300 others to freedom,¹⁷⁶ did not defy rules openly and with a willingness to accept the penalty. If she had, she could not have rescued very many slaves. Despite her disregard of Martin Luther King's principles of civil disobedience, Harriet Tubman surely has a place among the saints.¹⁷⁷

At a war conference on July 20, 1944, Colonel Heinz Brandt moved aside the briefcase of Colonel Klaus von Stauffenberg so that Brandt could better see a map. A few minutes later, a bomb in Stauffenberg's briefcase exploded, killing Brandt and three others but causing only minor injuries to its primary intended target, Adolf Hitler.¹⁷⁸ The motives that prompted Stauffenberg to try to kill Hitler were more complex than those that prompted Harriet Tubman to free slaves, and Stauffenberg's actions were far more violent. My guess, however, is that Klaus von Stauffenberg is among the saints too. Even prohibitions of homicide are not quite categorical imperatives.¹⁷⁹

As this Article has indicated, the extent to which prohibitions are enforced and the extent to which they are observed by others bear on their claims to obedience. Settlements that both on paper and in operation distribute social burdens equitably have stronger claims to obedience than settlements that do not. Moreover, civil authority cannot

174. See, e.g., FORTAS, *supra* note 136, at 30, 34.

175. See *id.* at 16, 31, 32.

176. See SARAH BRADFORD, HARRIET TUBMAN, THE MOSES OF HER PEOPLE 33 (1961).

177. Contrary to the apparent assumptions of those who consider only open, nonviolent disobedience appropriate, the goal of disobedience may not be to prick the community's conscience. Its object may be to free slaves or to keep cattle cars from rolling to the death camps.

178. See WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 1050-54 (1960).

179. Cf. Letter from Thomas Jefferson to William Stephens Smith, 5 THE WORKS OF THOMAS JEFFERSON, *supra* note 157, at 362 ("The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."); Malcolm X, *The Black Revolution*, in MALCOLM X SPEAKS 45, 49 (George Breitman ed., 1966) ("If George Washington didn't get independence for this country nonviolently, and if Patrick Henry didn't come up with a nonviolent statement, and you taught me to look upon them as patriots and heroes, then it's time for you to realize that I have studied your books well.").

properly demand obedience to secret rules or compliance with contradictory commands. The requisites of law emphasized by Lon Fuller—publication, comprehensibility, consistency, prospectivity, and the like—also influence the recognition of binding settlements.

This discussion has not exhausted all of the circumstances that influence the identification of law. That task would be impossible. The discussion has indicated, however, why no definition of law can be any good. “Law” is a matter of more-or-less rather than yes-or-no. Law-identification depends on assessments of social roles, the legitimacy of the authority that has promulgated a rule, the justice or injustice of the rule itself, the form and extent of one’s noncompliance, the degree to which the rule has been enforced or obeyed, the observation of procedures that make compliance possible, and countless other circumstances.¹⁸⁰

Bifurcating the question of obedience into two stages does seem helpful. One who disobeys law as the term is used in everyday discourse (law “from the ground up”) should bear the burden of justifying this disobedience. In this two-stage inquiry, the word “law” merely allocates the burden of justifying noncompliance and need not be defined very precisely. A presumption in favor of obedience to law as the term is commonly understood by people who do not theorize about it seems appropriate as long as this presumption is coupled with a recognition of two corollaries—first, that one may owe obedience even when the presumption does not apply and, second, that the presumption in favor of obedience may not be strong.¹⁸¹

180. David Dolinko calls the conclusion “that ‘no definition of law can be any good’ because ‘[l]aw is a matter of more-or-less rather than yes-or-no’ ” a non sequitur. Dolinko, *supra* note 26, at 434. Yet I did not put the “because” between my two sentences and italicize it; Dolinko did. The two sentences are related, and the second supports the first. Nevertheless, I agree with Dolinko that neither entails the other. Some omitted introductory language in the first sentence that Dolinko quotes reveals the inferential basis of my conclusion: “*The [foregoing] discussion has indicated . . . why no definition of law can be any good.*” Whether Dolinko dissents from this judgment is unclear, but if he does, he ought to address the entire supporting argument, not just one supporting sentence.

Dolinko notes that qualities like baldness can be matters of more or less without being undefinable, but the concept of “baldness” can be conveyed by describing a single variable. My argument is that the process of law recognition is not like that. The influential variables are far too numerous and complex to fit within any manageable definition.

181. If someone were to ask why the public’s rough understanding should motivate her at all, the answer could begin with old-fashioned political theory. As social contract theorists have insisted, the alternative to law is a world in which each individual resolves disputed issues for herself, one in which social life is impossible. Once someone recognizes the need for law, the question becomes one of identifying law. Can she (or anyone else) know this social institution when she sees it? A person may not have a neat answer to this question, but the success of the public in identifying “law” most of the time is an evident fact. A rough, shared understanding

In his First Inaugural Address, Abraham Lincoln promised faithful enforcement of the fugitive slave law, then reiterated his unwillingness to respect the holdings of *Dred Scott*.¹⁸² He articulated a position somewhere between that of President Jackson's bank veto message¹⁸³ and the position of the Supreme Court in *Cooper v. Aaron*.¹⁸⁴

I [do not] deny that [constitutional decisions of the Supreme Court] must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration . . . by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect [of] following it . . . can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.¹⁸⁵

What Lincoln said about the Supreme Court might be said of every other law-giving or law-settling authority, and what he said about the people might be said of every person. Respect for the settling power of others is indispensable if a person is to live in society, yet she should not defer so completely that she ceases to be her own ruler. To remain fully human, she must retain the power to choose and must accept responsibility for her actions.¹⁸⁶

of the concept of law should at least cast the burden of justifying dissent onto the dissenter. When a sociologist or a legal theorist can identify more precisely the circumstances that produce the general recognition of law, so much the better. But that is where things get sticky.

182. Abraham Lincoln, *First Inaugural Address*, Mar. 4, 1861, in 6 JAMES RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1902, at 6-7 (1903).

183. See *supra* text accompanying note 158.

184. See *supra* text accompanying notes 151-54.

185. *First Inaugural Address*, *supra* note 182, at 9. As Lincoln delivered this address, Senator Stephen A. Douglas, the defeated Democratic candidate for President, stood near Lincoln, thereby underlining Douglas' support of Lincoln's efforts to maintain the Union. A brisk wind was blowing, and Douglas held Lincoln's hat. See ROBERT JOHANNSEN, STEPHEN A. DOUGLAS 843 (1973). That evening, "in a hall decorated with shields and flags and brilliantly lighted with gas, Douglas escorted Mrs. Lincoln to the inaugural ball, and at midnight he danced the quadrille with her." *Id.* at 844-45.

186. See 31 MARTIN LUTHER, LUTHER'S WORKS 44 (Harold J. Grimm ed., 1958) ("I shall set down the following two propositions concerning the freedom and the bondage of the spirit: A Christian is a perfectly free lord of all, subject to none. A Christian is a perfectly dutiful servant of all, subject to all."); Duncan Kennedy, *The Structure of Blackstone's Commentaries*,

Lincoln concluded that respect for the settling power of the Constitution demanded support of a fugitive slave law, yet respect for the settling power of the Supreme Court did not require acquiescence in the *Dred Scott* decision. Lincoln confronted challenging issues of responsibility and citizenship with sensitivity and judgment.¹⁸⁷ It might have been easier for him to think of law just as an exercise of power, as a dogmatic datum, as a prediction of what the courts will do in fact.¹⁸⁸

28 BUFF. L. REV. 205, 211-12 (1979) (describing as "the fundamental contradiction" the tension between the need to give power to other people and the need not to give them too much). *But see* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 14 (1989) (Kennedy's renunciation of "the fundamental contradiction").

187. Perhaps our admiration for Lincoln would be even greater if he had resisted the fugitive slave clause as he did *Dred Scott*. We might never have heard of Lincoln, however, if he had taken this step and disqualified himself from holding political office.

188. This section's analysis of the problem of obligation illustrates the process of seeking "coherence" or "reflective equilibrium" that I believe characterizes legal, ethical, and virtually all other reasoning. Human beings attempt both to generalize experience and to test generalization against experience. They move from induction to deduction and back again. For example: Should I accept Martin Luther King's belief that all legitimate disobedience of civil authority must be open? This view attracts me when I consider King's marches and sit-ins, but it is not a belief that fits well (or at all) when I consider Harriet Tubman's journeys along the underground railway. Can I at least join King in the belief that legitimate civil disobedience must be nonviolent? Probably not; what do I believe about Klaus Staufenberg's attempt to assassinate Adolph Hitler? Should I conclude, then, that the directives of murderous tyrants like Hitler are not entitled to obedience? Well, what about Hitler's traffic regulations? Must legitimate "law" always be prospective? Must it always be general? Must it always be published?

One seeks the highest level of generality that one can attain consistent with one's specific beliefs, and one may abandon specific beliefs that do not "fit" otherwise very powerful generalizations. When the attempt to generalize fails, however (as mine has in this Article's analysis of issues of law-recognition and obligation), one reluctantly accepts an inability to discover clear patterns and learns to tolerate disorder.

One then may discover that the inability to articulate clear patterns does not mean that one has made no progress at all toward the discovery of patterns. Patterns, like law, are a matter of more-or-less—sometimes blurry and sometimes sharp. The attempt to fit beliefs into patterns may have yielded an inarticulate "best fit" line. When one then confronts a new question of obedience—should I resist the draft? how guilty should I feel about smoking marijuana? would anything really be wrong with cheating on my taxes when everyone else seems to be doing it?—one's answer may be informed by inarticulate but reasonably coherent views concerning law observance in general, views that may have been formed in part by thinking about Martin Luther King, Harriet Tubman, Abraham Lincoln, John Wilkes Booth, Klaus Staufenberg, Operation Rescue, Little Rock's massive resistance to school desegregation, and the drug-law violations of Justice Clarence Thomas and President Bill Clinton. Whether one is a Holmesian bad man, a stern authoritarian, or a person who often parks illegally but never takes a space marked handicapped, one's position on a "law-authoritarianism" scale may be shaped by a series of experiences and beliefs that, consciously or unconsciously, one has managed to fit into a pattern.

Lincoln had learned his law from Blackstone, however, and law meant more to him than the prediction of judicial decisions. At age 29, in one of his earliest public addresses, Lincoln urged "reverence for the laws" as "the *political religion* of the nation":

As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor;—let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character of his own, and his children's liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice.¹⁸⁹

A psychologist might in fact give you a numerical score on a "law-authoritarianism" scale after asking your views about a number of hypothetical cases. The psychologist then might use this score to predict your views concerning other cases. Better-than-random predictions would reveal that you had to some extent integrated your beliefs and experiences into a pattern. Your views concerning the cases about which the psychologist had asked would "fit" (though probably only in an inarticulate way) with your views concerning other cases.

This epistemological model suggests a conclusion inconsistent with prevailing modernist assumptions and with Holmes' declarations that our tastes and values are "finalities." See Oliver Wendell Holmes, Address of Chief Justice Holmes at the Dedication of the Northwestern University Law School Building, Chicago, Oct. 20, 1902, in POSNER, *supra* note 5, at 99. To suppose that one's position on such things as the "law-authoritarianism" scale is dogmatic or simply a matter of taste is probably wrong. You may not be able to explain why you are no more authoritarian than you are, and I may not be able to give you "an argument" about why you should become more or less authoritarian. Cf. Holmes, *supra* note 69, at 40-41 ("Deep-seated preferences cannot be argued about—you cannot argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way."). But you are in fact seeking the soundest position that you can locate on the law-authoritarianism scale, not just any position. Like a theoretical physicist developing a unified theory of the universe or a child learning the English language, you are seeking the simplest, most heuristic ordering of the largest amount of experience that you can. My talk can give you (vicariously) new experiences and new attempted generalizations. Our discussion can contribute to the coherency-seeking process in which both of us are engaged.

Of course you and I have been engaged in this process for a long time, and my words are unlikely to change your life very much. A dozen new data points on a graph that already includes 100,000 data points cannot greatly alter the best-fit line. My words may, however, change your position on the "law-authoritarianism" scale just a little. They may bring you a bit closer to the knowledge that you seek. Your words can do the same for me.

189. Abraham Lincoln, The Perpetuation of Our Political Institutions: Address Before the Young Men's Lyceum of Springfield, Illinois, Jan. 27, 1838, in ABRAHAM LINCOLN: HIS

One cannot revere predictions of what the courts will do in fact; patriots have never pledged their lives, their property, or their sacred honor to the prediction of judicial decisions; and no mothers have told their babies to predict and honor whatever the courts will do. Lincoln's view of law-observance became more sophisticated with the passage of time and with the challenge of *Dred Scott*. His rhetoric became less flowery. Even in subdued form, however, Lincoln's rhetoric about reverence for law would evoke raised eyebrows today. We owe our raised eyebrows partly to thinkers like Holmes.

Holmesian positivism falsifies Lincoln's experience. Holmes could not see the complexity, the difficulty, and the richness of the choices that confronted Lincoln, Andrew Jackson, Harriet Tubman, Klaus Stauffenberg, Martin Luther King, the crowds outside Central High in Little Rock, and the youngsters who defied them. What Lincoln said of Douglas might better have been said of Holmes: "[H]e is blowing out the moral lights around us."¹⁹⁰

In fact, the same respect for the settling power of government that led Stephen A. Douglas to support *Dred Scott* also led him, following his defeat by Lincoln in the Presidential election of 1860 and the commencement of hostilities between the North and the South, to give his support to the Union.¹⁹¹ This action contributed notably to the unity of the North. Douglas died at the age of 48 with the Civil War barely underway. His final words were, "Tell my children to obey the laws and uphold the Constitution."¹⁹² Douglas probably did not mean, "Tell my

SPEECHES AND WRITINGS 76, 81 (Roy P. Basler ed., 1946).

190. CREATED EQUAL, *supra* note 139, at 311. Just as fire was the most frequent and prominent metaphor in Holmes' writings, light was the most frequent and prominent in Lincoln's.

191. Following the attack on Fort Sumter, Lincoln asked Douglas to the White House and showed him a draft of the proclamation that he intended to issue the next day. Douglas had one suggestion: Rather than call for 75,000 volunteers, "I would make it 200,000." JOHANNSEN, *supra* note 185, at 859. Months earlier, Douglas had told the Senate, "No man will go further than I to maintain the just authority of the Government, to preserve the Union, to put down rebellion, to suppress insurrection, and to enforce the laws." *Id.* at 820. Following Fort Sumter, in an address to the Illinois General Assembly, Douglas declared that party creeds and platforms must be set aside. "The first duty of an American citizen is obedience to the constitution and laws of the county. . . . Give me a country first, that my children may live in peace." *Id.* at 866. One critic asked, "What means this evident weakness of Mr. Douglas for Mr. Lincoln?" and another suggested that Douglas had "gone over to the Republicans." *Id.* at 845, 869.

192. DAMON WELLS, STEPHEN DOUGLAS: THE LAST YEARS 1857-1861 at 289 (1971); *see* JOHANNSEN, *supra* note 185, at 872. Although the language quoted in the text is chiseled into Douglas' sarcophagus, the Johannsen biography quotes slightly different language, and Wells doubts that Douglas in fact uttered his famous last words. Wells notes, however, that Douglas had used similar language in his address to the Illinois General Assembly a few weeks before his death. WELLS, *supra*, at 289.

children to uphold the best predictions of what the courts will do in fact." A closer paraphrase might be, "Tell my children to uphold the settlements that all of us must honor if we mean to live with one another in peace."

VII. MORAL TERMINOLOGY AND THE ALTERNATIVE THEORY OF CONTRACTS

In *The Path of the Law*, Holmes listed five words to illustrate the sort of moral terminology that he proposed to banish from law: rights, duties, malice, intent, and negligence.¹⁹³ Of these, the word "duty" appeared to be the principal object of his scorn.¹⁹⁴

Holmes indicated the force of his objection to this word in his presentation of the alternative theory of contracts:

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference. But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.¹⁹⁵

Holmes proposed to "wash [the notion of duty] with cynical acid and expel everything except the object of our study, the operations of the law."¹⁹⁶ With the success of his positivist project, lawyers have come to view "breach of duty" as a conclusory term meaning "any conduct to which the law attaches burdensome consequences."

This view, however, turns the word "duty" upside down. When the State of Florida takes Ernest's house to build a highway, it does not violate a legal duty. When Clare burns Ernest's house to the ground while negligently performing stunts in an airplane a few feet above Ernest's roof, Clare does violate a legal duty. In each case, however, the law imposes essentially the same material consequences upon the taker

193. See Holmes, *supra* note 2, at 460.

194. See *id.* at 461-62.

195. *Id.* at 462.

196. *Id.*

or destroyer of Ernest's house. When the state takes Ernest's house to build a highway, it must pay him what a jury thinks his house is worth. When Clare destroys Ernest's house by crashing an airplane into its roof, Clare, too, must pay Ernest what a jury thinks his house is worth.

When an act is not considered wrongful so long as one pays, we do not speak of a duty to refrain from the act. When an act is considered wrongful even if one pays, we do speak of duty not to perform the act. To people who use the English language in orthodox ways, the word duty tells people what the law expects of them, not what consequences it attaches to their conduct.¹⁹⁷

Society does not view Clare's destruction of Ernest's house in the same way that it views the destruction of Ernest's house by the Florida Highway Department, and it expresses this judgment by applying the words "breach of duty" to Clare's conduct and not to the Highway Department's. The words tell Clare (and everyone else) that Clare has done something we wish she had not done. The phrase expresses our judgment that the "alternative theory of eminent domain" makes sense but the "alternative theory of low-altitude stunt flying" does not.¹⁹⁸

Holmes insisted that the law should tell people only what it would do to them and not what it expected of them. He did not explain why. A mood of unsentimental, clear-eyed realism somehow required that the law not speak of its ends but only of its means. The case of Ernest's house was, I confess, not my illustration. It was Holmes':

197. See Kelsen, *supra* note 7, at 167-68 ("The existence of a duty is the legal necessity, not the factual probability, of a sanction.").

198. Blackstone articulated an alternative theory of *mala prohibita* offenses a century before Holmes voiced "the alternative theory of contracts." Blackstone wrote that "in regard to . . . such offenses as are *mala in se* . . . we are bound in conscience. . . ." Nevertheless, we are not "bound in conscience" when laws "enjoin only positive duties, and forbid only such things as are not *mala in se* but *mala prohibita*":

[I]n these cases the alternative is offered to every man: "Either abstain from this, or submit to such a penalty," and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving the game, a penalty is announced against every unqualified person that kills a hare. Now these prohibitory laws do not make the transgression a moral offense, or sin: the only obligation in conscience is to submit to the penalty, if levied.

1 WILLIAM BLACKSTONE, COMMENTARIES *57-58 (spelling and punctuation modernized). Blackstone's theory may understate one's moral obligation to obey regulatory legislation; at least Blackstone's 225-year-old views are too Holmesian for me. The most noteworthy aspect of Blackstone's statement, however, may be its recognition that an "alternative" theory appropriately characterizes some obligations while the language of duty appropriately characterizes others.

Leaving the criminal law on one side, what is the difference between . . . statutes authorizing a taking by eminent domain and the liability for what we call a wrongful conversion of property where restoration is out of the question? In both cases the party taking another man's property has to pay its fair value as assessed by a jury, and no more. What significance is there in calling one taking right and another wrong from the point of view of the law?¹⁹⁹

To a Holmesian bad man, law is a system of prices, and only material prices matter. The law's price may include damages, an injunction, a contempt citation, a fine, a prison term, or even death by hanging. Nevertheless, a man tough enough to pay the price always has the option of noncompliance with the law's directives.

Holmes, however, balked at this evident implication of his positivism. He qualified his claim that there was no greater reason to apply words like "breach of duty" to wrongful conversions of property²⁰⁰ than to takings by eminent domain with this preface: "Leaving the criminal law on one side." Holmes, the author of the alternative theory of contracts (and the alternative theory of torts²⁰¹) did not advance an alternative theory of criminal punishment. More strikingly, Holmes rescinded his banishment of moral terminology—and welcomed back even the murky term "duty"—in some tort and contract cases:

[T]here are some cases in which a logical justification can be found for speaking of civil liabilities as imposing duties in an intelligible sense. These are the relatively few in which equity will grant an injunction, and will enforce it by putting the defendant in prison or otherwise punishing him unless he complies with the order of the court. But I hardly

199. Holmes, *supra* note 2, at 461. Holmes added immediately after this passage:

It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it. If it matters at all, still speaking from the bad man's point of view, it must be because in one case and not in the other some further disadvantages, or at least some further consequences, are attached to the act by the law.

Id.

200. Holmes' offhand reference to *wrongful* conversions of property amidst his criticism of the use of moral terminology in law is ironic. This reference suggests the magnitude of the task of self-censorship that Holmes proposed.

201. See, e.g., HOLMES, *THE COMMON LAW*, *supra* note 24, at 117-19.

think it advisable to shape general theory from the exception. . . .²⁰²

Holmes again advanced a baffling position without explaining it. Why he failed to assert the "alternative theory of everything" remains a mystery. As the law's price increased and changed in kind (from awards of damages to injunctions, contempt citations, and jail sentences), Holmes apparently abandoned descriptive positivism and reverted to traditional moral terminology. That Holmes failed to recognize the implications of his positivism seems unlikely, yet Holmesian moralism seems almost as unlikely as Holmesian stupidity.

Perhaps, in a momentary lapse, a flicker of normativity did infect Holmes. When the law *really* sought compliance with its commands—when courts imposed severe, afflictive sanctions to enforce these commands—the language of duty seemed, even to Holmes, more appropriate than the language of pricing.

Holmes' midstream leap to the moralist horse, however, raised more questions than it answered. Holmes apparently agreed that the law meant what it said when it used the word "duty" in criminal cases and in injunctive actions. Why, then, did the law not mean what it said when, in an action for damages, it called Clare's careless stunt flying a breach of her duty to Ernest? When the law's response to a tort (or to a breach of contract) is an award of damages, does this response truly indicate indifference between committing the tort (or breaking the contract) and satisfying the award? Would use of the word duty be justified in an action for *punitive* damages? *Should* Clare have an option free from any hint of moral censure to risk burning down Ernest's house as long as she is willing to pay the price?²⁰³

202. Holmes, *supra* note 2, at 462.

203. A bit of history may help to explain Holmes' apparent incoherence. Twenty-five years before publishing *The Path of the Law*, Holmes criticized John Austin for "look[ing] at the law too much as a criminal lawyer." He explained:

The notion of duty involves something more than a tax on a certain course of conduct. A protective tariff on iron does not create a duty not to bring it into the country. The word imports the existence of an absolute wish on the part of the power imposing it to bring about a certain course of conduct, and to prevent the contrary. A legal duty cannot be said to exist if the law intends to allow the person supposed to be subject to it an option at a certain price. . . . The imposition of a penalty is therefore only evidence tending to show that an absolute command was intended (a rule of construction). . . .

Liability to pay the fair price or value of an enjoyment . . . is not a penalty; and this is the extent of the ordinary liability to a civil action at common law. In a case of this sort, where there are no collateral consequences attached . . . , it is

The Path of the Law has molded American legal consciousness for a century, and lawyers now carry gallons of cynical acid to pour over words like duty, obligation, rights, and justice. Holmes' alternative theory of contracts, however, remains what it was at the beginning—a hopeless muddle of ill-considered prescriptive and descriptive ideas.

Although Holmes did not assert an alternative theory of everything, many of his heirs in the law and economics movement have. These disciples have taken Holmes' declaration in *The Common Law* that “general principles of criminal and civil liability are the same”²⁰⁴ a bit further than Holmes apparently wanted them to. To these economically minded scholars, the criminal law (and all of law) is nothing but a system of pricing.

For example, Richard Posner has suggested that, were it not for the fact that some criminals are insolvent, criminal law could be abandoned altogether. The law of torts determines the optimal price for harmful conduct, and if all criminals could pay the full social costs of their

hard to say that there is a duty in strictness. . . .

Oliver W. Holmes, 6 AM. L. REV. 723 (1872) (reviewing Frederick Pollock, *Law and Command*, 1 LAW MAG. & REV. 189 (1872)).

This first iteration of Holmes' alternative theory described it from the perspective of “the law” or the lawgiver. Holmes declared that when “the power imposing” a law wishes “to bring about a certain course of conduct,” it creates a duty. When this power wishes to allow alternatives, however, its sanctions should be viewed as a tax. The nature and magnitude of the sanctions imposed are relevant, but only as evidence of the lawgiver's intention. Holmes' first version of the alternative theory was unsatisfactory only in failing to offer any support for the idea that some common-law lawgiver truly intended to afford tortfeasors a free option to kill, injure, and destroy property as long as they were prepared to pay the price.

In *The Path of the Law*, however, Holmes presented his alternative theory from a different perspective—that of a consumer of law. He spoke of what your duty to keep a contract means to you—“a prediction that you must pay damages if you do not keep it.” Holmes, *supra* note 2, at 462. He noted that he was “still speaking from the bad man's point of view.” *Id.* at 461. As with Holmes' prediction theory, see *supra* text accompanying notes 57-68, what seemed to begin as a qualified thesis emerged as a grander conceptual truth about the nature of law.

Holmes, who initially distinguished the imposition of a legal duty from the imposition of a tax on conduct, spoke in *The Path of the Law* of abandoning the concept of duty altogether. Talk of exceptional cases in which one might speak of “duties in an intelligible sense” persisted, but this talk had become unintelligible. From the bad man's perspective, all of law is a tax on conduct. The bad man cares no more for “duty” than he does for axioms and deductions. In damage actions, injunctive actions, and criminal proceedings alike, his concern is simply what the courts will do to him. In Holmes' words, “A man who cares nothing for an ethical rule which is believed and practiced by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.” Holmes, *supra* note 2, at 459. This person's perspective requires an alternative theory of everything, but Holmes evidently failed to keep his perspectives straight.

204. HOLMES, *THE COMMON LAW*, *supra* note 24, at 38.

behavior, the deterrence of antisocial behavior could be left to tort law.²⁰⁵

Imprisonment in Posner's view is necessary only for criminals who have caused more social harm than they can pay for. Moreover, before sentencing someone to imprisonment (a sanction that takes money out of the public treasury), courts always should exhaust the offender's financial resources through a fine (a sanction that puts money into the public treasury). Only offenders without money or other financial resources should go to jail.²⁰⁶

One apparent implication of Posner's view—an implication that he seems to have overlooked—is that imprisonment should be authorized for ordinary tort and contract defendants who lack funds. Until these defendants (like the people we now call criminals) face a risk of imprisonment, they will lack appropriate incentives for efficient or socially desirable behavior. Posner's approach does not explain why many harmful acts that give rise to civil liability have not been made crimes.²⁰⁷

Law and economics scholars speak of optimal deterrence. They voice concern that excessive punishment would deter "efficient crimes." Readers of their analyses might wonder whether we do not punish murder more severely because we are worried that we might not get enough of it.²⁰⁸ By extending Holmes' alternative theory of contract and tort throughout the legal universe, law and economics scholars have made Holmes' theory more coherent—and also more chilling and absurd.²⁰⁹

205. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1203-04 (1985).

206. See *id.*

207. An economically minded scholar might respond that imprisonment is a very costly sanction. Society can inflict the same disutility on a wrongdoer through imprisonment as through an award of damages, but not at the same price. Perhaps, just perhaps, the line between criminal and civil responsibility marks the point at which the high price of imprisonment becomes justified. This response seems implausible. Defective products, negligently labeled foods and drugs, and other "mass torts" can inflict more harm than the most tireless shoplifter, robber, or murderer could inflict in a lifetime.

208. Cf. Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 48 n.8 (1988).

209. For more detailed and scholarly arguments against viewing the criminal law as simply a system of pricing, see John C. Coffee, *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Kenneth Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Possibility*, 1990 DUKE L.J. 1; Schulhofer, *supra* note 208, at 43; Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984). See generally Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

Although, in the area of contracts, Holmes apparently offered his alternative theory as a matter of description, the propriety of this theory depends upon a normative judgment. One plausible ethical view is that when a person can break a contract, pay damages to the nondefaulting party, and still profit from the breach, she ought to break the contract. In this situation, the defaulting party is better off; the nondefaulting party is apparently no worse off; and the breach increases aggregate social utility. Law and economics scholars refer to contractual default in this situation as “efficient breach.”²¹⁰ When society’s judgment is

210. Even as an economic matter, however, the scholars are probably wrong. When economists call something efficient, one must ask (as the economists recognize), “Compared to what?” Although breach sometimes may seem efficient when compared to performance, that comparison is often inapt.

An alternative to both performance and breach is rescission by mutual consent. When a contracting party sees an opportunity to profit from the noncompletion of a contract, she should be able to negotiate with the other contracting party for rescission, and an inability to secure rescission probably would indicate the “Kaldor-Hicks inefficiency” of her default. In other words, the nonperforming party probably would not profit *enough* from her nonperformance to be able to compensate the other party for his losses (as those losses are valued subjectively by the other party).

The existence of the contractual relationship suggests that the “transaction costs” incurred in negotiating a mutually satisfactory solution would be low, and the costs of using a third party to ascertain damages often would drive the “process costs” of breach well above the “transaction costs” of negotiating rescission. Breach, moreover, produces “error costs” in the assessment of damages that could be avoided by permitting the injured party to value his own losses through negotiation.

In other words, unilateral breach bypasses the use of a market-like mechanism for determining both whether abandonment of the contract would be wealth-maximizing and how the surplus generated by this abandonment should be divided. *See generally* David Friedman, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1 (1989); Ian Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984). *But see* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 4.9, 4.12 (4th ed. 1992); Richard A. Posner, *The Strangest Attack Yet on Law and Economics*, 20 HOFSTRA L. REV. 933 (1992).

Punishing breach of contract even by death or imprisonment probably would not lead to the inefficient performance of contracts very often. When performance would be inefficient, contracting parties usually could arrange to share whatever benefits either one might gain from revising or rescinding their earlier agreement. My purpose in emphasizing the option of negotiated rescission, however, is neither to propose the enforcement of contracts through capital punishment nor indeed to propose any other alteration in the law of contract remedies. (The death penalty would in fact lead to the inefficient performance of contracts—not to mention death—often enough to make the idea a very poor one.) My goal is simply to explore the narrow issue that Holmes raised—the desirability of using moralistic language to characterize contractual undertakings.

This issue may seem more symbolic than consequential. At least the consequences of its resolution may lie more in shaping people’s attitudes than in influencing the rate of contractual default in the short run. Even in the short run, however, the traditional use of moralistic

that the defaulting party ought to default, we surely should not call the default a breach of duty. We might better speak of a duty to *break* one's promises.²¹¹

There is, however, a competing ethical view. Broken promises are among the harmful things that human beings do to other human beings, and damages often cannot remedy the injuries that broken promises inflict.²¹² If our social judgment is that contractual default remains objectionable even when the defaulting party pays damages, the alternative theory of contract is inappropriate. We might better speak of duty.²¹³

Frederick Pollock thought the moralistic position closer to the ordinary person's understanding of ordinary contracts. Pollock noted that when a person contracts with a tailor for the delivery of a coat, he does not envision himself as making a bet with the tailor. Similarly, the purchaser does not see himself as purchasing an insurance policy. The purchaser wants a coat.²¹⁴

terminology adds some weight to the side of the scale opposed to default. I see no reason to doubt that this tilt is desirable and efficient. The words to which Holmes objected encourage contracting parties to seek a mutually beneficial accommodation with one another rather than to resort to unilateral breach at the first scent of profit.

211. To be sure, even when breach appears efficient, a contracting party could ethically adhere to the contract if she would gain enough personal satisfaction from keeping her promise to be worth the lost profits. In the strange thinking of welfare economists, the psychic utility that a promisor may gain by adhering to a promise may be the only reason why the *moral* duty to break promises whose performance now seems inefficient is not a *legal* duty as well.

212. The following observations of James Gustafson apply to at least some contractual defaults:

The experience of betrayal of trust is, perhaps, one of the most bitter of human life. . . . Something about human relations that cannot be fully encompassed in a rule is violated in broken trust—whether promise-keeping, expectations that the other will tell one the truth, [or] reliance on institutions to meet their commitments and fulfill their functions. . . . Betrayal and deception are the sins against trust, and elaborate indeed are the cultural and social devices that have been developed to guard against them: vows, contracts, promises, surveillance procedures, laws, and regulations.

1 JAMES M. GUSTAFSON, *ETHICS FROM A THEOCENTRIC PERSPECTIVE* 303 (1981).

213. As I have suggested *supra* note 210, although this moralistic position is often rejected (and derided) by law and economics scholars, it might in fact promote efficiency. A positive correlation between conventional morality and efficiency should come as no surprise.

214. See FREDERICK POLLOCK, *PRINCIPLES OF CONTRACT LAW* xix (3d ed. 1881). Pollock and Holmes disputed the alternative theory of contracts in their lengthy correspondence. See Letter from Frederick Pollock to Oliver Wendell Holmes, July 3, 1874, in 1 HOLMES-POLLOCK LETTERS 3 (Mark D. Howe ed., 1944); Holmes to Pollock, Mar. 25, 1883, in 1 *id.* at 21; Pollock to Holmes, Sept. 17, 1897, in 1 *id.* at 79-80; Holmes to Pollock, Mar. 12, 1911, in 1 *id.* at 177.

A defaulting tailor might report that the day before he was scheduled to deliver a coat, a billionaire named Trump noticed the coat and offered to pay him 5000 dollars to deliver it to Trump rather than to the person who had ordered it. The tailor then might return the purchaser's money with interest and might add something to cover the cost of purchasing a coat elsewhere. Economically minded scholars might praise the tailor for a wealth-maximizing breach, but Frederick Pollock and the purchaser might judge the tailor's act wrongful.²¹⁵

Amidst the jumbled jurisprudence of the realist Karl Llewellyn, a coherent sentence sometimes appeared. Here is one:

[The right to recover damages for breach of contract] could rather more accurately be phrased somewhat as follows: if the other party does not perform as agreed, you can sue, and *if* you have a fair lawyer, and nothing goes wrong with your witnesses or the jury, *and* you give up four or five days of time and some ten to thirty percent of the proceeds, and wait two to twenty months, you will *probably* get a judgment for a sum considerably less than what the performance would have been worth—which, if the other party is solvent and has not secreted his assets, you can in further due course collect with six percent interest for delay.²¹⁶

Llewellyn offered this sentence shortly after deriding Roscoe Pound as "a man partially caught in the traditional precept-thinking of an age that is passing."²¹⁷ As Llewellyn characterized the views of Pound, "It is a heresy when . . . Holmes speaks of a man having liberty under the law to perform his contract, or pay damages, at his option."²¹⁸

Llewellyn's observation suggests, however, why (even from an economic perspective) the payment of damages often is not a satisfactory alternative to the performance of a contract, and why realism argues against rather than in favor of the alternative theory of contracts. If Holmes' theory makes sense, it does so only for the defaulting party who does not force the nondefaulting party to resort to process, who

For recent scholarly support of Pollock's position, see CHARLES FRIED, *CONTRACT AS PROMISE* (1981).

215. In this case, delivery of the coat to Trump without the purchaser's consent would maximize social utility only as a matter of economic definition. The case for breach might be stronger if Trump had told the tailor that he planned to give the coat to a homeless person whom he had just seen shivering outside the tailor's shop.

216. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 437 (1930).

217. *Id.* at 434.

218. *Id.* at 437.

does not squabble, who resolves doubts about what he owes in favor of the nondefaulting party, and who promptly sends the nondefaulting party a check for this amount. The normative version of Holmes' alternative theory—the version now apparently endorsed by law and economics scholars—depends on a formalist fiction, the “juridically assumed” adequacy of legal and other remedies for breach of contract. Only this fiction enables scholars to treat as “efficient” many breaches of contract that plainly are not. When efficiency is the goal, encouraging performance or rescission by mutual consent is probably preferable in the overwhelming majority of cases to encouraging resort to costly dispute-resolution procedures.²¹⁹

For plausible reasons, however, the common law has been reluctant to tie contracting parties too tightly to their promises.²²⁰ Treating damages as normatively equivalent to performance may be appropriate for some kinds of contracts and not for others. For purposes of this Article, these issues need not be resolved. The important point is simply that, whether one endorses Frederick Pollock's view of ordinary contracts or the economists' relentless ethic of wealth-maximization, the law should say what it means. When the law does not seek to encourage the performance of contracts, it should speak in terms of unfreighted alternatives. When it prefers performance, it should use words like “duty.” Contrary to the claim of Oliver Wendell Holmes, descriptive honesty does not demand the abandonment of traditional moralistic language.

Words in fact are cheap; and if words of censure can discourage harmful or inefficient conduct even slightly, they are worth the price. When language describing the law's normative judgments succeeds in shaping consciousness and influencing conduct, this language is likely to be far more cost-effective than damage awards or other sanctions. There can be only one explanation for the failure of Holmes and of modern law and economics scholars to embrace moral terminology as a masterpiece of efficiency: Such a mode of looking at the matter “stinks in the nostrils” of those who think it advantageous to get as much morality out of the law as they can.²²¹

219. See, e.g., Albert W. Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986) (describing America's cost-ineffective legal system).

220. Most notably, our law does not permit the award of punitive damages for breach of contract and rarely orders specific performance of a contract.

221. But see Holmes, *supra* note 2, at 462 (claiming that the alternative theory of contracts “stinks in the nostrils of those who think it advantageous to get as much ethics into law as they can”). Law and economics scholars especially should embrace traditional moral terminology. The common law's use of this language provides further support for the economists' thesis that the

VIII. CONCLUSION

Holmes once wrote of “the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought—the [subtle] rapture of a postponed power . . . which to his prophetic vision is more real than that which commands an army.”²²² Holmes surely was writing about Holmes; and one hundred years after *The Path of the Law*, descriptions of this article as an “acknowledged masterpiece in jurisprudence,” “the single most important essay ever written by an American on the law,” and perhaps “the best article-length work on law ever written” confirm Holmes’ prophetic vision of his intellectual power.²²³

At the conclusion of a tour of Holmes’ dark, elegant, engaging, and destructive essay, however, the praise seems flawed. Morton Horwitz’s judgment appears more appropriate: “With ‘The Path of the Law’ Holmes pushed American legal thought into the twentieth century.”²²⁴ The only flaw in this pronouncement is that Horwitz apparently meant it as a compliment to Holmes, to the century, and to American law.

common law is efficient.

222. Oliver Wendell Holmes, *The Profession of Law*, in COLLECTED LEGAL PAPERS 29, 32 (1920).

223. See *supra* text accompanying notes 1, 5.

224. See *supra* text accompanying note 3.