

## HOLMES ON LAW AND MORALITY

MARK STRASSER\*

*This article explores Justice Holmes' position on the relationship between law and morality, and discusses some of the mistaken interpretations of that position. Commentators' claims to the contrary notwithstanding, Holmes' predictive theory of law and his discussion of the "bad man" do not illustrate the separation between law and morality but merely that lawful actions need not be performed for morally praiseworthy reasons and that positive law and morality do not always coincide. He suggested that the conflation of law and morality might be reduced by changing legal terminology so that moral and legal terms would not overlap, a proposal with possible drawbacks that Holmes did not seem to appreciate. That said, however, detractors overestimate the extent to which Holmes asserted that law and morality should be distinguished, thereby distorting both Holmes' views and the value of his insights.*

*Cet article explore la position du juge Holmes sur la relation entre la loi et la moralité et traite de certaines interprétations erronées à ce sujet. Nonobstant les revendications contraires des commentateurs, la théorie prédictive de droit de Holmes et sa discussion sur « les méchants » n'illustrent pas la séparation entre le droit et la moralité, mais simplement que les actions licites ne doivent pas être exécutées pour des raisons moralement louables et que le droit positif et la moralité ne vont pas toujours de pair. Il suggère qu'en changeant la terminologie juridique de sorte que les termes juridiques et moraux ne se chevaucheraient pas, le droit et la moralité seraient alors moins appariés, une suggestion qui présente des inconvénients éventuels que Holmes n'a pas semblé apprécier. Ceci dit, les détracteurs surestiment toutefois la mesure dans laquelle Holmes a affirmé qu'il fallait distinguer le droit de la moralité, faussant par conséquent les points de vue de Holmes et la valeur de ses idées.*

## TABLE OF CONTENTS

I.	INTRODUCTION	378
II.	THE BAD MAN	378
	A. HOLMES' UNDERSTANDING OF THE LAW	379
	B. ON FINES VERSUS TAXES	380
	C. WHAT ABOUT THE BAD MAN MAKES HIM BAD?	382
	D. THE PREDICTION THEORY OF LAW	386
III.	ON CLEANING UP THE LEGAL LEXICON	390
	A. THE SEPARATION OF LAW AND MORALS	390
	B. MORAL VERSUS LEGAL DUTIES	392
IV.	HOLMES' MORAL VIEW	395
	A. HOLMES' MORAL SKEPTICISM	396
	B. HOLMES' MORAL CRITIQUE	397
V.	CONCLUSION	401

\* Trustees Professor of Law, Capital University Law School, Columbus, Ohio. I would like to thank Professors Mark Brown, James Beattie, and the anonymous reviewers of the *Alberta Law Review* for their helpful comments on earlier drafts of this article.

## I. INTRODUCTION

Justice Oliver Wendell Holmes is one of the most cited and discussed United States Supreme Court Justices in American history.<sup>1</sup> As is perhaps true of all influential thinkers, however, Holmes also has his detractors — in particular, for his alleged moral nihilism.<sup>2</sup> While these detractors are correct that Holmes denies that there is an objective universal morality, they are incorrect about the implications of his moral position for his analysis of the law. This article will explore some of the mistaken interpretations of Holmes' position and offer an explanation of his position that makes it both more plausible, and more useful, in understanding the relationship between law and morality.

## II. THE BAD MAN

Holmes famously suggested that the law should be viewed through the eyes of a bad man. Commentators disagree about both what Holmes was saying and why he was saying it. Those disagreements are due at least in part to differing emphases on the context in which his comments were first made public, and in part to a failure to pay sufficiently close attention to what he said. When that context is examined more closely and considered in light of Holmes' letters and other works, many of the current Holmes interpretations will be seen to be not only implausible, but also incapable of capturing Holmes' insights about the law. Holmes' actual view is much more respectful of morality than is currently appreciated, and is quite compatible with a range of views about the nature of morality and its connection to law.

---

<sup>1</sup> See, e.g., Morton J. Horwitz, *The Transformation of American Law: 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) at 109 ("Oliver Wendell Holmes, Jr., [was] the most important and influential legal thinker America has had"); Richard A. Posner, ed., *The Essential Holmes* (Chicago: University of Chicago Press, 1992) at ix [Posner, *The Essential Holmes*] ("Oliver Wendell Holmes is the most illustrious figure in the history of American law"); Fred R. Shapiro, "The Most-Cited Legal Scholars" (2000) 29 *J. Leg. Stud.* 409 at 424 (listing Holmes as one of the most-cited legal scholars); James Knudson, "The Influence of the German Concepts of *Volksgeist* and *Zeitgeist* on the Thought and Jurisprudence of Oliver Wendell Holmes" (2002) 11 *J. Transnat'l L. & Pol'y* 407 at 407 ("Justice Oliver Wendell Holmes is perhaps the most famous and influential judge in American legal history"); Morris B. Hoffman, Book Review of *Law Without Values: The Life, Work and Legacy Of Justice Holmes* by Albert W. Alschuler (2001) 54 *Stan. L. Rev.* 597 at 598 ("No other American legal figure has ever had more written about him than Holmes"); and Morton J. Horwitz, "The Place of Justice Holmes in American Legal Thought" in Robert W. Gordon, ed., *The Legacy of Oliver Wendell Holmes, Jr.* (Stanford: Stanford University Press, 1992) 31 at 31 [Horwitz, "The Place of Justice Holmes"] ("THERE HAS BEEN only one great American legal thinker and it was Holmes").

<sup>2</sup> See Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000) at 10 ("Holmes was at the forefront of ... a revolt against objective concepts of right and wrong"); Stephen B. Presser, "Some Thoughts on Our Present Discontents and Duties: The Cardinal, Oliver Wendell Holmes, Jr., the Unborn, the Senate, and Us" (2003) 1 *Ave Maria L. Rev.* 113 at 118 ("Holmes probably was not the Antichrist, but he surely gave the Prince of Darkness a run for the money"); and David Luban, "Justice Holmes and the Metaphysics of Judicial Restraint" (1994) 44 *Duke L.J.* 449 at 475 ("Holmes qualifies as a moral nihilist") [Luban, "Judicial Restraint"].

## A. HOLMES' UNDERSTANDING OF THE LAW

In 1897, Holmes gave an address at the dedication of a new hall at the Boston University School of Law.<sup>3</sup> One of his goals was to help students undertake “a right study and mastery of the law as a business with well understood limits, a body of dogma enclosed within definite lines.”<sup>4</sup> To make the law’s limits clear, he offered an heuristic to separate law from the provinces of morality and social convention:

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.<sup>5</sup>

Holmes offers the example of the bad man because, as Posner points out, such an individual is not motivated by his conscience to act rightly.<sup>6</sup> Yet, Holmes is not thereby suggesting that such an individual is likely to be a law-breaker — “a bad man has as much reason as a good one for wishing to avoid an encounter with the public force.”<sup>7</sup> Indeed, if we were only to use external behaviour as our guide, we might have great difficulty in determining who deserved moral praise, since a “man who cares nothing for an ethical rule which is believed and practised 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.”<sup>8</sup> While the bad man does not act based on “principles of ethics or admitted axioms,”<sup>9</sup> but instead in light of what the “courts are likely to do in fact,”<sup>10</sup> he nonetheless will abide by the law as a matter of self-interest.

At first glance,<sup>11</sup> it might seem as though Holmes’ bad man is simply the paradigmatic self-interested man.<sup>12</sup> Yet, there are a variety of reasons that such a description of the bad man is inaccurate, if only because he may not be sufficiently self-interested. For example, there is no mention of the bad man’s wanting to know the likelihood of his being punished even were he to break the law — he might avoid punishment by escaping detection,<sup>13</sup> bribing

<sup>3</sup> The address, delivered at the dedication on 8 January 1897, was later published in the *Harvard Law Review*. See Oliver Wendell Holmes, “The Path of the Law” (1897) 10 *Harv. L. Rev.* 457 at 457, n. 1 [Holmes, “The Path of the Law”].

<sup>4</sup> *Ibid.* at 459.

<sup>5</sup> *Ibid.*

<sup>6</sup> See Posner, *supra* note 1 at xi (discussing “the ‘bad man’ theory of law (law viewed from the standpoint of persons who care nothing for moral duty)”).

<sup>7</sup> *Supra* note 3 at 459.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.* at 460.

<sup>10</sup> *Ibid.* at 461.

<sup>11</sup> Sanford Levinson & J.M. Balkin, “The ‘Bad Man,’ the Good, and the Self-Reliant” (1998) 78 *B.U.L. Rev.* 885 at 886-87 (“At first glance, the image of the ‘bad man’ seems perfectly clear. He is a version of the ideal-type of *homo economicus* interested only in maximizing his own individual preferences, indifferent to others except insofar as they serve as material obstacles to fulfilling egoistic desires”).

<sup>12</sup> See Robert W. Gordon, “The Path of the Lawyer” (1997) 110 *Harv. L. Rev.* 1013 at 1014 (suggesting that on one view, “the ‘bad man’ is just the rational man — *Homo law-and-economicus* — who treats all legal rules as prices on conduct”).

<sup>13</sup> Jack M. Beermann, “Holmes’s Good Man: A Comment on Levinson and Balkin” (1998) 78 *B.U.L. Rev.* 937 at 944 (noting that “in addition to the reaction of the courts, the bad man is likely to take into account the probability of detection when deciding whether to obey the law”). See also Alschuler, *supra*

or blackmailing a judge, *etc.* Indeed, some commentators seem to believe that Holmes' bad man is not bad enough because of his failure to consider that he might escape justified sanctions due to the legal system's inefficiencies.<sup>14</sup>

## B. ON FINES VERSUS TAXES

Even if one brackets the possibility that a wrongdoer will be able to escape justified punishment, Holmes' picture of the bad man still seems incomplete, as becomes clear when one considers Holmes' differentiation between paying taxes and fines. Holmes notes that from the perspective of the bad man, duty mainly means "a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money."<sup>15</sup> By talking about duty in this way, Holmes does not provide a ready way to distinguish between two different types of compulsory payments — fines and taxes.<sup>16</sup> Given that fines tend to be exacted when one has done something illegal whereas taxes will be exacted when one has done something such as earning a salary, Holmes might seem to have overlooked something important.

Holmes understands that he has not provided a way to distinguish between these types of payments, and offers an analysis of whether it would matter to a bad man if he were "being fined [or] ... being taxed a certain sum for doing a certain thing."<sup>17</sup> In the bad man's view, 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."<sup>18</sup> Basically, Holmes is suggesting that if the consequences are the same whether the bad man pays a \$100 tax or a \$100 penalty, the bad man will be indifferent between those two possibilities. The bad man will only have a preference if "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."<sup>19</sup>

Yet, Holmes' bad man seems to ignore disadvantages and adverse consequences that others would consider. For example, an individual who is fined \$100 rather than paying that amount in taxes might suffer in the eyes of his fellow citizens. Perhaps those individuals would be less likely to patronize his business or socialize with him or his family. Even the bad man would care about effects like that. Just as one might argue that Holmes fails to consider that the selfish man would want to know about the probability that he would not be prosecuted or convicted notwithstanding an express statutory prohibition, one might argue that Holmes seems not to have considered that the selfish man would be interested in knowing about external sanctions that might be imposed against him even if those sanctions would not be imposed by the state. For example, sanctions imposed by members of society might affect the bad man's enjoyment of life or his ability to earn an income.

---

note 2 at 145 (suggesting that the bad man would really be concerned about what the sheriff would do).

<sup>14</sup> See Beermann, *ibid.*

<sup>15</sup> *Supra* note 3 at 461.

<sup>16</sup> See, e.g., David Luban, "The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's *The Path of The Law*" (1997) 72 N.Y.U.L. Rev. 1547 at 1565 [Luban, "The Bad Man and the Good Lawyer"].

<sup>17</sup> *Supra* note 3 at 461.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

When discussing Holmes' bad man, Posner suggests that the bad man would take all of these factors into account:

Many people obey the law because they would not profit from breaking it even if there were no formal sanctions — they are restrained by habit, conscience (insofar as law tracks morals, as it frequently does), concern with reputation or other considerations of reciprocity, lack of net expected gain when risks and opportunity costs are taken into account, or sympathy or affection for the potential victims of their wrongdoing.<sup>20</sup>

Yet, Posner's bad man considers a variety of factors Holmes' bad man does not. Holmes says that the bad man would be indifferent between paying a tax and paying a fine unless "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*."<sup>21</sup> This means that unlike the Posnerian bad man, the Holmesian bad man would be indifferent between paying a fine and paying a tax where no further *legal* consequences were attached to that decision, even if other *non-legal* consequences would attach to that decision.

In commenting on Holmes' bad man theory of law, Judge Posner suggests that Holmes' "conception overlooks the people who obey the law *because* it is the law."<sup>22</sup> However, Posner argues, the "oversight may not be critical"<sup>23</sup> because there "may not be many 'good men' in the specific sense of people who comply with laws merely out of respect for law, a felt moral obligation to obey it."<sup>24</sup> Yet, Holmes does not overlook that there are individuals who obey the law because it is law. On the contrary, Holmes discusses the good man "who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."<sup>25</sup>

It is worth exploring why the Holmesian bad man only considers the legal consequences of his act. Holmes discusses the bad man — someone not motivated by conscience — precisely because he believes that many (good) individuals are motivated by their consciences to act in accord with law.<sup>26</sup> Because such individuals might act rightly whether or not the law requires them to do so,<sup>27</sup> it might be difficult to ascertain in a given instance whether an individual acted properly because of the law rather than because of morality. By the same token, Holmes wants to remove from consideration the effects of social opinion on the individual's calculation about whether to obey the law because, otherwise, it would be difficult to tell whether the individual was motivated to obey the law because of the legal

<sup>20</sup> Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990) at 223-24 [Posner, *The Problems of Jurisprudence*].

<sup>21</sup> *Supra* note 3 at 461 [emphasis added].

<sup>22</sup> See Posner, *The Problems of Jurisprudence*, *supra* note 20 at 223 [emphasis in original].

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> See Holmes, "The Path of Law," *supra* note 3 at 459.

<sup>26</sup> See *ibid.* (discussing the good man "who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience").

<sup>27</sup> See Erin Rahne Kidwell, "The Paths of the Law: Historical Consciousness, Creative Democracy, and Judicial Review" (1998) 62 *Alb. L. Rev.* 91 at 114 ("ethical individuals will behave correctly regardless of whether legal consequences ensue or not").

sanctions that might otherwise be imposed or, instead, because he valued his neighbours' business or their opinion of him.

Holmes' focus on the legal consequences of actions is why he has to exclude from consideration both sanctions of conscience (corresponding to the consequences of moral wrongdoing) and the social opprobrium that might be associated with law-breaking. Holmes' bad man only considers the effects of the law,<sup>28</sup> notwithstanding that a purely self-interested individual would consider other effects on his own well-being as well.<sup>29</sup>

Posner notes that "[m]any people obey the law because they would not profit from breaking it even if there were no formal sanctions."<sup>30</sup> He, too, recognizes that an individual might be motivated by a variety of concerns to act in the way required by law. Basically, both he and Holmes offer pictures involving two people: (1) the "bad" man who acts in light of the legal consequences; and (2) the "good" man who acts in light of a variety of other considerations. Yet, the "good" man might be acting in light of many non-moral considerations, such as the possibility that his acting poorly will cause his neighbours to shun him, and it is not at all clear that the man who acts to avoid adverse legal consequences is any worse (morally or otherwise) than the man who acts to avoid adverse non-legal consequences. Further, even good people might want to know about the legal consequences of acting in particular ways, especially because the law may not permit one to follow the morally preferable course of action.<sup>31</sup>

### C. WHAT ABOUT THE BAD MAN MAKES HIM BAD?

If the bad man's wanting to know the practical implications of the law is not itself worthy of condemnation, then it may be helpful to figure out the sense in which he is appropriately labeled "bad." Indeed, there has been some confusion about why Holmes describes him as bad, which is due at least in part to a misunderstanding of Holmes' project.

Consider the view that good and bad individuals are distinguishable in that the former but not the latter acts rightly out of a recognition that it is their duty to do so.<sup>32</sup> According to this view, good individuals neither follow the law because they fear the imposition of sanctions such as a fine or imprisonment, nor because they fear the sanctions of conscience. Instead, they act rightly without considering the benefits of doing so or the costs of failing to do so.

<sup>28</sup> *Supra* note 3 at 461 (noting that the bad man would treat a tax and a fine differently only if the one and not the other had disadvantages or consequences "attached to the act by the law").

<sup>29</sup> It is for this reason among others that it is not accurate to say that Holmes' bad man is simply the Hobbesian man. See Stephen R. Perry, "Holmes versus Hart: The Bad Man in Legal Theory" in Steven J. Burton, ed., *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (New York: Cambridge University Press, 2000) 158 at 179 (pointing out that "Holmes never discusses a realistic calculus of self-interest"). Professor Perry realizes that the bad man is not a realistic self-interested individual, but does not seem to appreciate how this undercuts the suggestion that the bad man is simply the Hobbesian man. See *ibid.* at 173 (suggesting that "the best overall interpretation of the bad man is the Hobbesian view that he is the human archetype").

<sup>30</sup> *Supra* note 20 at 223.

<sup>31</sup> For a discussion of immoral laws, see *infra* notes 79-80 and accompanying text.

<sup>32</sup> See Posner, *The Problems of Jurisprudence*, *supra* note 20 at 223 (noting that there "may not be many 'good men' in the specific sense of people who comply with laws merely out of respect for law, a felt moral obligation to obey it").

In contrast, bad individuals act rightly only after a consideration of the pains that might follow from non-compliance. Some commentators seem to believe Holmes discusses the bad man as a way of proposing that this is the difference between good and bad individuals.

Commentators are correct when suggesting that the Holmesian bad man obeys the law only because he fears the imposition of legal sanctions.<sup>33</sup> Nonetheless, the bad man is not bad because he is willing to decide whether to obey the law out of a prospective calculation of pains and pleasures, since the Holmesian *good* man follows the law because he fears that his own conscience would punish him unmercifully were he to do otherwise.<sup>34</sup> On Holmes' view, the fact that both the good and the bad man act out of a prospective calculation of pains and pleasures does not undercut the difference between them.<sup>35</sup> The two are to be distinguished in that the bad man's conscience (unlike the good man's) does not play its proper role — it may fail to specify properly which actions are right and which are wrong, or it may fail to impose sanctions for the performance of bad actions.<sup>36</sup>

Commentators have proposed a variety of theories to explain why Holmes discusses the bad man. Professor Grey discusses and ultimately rejects the suggestion that Holmes' "deployment of the figure of the 'bad man' implies that while morality is for good people, law is only for bad people."<sup>37</sup> Such a view should be rejected. Holmes is using the bad man to illustrate how the law itself promotes good behaviour, which can only be done if the influences of public opinion and conscience are bracketed.

Professor Twining suggests that "the 'bad man' was introduced for quite limited purposes ... to dramatize a distinction between law and morals — the badness or amoral aspect, and

<sup>33</sup> See Kidwell, *supra* note 27 at 113-14 ("The 'bad man' is an unethical individual who only behaves out of a fear of being punished by the law. This perspective is more useful than that of the 'good man,' because ethical individuals will behave correctly regardless of whether legal consequences ensue or not.").

<sup>34</sup> Holmes, "The Path of the Law," *supra* note 3 at 459 (Holmes discusses the good person "who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience"); Luban, "The Bad Man and the Good Lawyer," *supra* note 16 at 1564 ("Holmes means to contrast the bad man not just with someone who takes all his cues from the law, but with someone who is guided by conscience outside/as well as inside the law. In short, Holmes's 'good man' is the man of conscience, and Holmes's 'bad man' is not.").

<sup>35</sup> Beer mann, *supra* note 13 at 939-40:

[Levinson & Balkin], however, develop a second reading of Holmes's passage which is at odds with the notion that the good man obeys law out of at least a *prima facie* ethical duty to do so regardless of the consequences. [Levinson & Balkin] focus on Holmes's phrase "vaguer sanctions of conscience" and state that Holmes offers another reason for the good man's obedience to the law, that the good man is "motivated by conscience" in the sense that "feelings of guilt or the fear of hellfire" are among the "sanctions" of conscience that motivate the good man to obedience. [Levinson & Balkin] recognize that this reading reduces the differences between the good man and the bad man. Now both are motivated by the desire to avoid sanctions, one material, the other spiritual.

<sup>36</sup> Cf. William Twining, "The Bad Man Revisited" (1973) 58 Cornell L. Rev. 275 at 282 ("The difference between the Bad Man and the Good Citizen does not rest on the latter's indifference to prediction, but on the former's indifference to morality").

<sup>37</sup> Thomas C. Grey, "Plotting *The Path of the Law*" (1997) 63 Brook. L. Rev. 19 at 37 [Grey, "Plotting"]. Grey rejects this because he believes that Holmes uses the bad man for a limited purpose. See *ibid.* at 55 ("Holmes has made it explicit that the 'bad man's' perspective is adopted for a limited purpose, that of learning the rules and forcing the student and lawyer to focus on what those rules actually provide by way of remedy").

... to focus attention on a more realistic standpoint for law students than that of appellate judges — the predictive aspect.”<sup>38</sup> Yet, it is important to understand the sense in which the bad man illustrates the distinction between law and morals and the sense in which the predictive aspect is more relevant for law students and practicing lawyers than for appellate judges.

Holmes’ bad man fulfills his duty and acts rightly, although perhaps for the wrong reason. Yet, that means that Holmes’ use of the bad man does not illustrate the amorality of the law since the bad man performs the *right* action, but merely that individuals might follow moral laws for non-moral reasons.

Suppose that in the country of Uprightland there is a constitutional requirement that the law mirror the existing morality. Whatever morality requires, permits, or prohibits is required, permitted, or prohibited by the Uprightland law as well. Further, when moral notions change, the law will change with them. There may well be Holmesian bad men in Uprightland who perform the morally and legally required action solely because they fear fines or imprisonment. Yet, *ex hypothesi*, the Uprightland law mirrors the moral law.<sup>39</sup> It is thus at best misleading to suggest that Holmes offers the example of the bad man to illustrate the separability thesis<sup>40</sup> — namely, that there is no necessary connection between law and morality,<sup>41</sup> since Holmesian bad men might live in Uprightland, notwithstanding that system’s necessary connection between law and morality.

Insofar as Holmes’ bad man illustrates the difference between law and morality,<sup>42</sup> it is a difference that Holmes frequently cites but that commentators do not sufficiently emphasize — namely, the different roles played by the agent’s intention and motivation in the moral as

<sup>38</sup> William Twining, “Other People’s Power: The Bad Man and English Positivism, 1897-1997” (1997) 63 *Brook. L. Rev.* 189 at 204 [Twining, “Other People’s Power”].

<sup>39</sup> We shall assume for the purposes of this example that there is one moral law that is knowable. But compare Robin West, “Natural Law Ambiguities” (1993) 25 *Conn. L. Rev.* 831 at 835 (describing the positivist legal reactionary position “that ‘law is law’ and that there simply is no coherent or knowable independent ‘moral standard’ against which the law can be judged”).

<sup>40</sup> Twining, “Other People’s Power,” *supra* note 38 at 222 (“Holmes’s original intention was to use the ‘bad man’ as a device to introduce a positivist and a realist perspective. It is a vivid way of illustrating the separability thesis, which was, and to this day remains, controversial.”); Robert W. Gordon, “Law as a Vocation, Holmes and the Lawyer’s Path” in Burton, *supra* note 29, 7 at 13 (“Probably the most common reading of the speech is that it sets forth a purely positivist theory of the law—a deflated, demoralized, ‘disenchanted’ view (to use Max Weber’s term) of the legal system”).

<sup>41</sup> John C.P. Goldberg, “Style and Skepticism in *The Path of the Law*” (1997) 63 *Brook. L. Rev.* 225 at 242 discussing

the “separation” or “separability thesis” — the notion that law and morality bear no necessary connection — was offered as a means of distinguishing positivism from the natural law tradition, which claims that, strictly speaking, there is no such thing as an “immoral law,” only moral laws or immoral exercises of power.

See also Horwitz, “The Place of Justice Holmes,” *supra* note 1 at 140 (“‘The Path of the Law’ marks the first clear articulation of legal positivism—that is, an insistence on a sharp distinction between law and morals—by any American legal thinker”).

<sup>42</sup> H.L. Pohlman, *Justice Oliver Wendell Holmes & Utilitarian Jurisprudence* (Cambridge Mass.: Harvard University Press, 1984) at 161-62 (“Holmes no doubt was a positivist. To prevent any confusion of law with morality, Holmes advised the student to look upon law as a ‘bad man.’”).

opposed to legal assessment of her action.<sup>43</sup> The law regards law-abiding conduct as right regardless of why the agent is following the law, whereas (Holmes suggests) an agent's action is morally good only if performed for the right reasons.<sup>44</sup> Included within those reasons is a fear of the imposition of pangs of conscience, since the "good man" acts because he fears "the vaguer sanctions of conscience."<sup>45</sup>

<sup>43</sup> See Oliver Wendell Holmes, "The Common Law" in Sheldon M. Novick, ed., *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, vol. 3 (Chicago: University of Chicago Press, 1995) at 184 [Holmes, "The Common Law"]:

Courts of equity have laid down the doctrine in terms which are so wholly irrespective of the actual moral condition of the defendant as to go to an opposite extreme. It is said that "when a representation in a matter of business is made by one man to another calculated to induce him to adapt his conduct to it, it is perfectly immaterial whether the representation is made knowing it to be untrue, or whether it is made believing it to be true, if, in fact, it was untrue."

See also *ibid.* at 197:

[A]s the law has grown, even when its standards have continued to model themselves upon those of morality, they have necessarily become external, because they have considered, not the actual condition of the particular defendant, but whether his conduct would have been wrong in the fair average member of the community, whom he is expected to equal at his peril.

A separate issue involves Holmes' focus on what the agent might reasonably have been inferred to have intended rather than on what she subjectively intended. See *ibid.* at 183 ("The standard of what is called intent is thus really an external standard of conduct under the known circumstances"). The intention might help define what the agent was trying to do, e.g., help a person in need, rather than why she was trying to do it, e.g., out of duty.

<sup>44</sup> See *ibid.* at 280-81 ("But, as has been said before in these Lectures, although the law starts from the distinctions and uses the language of morality, it necessarily ends in external standards not dependent on the actual consciousness of the individual"); and Pohlman, *supra* note 42 at 15 ("As Holmes understood it, morality dealt 'with the actual internal state of the individual's mind'; the law dealt with the individual's external acts"). It is thus rather misleading to suggest that Holmes believes that the law has nothing to do with morality, as if the contents of the former have no connection to the contents of the latter. See Grant Gilmore, "Some Reflections on Oliver Wendell Holmes, Jr." (1999) 2 Green Bag 2d 379 at 387 (discussing "the proposition, which Holmes restated hundreds of times, that the law has no concern with morality. In his lecture on the criminal law he pointed out, with equanimity, that under the theory that he espoused we frequently end up punishing those who are guilty of no moral wrongdoing while letting those whose moral behavior is outrageous go free: all that counts is the convenience of the community."). Yet, this misrepresents Holmes in two respects: (1) Holmes' distinction between law and morality is focused on the agent's motivation; and (2) Holmes denies that law is reducible to any one thing, even the convenience (or utility) of society.

<sup>45</sup> See Holmes, "The Path of the Law," *supra* note 3 at 459:

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.

Cf. Levinson & Balkin, *supra* note 11 at 888:

As soon as we begin to unpack this formula, however, something very puzzling begins to happen. Holmes's "good man" starts to look increasingly like his "bad man," and his "bad man" increasingly resembles his formulation of the "good man." Consider, for example, that Holmes uses the "sanctions of conscience" to explain why the "good man" obeys the law. These "sanctions" presumably range from feelings of guilt to the fear of hellfire; and the "good man" can surely predict that they will descend upon him if he misbehaves. Thus, both Holmes's "good man" and his "bad man" seem to be defined in terms of responses to sanctions. Of course, we are not claiming that Holmes has accurately described the motivations of good and bad persons; rather, we are pointing out how impoverished his psychological model seems to be. Holmes's picture of the "good man" more resembles a person driven by a dominating superego than a mature individual whose ego can exercise at least some measure of autonomous reflection and judgment. In short, if a "bad man" is defined as one driven by the fear of punishment, the Holmesian "good man" is just a special case of his "bad man" — he is a "bad man" driven by the fear of sanctions existing outside the law. This may seem to be a play on words, but if so, it is one generated by Holmes's peculiar choice of language.

Professors Balkin and Levinson correctly infer from Holmes' comment about the vaguer sanctions of conscience that "the good person would not violate a just or morally binding law even if public authorities stopped punishing its violation or the courts were closed."<sup>46</sup> From this they conclude that "for the [Holmesian] good person, law is something other than predictions of official behavior; instead, law is a norm that generates a feeling of obligation to obey it, regardless of the probability of state-enforced sanctions resulting from disobedience."<sup>47</sup> Thus, Professors Balkin and Levinson believe that the Holmesian good person acts out of a recognition of a moral obligation to obey the law, whereas the Holmesian bad person acts out of a fear that sanctions would otherwise be imposed.

While correct in their analysis of the bad man, Professors Balkin and Levinson misunderstand the good man in a crucial respect, and seem to be committing exactly the kind of conflation that Holmes is trying to prevent. Holmes emphasizes the distinction between law and morality because he believes that it is too easy for the distinction between them to become blurred. He notes that the "law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds."<sup>48</sup> The interpretation offered by Professors Balkin and Levinson destroys the barrier that Holmes wishes to bolster. While many commentators discuss the moral obligation to obey the law,<sup>49</sup> Holmes wishes to keep the domains of morality and law separate (to the extent that is possible) rather than provide an additional bridge between them.

The bad man does not illustrate that law and morality are separable in the way that many commentators claim.<sup>50</sup> Bad men might live in a society or world in which there is a necessary connection between law and morality, where the contents of legal rules mirror the contents of moral rules. In such a society or world, the bad man might be as law-abiding and right-action-performing as any good man in the society. Thus, Holmes' discussion of the bad man does not illustrate illegal or immoral action, or even that law and morality must diverge in content.

#### D. THE PREDICTION THEORY OF LAW

Holmes' prediction theory of law has received much negative criticism in the secondary literature, only some of which is deserved. While it is fair to suggest that Holmes' theory does not give as full an account of the law as some would desire, many commentators have understated the usefulness of Holmes' description and have misstated Holmes' purpose in offering this account of the law.

---

<sup>46</sup> Levinson & Balkin, *ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> Holmes, "The Path of the Law," *supra* note 3 at 459-60.

<sup>49</sup> See generally, Joseph Raz, "About Morality and the Nature of Law" (2003) 48 Am. J. Juris. 1.

<sup>50</sup> Cf. Posner, *The Essential Holmes*, *supra* note 1 at xi (discussing "the severance of law from morals ... that is a basic element of Holmes's jurisprudence").

Holmes suggests that the “prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”<sup>51</sup> Here, Holmes makes clear his sympathy for the bad man’s view of law,<sup>52</sup> which primarily focuses on knowledge of the law as a means of understanding and predicting the “material consequences”<sup>53</sup> of particular courses of conduct.

Holmes’ suggestion that the law can be reduced to prophecies about what the courts will do has been subject to a variety of criticisms. Professor Grey notes some of the difficulties for Holmes’ approach insofar as it is purportedly offering “a scientific definition — one that might, for instance, identify the essence of the distinctively legal subset of social phenomena”:<sup>54</sup>

The prediction theory fails to capture the legal attitudes of officials and probably of most ordinary citizens, attitudes that any reasonably complete sociological account of law must consider. It leaves out the element of perceived legitimacy, which seems a necessary aspect of any serious attempt to distinguish legal from other constraints as part of a general scientific study of society. Nor, for similar reasons, is it an adequate account of law from the perspective of the judge.<sup>55</sup>

As Grey notes, however, Holmes was not attempting to offer a sociological account of the law. Rather, Grey argues, “Holmes proposed his prediction theory as a useful guideline for a particular and confined heuristic purpose, not as a general scientific or conceptual truth about the nature of law.”<sup>56</sup>

Grey believes that Holmes’ purpose was relatively narrow because Holmes was addressing law students when he delivered “The Path of the Law” as a dedication.<sup>57</sup> Yet, it is not at all clear that Holmes was solely emphasizing the importance of “learning the rules and forcing the student and lawyer to focus on what those rules actually provide by way of remedy,”<sup>58</sup> especially given Holmes’ personal endorsement of the predictive theory of law and his clear sympathy for the bad man’s view. Further, even if Holmes’ purpose was somewhat narrow when delivering the dedication, his purposes might have been broader when he decided to publish the piece in the *Harvard Law Review*. Thus, had Holmes not published his remarks, his Boston University Law School address might more plausibly have been thought to have been designed to target law students (notwithstanding that addresses are sometimes delivered to one audience when the speaker has a different or more general audience in mind). However, Holmes’ publication of the remarks in a law review whose readership is largely composed of legal professionals undercuts the persuasiveness and plausibility of the suggestion that the view expressed was only for law students. Further, Holmes’ emphasis on what courts *in fact* do suggests that his goal was not to induce students and attorneys to focus on how the system is supposed to work. Finally, the explication offered here coheres with Holmes’ other writings, further suggesting that the address and

---

<sup>51</sup> Holmes, “The Path of the Law,” *supra* note 3 at 461.

<sup>52</sup> See *ibid.*: “I am much of his [the bad man’s] mind.”

<sup>53</sup> *Ibid.* at 459.

<sup>54</sup> Thomas C. Grey, “Holmes and Legal Pragmatism” (1989) 41 *Stan. L. Rev.* 787 at 828.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> See Robert H. Bork, “The Judge’s Role in Law and Culture” (2003) 1 *Ave Maria L. Rev.* 19 at 27.

<sup>58</sup> Grey, “Plotting,” *supra* note 37 at 55.

Holmes' focus on the bad man should not simply be dismissed as designed to get students and attorneys to learn legal rules and remedies. Yet, if Holmes was not addressing his theory only to law students but instead to those associated with the law more generally, then it might be helpful to consider some of the respects in which Holmes' predictive approach has broader relevance than one might have inferred from the analyses offered by many commentators.

Consider the criticism that Holmes' analysis has no relevance for the judge who of course will not be attempting to predict what she herself will do.<sup>59</sup> Yet, judges might well be trying to predict whether their own opinions would be reversed on appeal<sup>60</sup> rather than what they themselves will do.<sup>61</sup> Even members of the United States Supreme Court might worry (or take comfort in the thought)<sup>62</sup> that holdings will or might be overruled by future Courts.<sup>63</sup>

The claim here is not that the prediction theory captures the role of the judge<sup>64</sup> in the same way that it captures the role of the practicing attorney. Judges debate whether they should rule in accord with established precedent or, instead, rule as they anticipate higher courts will rule where, for example, there is ample reason to believe that the higher court will overrule

---

<sup>59</sup> Luban, "The Bad Man and the Good Lawyer," *supra* note 16 at 1577-78:

[T]he prediction theory ... makes no sense at all from the point of view of a judge. Judges puzzled about the law of a case will not answer their questions by predicting their own behavior, especially if the only basis for that prediction is their belief that the law is nothing but a prediction of their own behavior. The problem is not that they can't get the prediction right, but rather that they can't get it wrong: any answer they come up with is the right answer, just because they have come up with it. If law is prophecies of what the courts will do, then court-made law consists of self-fulfilling prophecies.

<sup>60</sup> *Cf. Coalition for Economic Equity v. Wilson*, 122 F.3d 692 at 717-18 (9th Cir. 1997) (Hawkins, Circuit J.) (commenting on the denial of rehearing *en banc*) discussing

the proper role of an inferior court faced with contrary, but apparently controlling, precedent that it honestly and earnestly believes will not be followed (or will be distinguished) by higher authority. Is it the role (the duty, if you will) of a court in that circumstance to attempt to accurately predict what the higher authority will do? Or is its duty to faithfully follow existing precedent? If an inferior court in such a circumstance is free to predict what the higher court will do, then this panel probably got the issue right. If, however, the duty of a lower court is to faithfully apply existing authority, then I have seen no persuasive argument that contradicts Judge Norris' *Carolene Products-Hunter-Seattle* analysis.

<sup>61</sup> Bork, *supra* note 57 at 27 ("It is sometimes said, rather unperceptively, that [Holmes'] admonition is of no help to a judge who can hardly decide a case by prophesying what he himself will in fact do").

<sup>62</sup> See *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) at 2856 (Blackmun, J., dissenting):

It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobiitis*, 310 U.S. 586 (1940) ... I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do.

*Bowers* was overruled in *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>63</sup> Posner suggests that the predictive theory is accurate in a different sense, namely, that judges of the highest court might try to predict how past judges would have decided the case (*supra* note 20 at 224).

<sup>64</sup> Holmes did not offer his bad man example as a way of predicting court behaviour, notwithstanding commentators claims to the contrary. See, e.g., Anne C. Dailey, "Holmes and the Romantic Mind" (1998) 48 *Duke L.J.* 429 at 434 (suggesting that Holmes' "theory of the bad man lawyer was simply a heuristic device for predicting how courts will decide cases").

the existing precedent.<sup>65</sup> Thus, although Holmes' predictive stance is not one that would be absurd for a judge to take, it is at best a controversial approach and might not be the central focus of many judges.<sup>66</sup> It is much less controversial to suggest that an attorney should tell her client what the law requires, permits, and prohibits, which might well involve predicting when the public force would be used to impose sanctions upon the client.

Just as Holmes' prediction theory has implications for judges even if it does not offer a complete account of their roles, it also has implications for legislators, even if not accounting for all of a legislator's functions.<sup>67</sup> Legislators should consider how statutes will be construed by courts if only to foreclose potential misunderstandings about the content or breadth of legislation. They also should consider whether a statute would be held unconstitutional when deciding whether to vote in favour of particular legislation.<sup>68</sup> Thus, there are a variety of ways in which the prediction theory is applicable to a variety of individuals connected with the law, even if it does not describe their functions exhaustively.

Certainly, Holmes' prediction theory does not offer a complete account of the judge's, the legislator's, or even the practicing attorney's roles. Holmes was well aware that attorneys advise their clients about more than legal matters,<sup>69</sup> and an attorney advising a client about what is in her interest might well suggest that the client refrain from committing acts that, while harmful, might nonetheless escape legal sanction. Neither clients nor attorneys are solely interested in predictions about when the public force will be used,<sup>70</sup> so Holmes' predictive theory does not even capture all that attorneys will be asked to do.<sup>71</sup> Yet, Holmes' account was not meant to be exhaustive in its description of all of the functions performed by individuals associated with the law and thus should hardly be rejected out of hand for that reason.

<sup>65</sup> Cf. *Roper v. Simmons*, 125 S.Ct. 1183 at 1209 (2005) (O'Connor, J., dissenting):

As a preliminary matter, I take issue with the Court's failure to reprove, or even to acknowledge, the Supreme Court of Missouri's unabashed refusal to follow our controlling decision in *Stanford*. The lower court concluded that, despite *Stanford's* clear holding and historical recency, our decision was no longer binding authority because it was premised on what the court deemed an obsolete assessment of contemporary values. Quite apart from the merits of the constitutional question, this was clear error.

<sup>66</sup> See Twining, "Other People's Power," *supra* note 38 at 201 ("It is difficult to see how any careful reader can attribute to Holmes the view that legislators, judges or advocates are centrally concerned with prediction").

<sup>67</sup> Holmes need not be claiming that judges and legislators are centrally concerned with prediction, although he would suggest that it is something appropriately considered by them. Compare *ibid.*

<sup>68</sup> See, e.g., U.S., *Cong. Rec.*, vol. 143, WL 125477 at H1202-05 (20 March 1997) (Rep. Conyers) ("I cannot support this [partial birth abortion] bill because it is unconstitutional").

<sup>69</sup> Oliver Wendell Holmes, "Just the Boy Wanted, In the Law, Youth's Companion" (7 February 1889) in Novick, *supra* note 43 at 339 [Holmes, "Just the Boy Wanted"]:

The lawyer's judgment is a sense of the relative importance of facts with reference to the rules of law, and a sense also, — the more the better, — of their importance with regard to business, because law and business are bound together very closely, and in advising a man what to do the lawyer often needs to consider business consequences as well as law.

<sup>70</sup> Posner does not seem to appreciate this. See Posner, *The Problems of Jurisprudence*, *supra* note 20 at 223 ("All [clients] want to know is whether the power of the state will come down on them if they engage in a particular course of action").

<sup>71</sup> See Holmes, "Just the Boy Wanted," *supra* note 69 at 339-40 (describing various roles that attorneys play).

Holmes' discussion of the bad man and the predictive theory of law capture important elements of the law. They are not meant to establish that law must be separated from morality, although Holmes did have particular views about the ways in which law and morality were related. Those views are much less controversial than many commentators imply, since they merely deny that morality, *when understood in a particular way*, is necessarily embodied in the law.

### III. ON CLEANING UP THE LEGAL LEXICON

While commentators are incorrect to suggest that the Holmesian bad man illustrates the divergence between law and morality, they are correct that Holmes denies that the law mirrors morality. Indeed, Holmes emphasizes the dangers in failing to recognize this divergence and even suggests that much confusion would be avoided were legal terminology changed so that moral and legal terms did not overlap. Yet, this recommendation is offered to help clarify the law rather than denigrate morality. While Holmes' writing about morality is not always clear or even consistent, it is both unfair and inaccurate to suggest that he advocates moral nihilism or even skepticism.<sup>72</sup>

#### A. THE SEPARATION OF LAW AND MORALS

While not offering the example of the bad man to illustrate that the law is amoral,<sup>73</sup> Holmes nonetheless does suggest that there are important differences between morality and the law. Not only may the agent's motivation play different roles in moral as opposed to legal assessments,<sup>74</sup> but moral rights and duties have different contents than do legal rights and duties.

Holmes notes that one of the

many evil effects of the confusion between legal and moral ideas ... is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward.<sup>75</sup>

---

<sup>72</sup> See Holmes, "The Path of the Law," *supra* note 3 at 459:

I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men.

<sup>73</sup> Professor Weinberg does not seem to appreciate this. See Louise Weinberg, "Holmes' Failure" (1997) 96 Mich. L. Rev. 691 at 694 ("Morals are what is right; but law, according to *The Path of the Law*, is only the monetary penalty of which a 'bad man' must keep clear").

<sup>74</sup> Holmes notes that in some cases the law does take account of the agent's motivation in that an individual might not be liable but for his common law malice. See Oliver Wendell Holmes, "Privilege, Malice and Intent" (1894) 8 Harv. L. Rev. 1 at 2, as quoted in Novick, *supra* note 43 at 372:

In some cases, he even may intend to do the harm and yet not have to answer for it; and, as I think, in some cases of this latter sort, at least, actual malice may make him liable when without it he would not have been. In this connection I mean by malice a malevolent motive for action, without reference to any hope of a remoter benefit to oneself to be accomplished by the intended harm to another.

<sup>75</sup> Holmes, "The Path of the Law," *supra* note 3 at 458.

Here, Holmes suggests that legal rights and duties should be understood in terms of what will happen should there be a breach: "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; — and so of a legal right."<sup>76</sup> He also suggests, at least implicitly, that moral rights and duties cannot be analogously understood.

As an initial point, however, it is not at all clear that Holmes is accurately reflecting how moral rights and duties are understood, at least by John Stuart Mill, who suggests that they also should be understood in terms of what will happen in the event of a breach. Mill argues that "[w]hen we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion,"<sup>77</sup> and that a breach of duty — in other words, a wrong — is something for which "a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience."<sup>78</sup> Both Holmes and Mill define rights and duties in terms of what happens in the event of a breach, although Holmes' focus is on legal rights and duties and Mill's focus is on rights and duties more generally.

Even if moral rights and duties and legal rights and duties can all be explicated in terms of what happens when there has been a breach, this hardly establishes that Holmes is incorrect in believing that the two must be distinguished. Holmes suggests that "nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."<sup>79</sup> For example, an individual might have a moral right to do something that the law prohibits, and such a law may be enforced, moral right notwithstanding. Holmes writes that "[n]o one will deny that wrong statutes can be and are enforced,"<sup>80</sup> thereby making clear that individuals acting with clear consciences might nonetheless find themselves fined or imprisoned for having broken an immoral law. Thus, commentators are correct that Holmes denies that there is a one-to-one correspondence between moral and legal rights.

Holmes' recognition that the contents of moral and legal rights may diverge hardly entails a strict separation between law and morality,<sup>81</sup> although it does suggest that there can be serious theoretical and practical ramifications if the divergence between law and morality is ignored. Holmes warns of "the danger, both to speculation and to practice, of confounding morality with law, and the trap which legal language lays for us on that side of our way."<sup>82</sup> Because he believes that moral terms obscure rather than clarify legal terms when the terminology overlaps, Holmes argues that there would be a net "gain if every word of moral

<sup>76</sup> *Ibid.*

<sup>77</sup> John Stuart Mill, "Utilitarianism" in J.M. Robson, *Collected Works of John Stuart Mill: Essays on Ethics, Religion and Society*, vol. 10 (Toronto: University of Toronto Press, 1969) 205 at 250.

<sup>78</sup> *Ibid.* at 246.

<sup>79</sup> Holmes, "The Path of the Law," *supra* note 3 at 460.

<sup>80</sup> *Ibid.*

<sup>81</sup> Catharine Peirce Wells, "Oliver Wendell Holmes, Jr., and William James: The Bad Man and the Moral Life" in Burton, *supra* note 29, 211 at 220 ("In *The Path of the Law*, Holmes proposes a strict separation between law and morals. 'Nothing but confusion of thought,' he warns, 'can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.'").

<sup>82</sup> Holmes, "The Path of the Law," *supra* note 3 at 464.

significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law."<sup>83</sup>

Such a pruning of the legal lexicon would not be without cost, since we would "lose the fossil records of a good deal of history and the majesty got from ethical associations."<sup>84</sup> He nonetheless argues that such a cost is worth paying because "by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought."<sup>85</sup> Basically, Holmes is suggesting that there is an important connection between law and morality but that the benefits of recognizing that connection through the use of common terminology are more than outweighed by the costs of using that common terminology, for example, mistakenly believing that what is morally protected must be legally protected and vice versa.

## B. MORAL VERSUS LEGAL DUTIES

Holmes makes a point that might also be made by individuals believing in an objective and knowable morality — namely, that morality and the law sometimes diverge. Yet, such a point might be made for a variety of reasons including, for example, to provide a reason to change outdated and anachronistic laws. Thus, Holmes notes that morality and the law are not coextensive because the law does not always keep abreast of changing moral notions. He suggests that "when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached."<sup>86</sup> Those ideals may not have been incorporated into the law, however. Indeed, "many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it."<sup>87</sup> Thus, Holmes suggests that there will be instances in which legal sanctions should be imposed as a legal matter because the individual clearly violated the law, even though the legal sanctions should not be imposed as a moral matter because the legal prohibition itself should not exist as a moral matter.

Yet, one's making the point that the law may not keep up with morality hardly makes one a moral nihilist. Even Holmes' discussion of the bad man<sup>88</sup> is hardly nihilistic or even positivistic, commentators' claims to the contrary notwithstanding.

Consider the following criticism of Holmes: "Holmes disagreed that there were any objective moral truths, a thoroughly positivist argument ... [which] can be seen from his argument that 'a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer...'"<sup>89</sup> Yet, Holmes might believe that there were objective moral truths without defining legal duties in terms of those truths. For example, in

---

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.* at 460.

<sup>87</sup> *Ibid.*

<sup>88</sup> See *supra* notes 5-10, 15-19 and accompanying text.

<sup>89</sup> Knudson, *supra* note 1 at 416 [footnotes omitted].

*The Province of Jurisprudence Determined*,<sup>90</sup> John Austin distinguishes between “natural law, or ... the law of nature (meaning, by those expressions, the law of God), [and] the aggregate of the rules, established by political superiors, [which] is frequently styled *positive* law, or law existing by position.”<sup>91</sup> Austin believes both in a universal, objective moral code established by God and in a positivist, legal code imposing legal duties that may but need not coincide with moral duties.<sup>92</sup> Thus, one who offers a positivist analysis of law and legal duty might nonetheless believe in an objective moral reality.<sup>93</sup>

Those affirming and those denying an objective, knowable, moral reality should recognize the importance and accuracy of Holmes’ point that legal rights and duties may differ in content from moral rights and duties. While these theorists might disagree about the implications of such a divergence — some suggesting that moral rights and duties must be respected regardless of what the law dictates<sup>94</sup> and others suggesting that legal rights and duties must be respected regardless of what morality dictates<sup>95</sup> — that is a different point that supports rather than undermines the importance of recognizing that divergence.

That moral and legal duties may have different contents does not entail that it would be beneficial to remove any terms having moral import from the legal lexicon. Holmes’ claim that there would be a net gain by performing such a pruning does not entail the non-existence of moral truth but merely that the costs incurred in using common terminology are greater than the benefits thereby accrued. Thus, some of those accepting and some of those rejecting the existence of objective moral truth might believe that such a pruning would be beneficial, while others from each camp might disagree.

A number of factors might be considered when assessing Holmes’ cost-benefit calculation regarding whether such a pruning would be worthwhile. One might want to know whether using another term to refer to legal rights would somehow undermine the connection between that which is protected legally and that which is protected morally. If people conflate moral and legal rights out of a belief that the contents of legal rights are determined by the contents

<sup>90</sup> John Austin, *The Province of Jurisprudence Determined* (Union, N.J.: The Lawbook Exchange Ltd., 1999) (London: John Murray, 1832).

<sup>91</sup> *Ibid.* at 2 [emphasis in original].

<sup>92</sup> Austin defines duty in terms of the duty-holder’s being subject to punishment for the failure to perform his duty. See *ibid.* at 7: “Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it” [emphasis in original].

<sup>93</sup> To make matters even more complicated, Austin distinguishes between natural law (the “true” morality) and positive morality. See *ibid.* at 4: “the name *morality* (or *morals*), when standing unqualified or alone, denotes indifferently either of the following objects: namely, positive morality *as it is*, or without regard to its merits; and positive morality *as it would be*, if it conformed to the law of God” [emphasis in original].

<sup>94</sup> See, e.g., John Finnis, “On the Incoherence of Legal Positivism” (2000) 75 Notre Dame L. Rev. 1597 at 1606-607:

Some laws are utterly unjust, utterly immoral; the fact that something is declared or enacted as law by the social sources authorized or recognized as sources of valid law in no way entails that it is (or is even regarded by anyone as) morally acceptable or is even relevant to a consideration of someone’s moral responsibilities.

<sup>95</sup> Cf. Richard A. Posner, *The Problematics of Moral and Legal Theory* (Cambridge, Mass.: Harvard University Press, 1999) at 141 (“moral theory has nothing for law”); but see *ibid.* at 143 (“If judges are carefully selected, as is generally true of federal judges, a judge’s civil disobedience — his refusal to enforce a law ‘as written’ because it violates his deepest moral feelings — is a significant datum”).

of moral rights rather than because the term “right” is used in both contexts, then modifying the legal lexicon would not prevent the conflation.

By the same token, suppose that the word “wrong” were reserved for the failure to meet the relevant moral standard and other words were used to describe legal wrongs such as “illegal” or “tortious.” Lack of overlapping terminology notwithstanding, individuals might still incorrectly believe that whatever is (morally) wrong is also illegal or tortious. Holmes’ pruning suggestion assumes, without establishing, that the terminology itself affects what people believe, that changing the terminology would change the beliefs. If instead the conflation is due to something else, then adopting Holmes’ suggestion might not yield the benefits that he envisions.

If, indeed, the terminology itself has an effect on what people believe, one would want to know whether a change in terminology would change the likelihood that legal rights and duties would be respected by societal members or, perhaps, whether the penalties for not respecting those rights and duties would have to be enhanced to induce more compliance. Thus, it might be argued that individuals would be less likely to follow the law were they to feel no moral obligation to do so, and penalties would have to be increased to make up for the lost moral incentive to be law-abiding. Perhaps that is so, although Holmes’ example of the bad man is designed to refute that claim. Holmes argued that the current system gives individuals sufficient incentive to act well even bracketing their desires to act morally, and thus that the “majesty got from ethical associations”<sup>96</sup> is not necessary to induce people to follow the law.

Some individuals seem to believe that the law and morality are interrelated at least in the sense that (their perception of) what is morally required must be permitted by the law if only as an exception to the general legal rules. For example, one who sincerely believes the killing of abortion doctors to be morally required might wrongly believe that the law allows such behaviour as an exception to the general laws proscribing murder.<sup>97</sup> Arguably, more clearly separating moral and legal terminology would make it less likely that individuals would wrongly think that the law would contain such an exception.

Killing a physician who performs abortions might seem to be a poor example for purposes here, since such an act is both illegal and morally wrong. Yet, the illegality of that act is not dependent upon the recognition of its immorality. Indeed, there is no universal agreement about the correct moral evaluation of such a killing, as might be evidenced by some of the comments made by the perpetrators of such acts — some who have committed such murders have gone to their deaths believing that what they did was morally defensible if not morally required.<sup>98</sup>

The point here is not that the murderer’s sincerity of belief regarding the moral permissibility of his action somehow makes it so, but merely that an illegal act does not

---

<sup>96</sup> Holmes, “The Path of the Law,” *supra* note 3 at 464.

<sup>97</sup> Compare *Hill v. State*, 688 So.2d 901 (Fla. 1996), affirming a rejection of the necessity defense offered by a man convicted of murdering an abortion clinic physician and a volunteer.

<sup>98</sup> See, e.g., “US executes abortion killer” *Melbourne Herald Sun* (5 September 2003) 39 (abortion doctor murderer unrepentant for his act).

suddenly become legal because of a sincere belief in the act's moral permissibility. That is true even in cases where the perpetrator is correct about the moral quality of his action — as Holmes points out, “[n]o one will deny that wrong statutes can be and are enforced.”<sup>99</sup>

A separate question is whether the fact of the action's illegality (and the non-existence of an exception to the law against murder which would permit the killing of doctors who perform abortions) would dissuade the would-be murderer from performing the act. It is not at all clear that one who believed that he would be greatly rewarded in heaven for his act<sup>100</sup> would be dissuaded from performing it by the knowledge that it was illegal and that he would be punished in this life for performing it. Thus, even in the kind of case where the person believes in a very close correspondence between law and morality but misunderstands what morality requires or even permits, it is simply unclear whether adopting Holmes' suggestion to prune the legal lexicon to make even clearer that law and morality sometimes diverge would bring about a desired change in behaviour.

Holmes had an intuition that individuals would be less likely to conflate law and morality were the legal terminology changed, and that the clarity thereby achieved would be a net benefit for society notwithstanding the loss of “majesty got from ethical associations.”<sup>101</sup> While Holmes can perhaps be criticized for not having offered a more persuasive case for his recommendation,<sup>102</sup> his recognition that morality and the law do not always overlap and his recommendation that moral terms be removed from the legal lexicon hardly constitute a theory advocating a radical separation between law and morality. Indeed, an individual believing that there is a necessary connection between law and morality as a general matter might nonetheless recognize that some laws are immoral and, further, support a recommendation that legal terminology be changed so that the unwary would not be misled into believing that there is a one-to-one correspondence between moral and legal duties.

#### IV. HOLMES' MORAL VIEW

Commentators are correct that Holmes did not believe in a knowable, objective, universal morality. Yet, commentators fail to place Holmes' moral skepticism<sup>103</sup> in context and, further, fail to examine the non-implications of that moral skepticism for his theory of law. While Holmes' moral views may not have been well-developed or even coherent, that should not be permitted to undermine his contributions to an understanding of the law.

<sup>99</sup> Holmes, “The Path of the Law,” *supra* note 3 at 460.

<sup>100</sup> See *supra* note 98 (unrepentant murderer of abortion doctor expected great rewards in heaven).

<sup>101</sup> Holmes, “The Path of the Law,” *supra* note 3 at 464.

<sup>102</sup> It is not at all clear that Holmes was offering this as a proposal for serious consideration, so it is not at all clear that he should have offered the kind of support which a serious proposal would have required.

<sup>103</sup> See Michael J. Phillips, “The Substantive Due Process Decisions of Mr. Justice Holmes” (1999) 36 *Am. Bus. L.J.* 437 at 474 (suggesting that Holmes is a moral skeptic).

## A. HOLMES' MORAL SKEPTICISM

Holmes was sometimes quite acerbic about morality, having once described morals as “the superior politenesses that absorb the shock of force.”<sup>104</sup> Yet even here, Holmes' comment is open to a variety of interpretations,<sup>105</sup> and it is not at all clear that he was dismissing morality as merely something that makes force more palatable.<sup>106</sup> Indeed, Holmes was quite aware that this description of morality was open to great misunderstanding, and he cautioned that the comment should not be repeated for fear that the necessary accompanying explanation of what he meant would not also be presented.<sup>107</sup>

Commentators' claims notwithstanding, it is not at all clear that Holmes was a moral nihilist,<sup>108</sup> if only because his comments about morality were not consistent. In a letter, he suggests that morals absorb the shock of force, but elsewhere he offers a much more positive view of morality, suggesting that it has a salutary effect on the way that people behave.<sup>109</sup>

One reason that commentators claim that Holmes did not believe in morality<sup>110</sup> is that in a letter, Holmes compared moral views to gustatory preferences, suggesting that

one's own moral and aesthetic preferences ... [are] more or less arbitrary, although none the less dogmatic on that account. Do you like sugar in your coffee or don't you? You admit the possibility of difference and yet are categorical in your own way, and even instinctively condemn those who do not agree.<sup>111</sup>

Here, Holmes is suggesting that individual moral beliefs, while steadfastly held, are not the sorts of beliefs that are subject to disconfirmation through rational discussion.<sup>112</sup>

<sup>104</sup> Robert M. Menkel & Christine L. Compston, eds., *Holmes and Frankfurter: Their Correspondence, 1912-1934* (Hanover: University Press of New England, 1996) at 203 (21 May 1926).

<sup>105</sup> He might have been suggesting, for example, that *false* claims about what morality requires are sometimes used to justify the enforcement of questionable policies.

<sup>106</sup> For such a view, see Pohlman, *supra* note 42 at 132 (“Holmes understood morality as a veneer of politeness that hid the ultimate fact of force”).

<sup>107</sup> Menkel & Compston, *supra* note 104 at 203 (“But this is between ourselves as such a proposition unexplained would be caviare to the general”). Cf. William Shakespeare, *Hamlet*, act II, scene 2, in W.J. Craig, ed., *The Complete Works of William Shakespeare* (London: Henry Pordes, 1973) 941 at 956 (“the play, I remember, pleas'd not the million; 'twas caviare to the general”).

<sup>108</sup> Luban, “Judicial Restraint,” *supra* note 2 at 475, suggesting that Holmes was a kind of moral nihilist.

<sup>109</sup> Cf. Holmes, “The Path of the Law,” *supra* note 3 at 459 (“The practice of [morality], in spite of popular jests, tends to make good citizens and good men”).

<sup>110</sup> Henry Cohen, “Oliver Wendell Holmes Jr.: Life and Philosophy” (2004) 51 Fed. Law. 22 at 24 (“Holmes went further: he denied morality entirely, once comparing moral preferences to a taste for sugar in one's coffee”).

<sup>111</sup> Mark DeWolfe Howe, ed., *Holmes-Pollock Letters: The Correspondence of Mr Justice Holmes and Sir Frederick Pollock, 1874-1932*, 2d ed. (Cambridge, Mass.: Harvard University Press, 1961) vol. I at 105 (6 September 1902).

<sup>112</sup> Luban, “The Bad Man and the Good Lawyer,” *supra* note 16 at 1571: “Holmes doubted that we have a moral obligation to obey the law, but that is only because he doubted that we have *any* moral obligations; he was certain that law cannot be deduced rationally from ethical principles; he denied that ethical principles *are* rational” [emphasis in original].

Yet, what is not sufficiently emphasized is that Holmes was not merely offering this skeptical view about morality in particular — he was offering it about truth more generally. In the same letter he suggests:

We tacitly postulate that if others were as intelligent and well educated as we they would be compelled to agree with us [about truth]... The fact is that each has his more or less differing system; whether there is an objective reality in which is to be found the unity of our several compulsions or whether our taste in truth is as arbitrary as our taste in coffee and there is no objective truth at all, I leave to philosophers by profession.<sup>113</sup>

To understand Holmes' moral view, one must place Holmes' denial of an objective moral truth<sup>114</sup> in the context of his denying having knowledge about a whole host of subjects including the existence of other beings.<sup>115</sup> He classified himself as a "bettabilitarian (one who thinks you can bet about it but not know)."<sup>116</sup> For Holmes, truth was not something that was somehow independently verifiable but, instead, something that he simply could not help believing.<sup>117</sup> Thus, while it is true that Holmes was not confident of the existence of objective moral truth, it is also true that he was not confident of the existence of *any* kind of truth.<sup>118</sup>

## B. HOLMES' MORAL CRITIQUE

Some commentators who condemn Holmes for his alleged amoralism imply that anyone who does not believe as they do must be amoral. For example, Professor Alschuler argues that "Holmes was at the forefront of ... a revolt against objective concepts of right and wrong — a revolt against natural law,"<sup>119</sup> as if the only individuals who could believe in an objective right and wrong were those who subscribed to a natural law position. Yet, Mill believed in an objective right and wrong, notwithstanding his rejection of natural law in favour of utilitarianism. Many of the criticisms offered against Holmes are just as applicable

<sup>113</sup> Howe, *supra* note 111.

<sup>114</sup> Pohlman, *supra* note 42 at 14 ("Since he had no objective standard of morality, Holmes did not believe in a necessary relationship between ideal systems of law and morality"); Catharine Wells Hantzis, "Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr." (1988) 82 Nw. U.L. Rev. 541 at 580 ("Holmes proclaimed himself to be a skeptic with respect to moral questions").

<sup>115</sup> Howe, *supra* note 111, vol. 1 at 122 (23 November 1905):

I quite agree that when we decide that our brother is not our dream it is his agreement with us as to chair, table, etc., that makes us surmise that they also are not only our dream — and I add that if I admit my brother I don't see why I should not admit the world. Yet as I can't get outside my dream I admit something I don't know. I put it as a mere bet.

<sup>116</sup> *Ibid.*, vol. 2 at 22 (21 August 1919).

<sup>117</sup> *Ibid.*, vol. 1 at 126 (23 June 1906) ("I always start my cosmic salad by saying that all I mean by truth is what I *can't help* thinking and that I have no means of deciding whether my can't helps have any cosmic worth").

<sup>118</sup> Oliver Wendell Holmes, "Ideals and Doubts" (1915) 10 Ill. L. Rev. 1 at 2, as quoted in Novick, *supra* note 43, 442 at 443 [Holmes, "Ideals and Doubts"]:

When I say that a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped. With absolute truth I leave absolute ideals of conduct equally on one side.

<sup>119</sup> See Alschuler, *supra* note 2.

to theorists who would self-describe as believers in an objective moral code which happens not to correspond to the preferred moral view of the individual offering the criticism. It thus is sometimes difficult to tell whether Holmes' failure (in the eyes of these commentators) is in his not believing in an objective and universal moral code or in his not sharing their particular moral views.<sup>120</sup>

The point here should not be misunderstood. It is hardly surprising that Holmes is criticized severely by those sympathetic to a natural law position, since Holmes is especially critical of natural law. Holmes suggests that the "jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."<sup>121</sup> In these observations, Holmes is echoing Mill's observation that the "universal voice of mankind, so often appealed to, is universal only in its discordance. What passes for it is merely the voice of the majority or, failing that, of any large number having a strong feeling on the subject."<sup>122</sup> Holmes and Mill object to these claims of universality both because of their factual inaccuracy<sup>123</sup> and because that alleged universality was offered as proof of the validity of the views being offered.<sup>124</sup>

Holmes complains of the "alliance of philosophy with religion and the dogmatic foothold that it gets from a morality from which to bully *nous autres*."<sup>125</sup> His discussion of moral bullying and dogmatic footholds suggests that: (1) he disagrees with what is being asserted, since he does not like others attempting to bully him into adopting their position; (2) he believes that those propounding these views offer no justification for that position but instead are offering dogmatic truths, in other words, they are making assertions which have to be accepted on faith; and (3) he believes that these theorists are seeking to impose their views through illicit means (intellectual bullying) rather than persuasion, for example, by pointing out the beneficial effects the adoption of these positions would have.<sup>126</sup>

---

<sup>120</sup> See, e.g., Robert J. Muldoon, Jr., Book Review of *Law without Values: The Life, Work, and Legacy of Justice Holmes* by Albert W. Alschuler (2002) 86 Mass. L. Rev. 125 at 127 ("Contrary to the title, Alschuler argues and, to a great extent, demonstrates, that Holmes did indeed operate on a basis of values, but they are not Alschuler's").

<sup>121</sup> Oliver Wendell Holmes, "Natural Law" (1918) 32 Harv. L. Rev. 40 at 47, as quoted in Novick, *supra* note 43, 445 at 446 [Holmes, Natural Law"].

<sup>122</sup> John Stuart Mill, "Whewell on Moral Philosophy" in Robson, *supra* note 77, 165 at 194.

<sup>123</sup> Robert George dismisses Holmes' criticisms. See Robert P. George, "Holmes on Natural Law" (2002-2003) 15 Regent U.L. Rev. 175 at 184 ("this is plainly a false charge"). He then suggests that one of the main points of dispute between Holmes and the Natural Law theorists is whether "people ought to believe and act on the basis of what is true, correct, sound, and warranted," as if this were something to which the Natural Law Theorist had access in a way which others did not (*ibid.* at 186). This is precisely Holmes' point.

<sup>124</sup> Cf. Mennel & Compston, *supra* note 104 at 8 (8 April 1913) ("Philosophers are apt to try to retain the dogmatic supremacy formerly accorded to theologians by assuming a mystic infinite value for morality as *point d'appui* [point of support]").

<sup>125</sup> Howe, *supra* note 111, vol. 1 at 191 (26 April 1912).

<sup>126</sup> Holmes viewed morality as a collection of rough generalizations about what would promote the general good. Cf. Holmes, "Ideals and Doubts," *supra* note 118 at 444 ("Our system of morality is a body of imperfect social generalizations expressed in terms of emotion. To get at its truth, it is useful to omit the emotion and ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained.").

When criticizing these “moral bullies,” Holmes is presumably not complaining about the lack of deductive proof for their arguments, since he believes that no one could offer such arguments.<sup>127</sup> Rather, he is complaining about what he views as intellectual dishonesty, since these theorists claim to be offering reasoned arguments while really making assertions that ultimately are no more rationally established than any other.

Notwithstanding his worries about the way moral positions might be used or abused, Holmes is not dismissing the importance of morality.<sup>128</sup> He describes law as the “witness and external deposit of our moral life.”<sup>129</sup> “Our moral life” does not refer to some universally held position, but instead to the views of society or, perhaps, of a particular subset of society. Holmes accepts that “there is such a body on which to a certain extent civilized men would agree,”<sup>130</sup> although he suspects that even that moral consensus is much narrower than commonly believed.<sup>131</sup>

When Holmes discusses morality, he has in mind “a body of imperfect social generalizations”<sup>132</sup> about what would promote the common good, which are “expressed in terms of emotion,”<sup>133</sup> in other words, asserted with an air of correctness and certainty. He argues that to determine which generalizations actually promote the common good, it is helpful to discard the emotion, *i.e.*, the steadfastness and certainty about the contents of moral rules, and instead examine the rules and their effects — “it is useful to omit the emotion and ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained.”<sup>134</sup>

This view of morality as imperfect generalizations about what would promote the general good echoes Holmes’ understanding of the law — he suggests that the law develops in accord with what will promote the good of the community.<sup>135</sup> It is perhaps because he views the law and morality as being similar in the sense that he thinks that there is “a wider point of view from which the distinction between law and morals becomes of secondary or no importance.”<sup>136</sup>

While Holmes believes that law and morality develop in light of what will promote the general good, he nonetheless denies that the law’s development is clear and

<sup>127</sup> It is for this reason that Holmes’ argument is not self-refuting in the way sometimes suggested by his critics. See George, *supra* note 123 at 184-85.

<sup>128</sup> Gordon, “The Path of the Lawyer,” *supra* note 12 at 1015:

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.”

<sup>129</sup> Holmes, “The Path of the Law,” *supra* note 3 at 459.

<sup>130</sup> Howe, *supra* note 111, vol. 2 at 3 (24 January 1919).

<sup>131</sup> *Ibid.* (mentioning the fact of some agreement but then suggesting that the extent of agreement may be much less than was commonly believed — “how much less than would have been taken for granted fifty years ago, witness the Bolsheviks”).

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> Holmes, “Ideals and Doubts,” *supra* note 118 at 444.

<sup>135</sup> Holmes, “The Common Law,” *supra* note 43 at 133.

<sup>136</sup> Holmes, “The Path of the Law,” *supra* note 3 at 459.

straightforward.<sup>137</sup> In "The Common Law," Holmes explains: "[t]he life of the law has not been logic: it has been experience."<sup>138</sup> He lists a number of factors that determine how the law will develop: the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."<sup>139</sup> Thus, theories, intuitions, and a host of other elements all play a role in how the law develops, some involving principles and some not. Although the promotion of the good of the community will play an important role in the law's development,<sup>140</sup> it is simply false that any one principle, even the promotion of the common good, can fully explain that development. While it may be possible to spot a pattern in the law's development, the law does not develop along a straight line.<sup>141</sup>

Holmes criticizes those who believe that they can deduce the law from abstract principles,<sup>142</sup> or even those who would claim that the law at the very least is internally consistent.<sup>143</sup> Indeed, he believes that one of the law's strengths is that it is changing in light of all of these factors and that the law "will become entirely consistent only when it ceases to grow."<sup>144</sup>

While the law is quite clear in some cases, it is much less so in others, especially because "the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off."<sup>145</sup> Precisely because the law changes in light of a number of factors,<sup>146</sup> not all of which are articulated or even consciously considered,<sup>147</sup> prediction of how the law will develop is both difficult and quite important.

---

<sup>137</sup> Holmes, "The Common Law," *supra* note 43 at 154-55.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.* at 133:

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.

<sup>141</sup> See *ibid.* at 154-55:

The law did not begin with a theory. It has never worked one out. The point from which it started and that at which I shall try to show that it has arrived, are on different planes. In the progress from one to the other, it is to be expected that its course should not be straight and its direction not always visible. All that can be done is to point out a tendency, and to justify it.

<sup>142</sup> *Ibid.* at 133 ("What has been said will explain the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from *a priori* postulates").

<sup>143</sup> *Ibid.* (criticizing those who commit the "humbler error of supposing the science of the law to reside in the *elegantia juris*, or logical cohesion of part with part").

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> See Oliver Wendell Holmes, "The Bar as a Profession" in Novick, *supra* note 43, 386 at 387 ("A system of law at any time is the resultant of present needs and present notions of what is wise and right on the one hand, and, on the other, of rules handed down from earlier states of society and embodying needs and notions which more or less have passed away").

<sup>147</sup> Holmes, "The Path of the Law," *supra* note 3 at 467.

One reason that Holmes is sometimes thought to be a moral nihilist who glorifies the strong and powerful is his suggestion that the "first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."<sup>148</sup> Yet, here Holmes is not glorifying the demands of the most powerful element of the community,<sup>149</sup> but instead suggesting that if the law does not capture the feelings of the community in important ways, members of the community may well take matters into their own hands.<sup>150</sup> Indeed, ironically, by positing the possibility of a divergence between the demands of the community and the dictates of morality, Holmes is suggesting that morality is objective and that it does not simply reflect the views of the dominant in society.<sup>151</sup>

Holmes' moral views are not particularly well developed in his writings and, further, are not consistent. He sometimes implies that morality is simply the velvet glove on the iron fist of the law,<sup>152</sup> and implies at other times that it makes people better than they otherwise would be.<sup>153</sup> Yet, what tends not to be discussed is that Holmes' discussion of the development of the law is not dependent on whether he believes in an objective morality. Basically, he suggests that a variety of factors, including morality, influence how the law develops. Such a view is consistent with morality having a necessary (but not determinate) connection with law, a contingent connection with law, and no connection with law (insofar as morality is thought to refer to one objective, knowable code). Further, it is also consistent with the view that there is one universal moral code, as well as with the view that each society has its own moral code. While Holmes' moral views may be controversial, it is not at all clear that they in some way undercut the worth or accuracy of his observations about the law.

## V. CONCLUSION

Holmes offers a predictive theory of law that uses the controversial example of a bad man to illustrate the theory. While capturing various insights about the law, the theory is neither as unique nor as destructive as various commentators claim. For example, commentators incorrectly claim that the bad man illustrates the immoral nature of the law. Rather, by using the bad man, Holmes merely illustrates that many individuals will follow the law to avoid adverse legal consequences even if they are not, in addition, induced to follow it out of a recognition of its moral rightness or, perhaps, out of fear that the failure to abide by the law will result in the imposition of moral sanctions.

<sup>148</sup> Holmes, "The Common Law," *supra* note 43 at 136.

<sup>149</sup> Cf. Albert W. Alschuler, "The Descending Trail: Holmes' *Path of the Law* One Hundred Years Later" (1997) 49 Fla. L. Rev. 353 at 358 ("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 *generated* power, conflict, violence, death, and survival").

<sup>150</sup> See Holmes, "The Common Law," *supra* note 43 at 136 (suggesting that it is important to "avoid the greater evil of private retribution").

<sup>151</sup> Cf. Holmes, "Natural Law," *supra* note 121 at 446 ("I used to say, when I was young, that truth was the majority vote of that nation that could lick all others").

<sup>152</sup> Cf. Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge, Mass.: Harvard University Press, 1987) at 8 ("Difference is the velvet glove on the iron fist of domination").

<sup>153</sup> See Holmes, "The Path of the Law," *supra* note 3 at 459 ("The practice of [morality], in spite of popular jests, tends to make good citizens and good men").

Holmes recognizes as a matter of fact that the dictates of the law and morality do not always coincide, and claims that much clarity would be gained if moral and legal terminology did not overlap. Perhaps he is incorrect, for example, because the conflation of law and morality is not due to overlapping terminology, but instead to the societal inculcation of the belief that law reflects or is dependent upon morality. Further, even if clarity would be gained by pruning the legal lexicon of moral terminology, a separate question is whether that increased clarity would have any effect on behaviour and, if so, what that effect would be. Thus, commentators might disagree with Holmes about whether the increased clarity would afford society a net benefit.

Yet, commentators discussing Holmes' views tend not to address whether: (1) Holmes is correct that the law provides sufficient incentive to be law-abiding so that the effects of conscience or public opinion need not be considered; or (2) whether there would be increased clarity were the legal lexicon pruned of moral terms; or even (3) whether such a pruning would have net benefits. They instead overestimate the degree to which he asserts that law and morality should be distinguished, thus distorting his view and the value of his insights. Society and the legal system itself are losers when the insights of one of the foremost American legal theorists are dismissed out of hand because of misrepresentations of his views. Both Holmes and society deserve better treatment than that.