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Three Positivisms

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THREE POSITIVISMS

ROBIN WEST

Great works of literature endure, in part, simply because their central metaphors can be variously interpreted, yielding multiple meanings that instruct, reflect, or otherwise speak to competing conceptions of self and society. Holmes's *The Path of the Law,* albeit jurisprudential rather than fictional, is no exception: It is unquestionably literary and has unmistakably endured. It may behoove us, then, to look to it for multiple and interpretive meanings rather than one analytic and singular meaning.

In this Essay, I accept and hope to expand upon the conventional consensus view that *The Path of the Law* is a brief for an Americanized version of Austinian legal positivism and for the "separation" of law and morality that is at its core. I also want to show, however, that the distinctive accomplishment of this Essay is its literary ambiguity: Both its explicit arguments for the positivist separation of law and morality, and the three enduring metaphors Holmes uses to make the case—(1) the "bad man" from whose perspective we can clearly view the law; (2) the "prophecies" of judicial acts of power that are in the end all that "is meant by law;" and (3) the bath of "cynical acid" after which we will clearly perceive the law's contours—support not one but at least three—and possibly more—understandings of, or interpretations of, legal positivism. Further, the differences between those three versions, although in important respects philosophical and political, are at bottom, perhaps, aesthetic. Each of the three "positivisms" foreshadowed in the Essay posit not only an analytic or philosophical relationship between law and morality, but also an aesthetic coloration of social life. They are very very different, and how we react to them, and which of the three we see or which we see most clearly, at any given time, says as much about the tenor of our times as it says about the Essay itself.

In Part I of this Essay, I will describe the three quite different positivisms that I believe are all intimated in some form in the text of Holmes's famous

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2 *Id.* at 459, 78 B.U. L. Rev. at 701.

3 *Id.* at 461, 78 B.U. L. Rev. at 702.

4 *Id.* at 462, 78 B.U. L. Rev. at 702.

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speech, with the goal of highlighting their philosophical, political, and aesthetic differences. In Part II, I will try to show that all three are supported by the text, although in quite different, and to some degree surprising, proportions. In Part III, I defend one version of positivism—the version that finds the least support in Holmes's text but that has been, at various times in the hundred years that followed, the dominant interpretation. I then offer a critical assessment of another—the version that has considerably more support in the text and that has dominated our own time.

I. THREE POSITIVISMS

Let me first describe the philosophical differences between these three positivisms. English legal positivists from Austin and Jeremy Bentham through to H.L.A. Hart and Joseph Raz, and American contemporary positivists as well—Jules Coleman, Fred Schauer, and others—have argued for a bewilderingly wide range of views that have only, or at best, a family resemblance, but nevertheless, they do seem to share a commitment to what Hart taught us all to call the "separation thesis"—the claim, contra the natural lawyer's faith, that there is an analytic "separation," or distinction, that must be drawn between legal and moral norms, or between law and morality, and that blurring the distinction hampers rather than furthers clear understanding of law. The problem, though, with the appealing notion that this lends a commonality to an otherwise chaotically diverse set of theories is neatly highlighted by the opacity of Holmes's Essay—that this "separation thesis," purportedly the shared core commitment of positivism, is itself profoundly ambiguous. Like positivism, the separation thesis can mean vastly different things, and carry enormously different consequences, depending upon, among much else, what is meant by the "morality" to be separated from law. There are three different philosophical "positivisms" exposited in The Path of the Law, based loosely upon three quite different understandings of "morality," and accordingly, three different interpretations of the "separation thesis" at its core.

Let me delineate the differences by asking a motivational question: Why,
exactly, would a lawyer, judge, legal scholar, or citizen want to separate law and morality? I think there are at least three distinct reasons one might find the invitation to do so appealing—all different, I should add, from the one given by Holmes himself, which is that such a separation facilitates the process of giving sound legal advice to clients. First, and as Bentham classically argued against Blackstone, and as Hart argued against Lon Fuller, and as many other positivists, perhaps most persistently Fred Schauer, have emphasized since, we might want to “separate” law and morality so as to preserve our capacity for morally responsible and morally informed legal criticism. If we “fuse” law and morality, if we fuse the “is” of the positive law with the “ought” of moral ideals, we will not be able to criticize what is by reference to what ought to be. If we think erroneously that law and justice—that which is posited and that which ought to be—are one, we will not be able to identify, much less rectify, those laws that are unjust. When we commit the “naturalistic fallacy” in this way, we look at the law through Panglossian, rose colored glasses: We see only justice and truth, rather than acts of power. As a consequence, we incapacitate ourselves for meaningful, enlightened legal reform; we lose the ability to speak truth to power when we confuse the two. The “separation” of law and morality follows from the separation of the is and the ought: It is the necessary first analytic step toward moral criticism of law, and hence, the first step in the path toward critical liberal reform.

There is, however, a quite different philosophical point of departure from which one may wish to “separate” morality and power, and that is, bluntly, that of the moral skeptic—or relativist—rather than the moral reformer: We may think it wise and conducive to clear thinking to “separate” the two, not so as to facilitate criticism, but rather, if we believe on solid evidence that legal norms, for better or worse, actually exist, but that moral norms, as least if understood to mean universal norms or truths independent of social power, simply do not. The case for separation then is on a par with the case for “separating” our knowledge of that which is, such as furniture and people and atoms and particles, from our superstitious and irrational but deeply held beliefs in illusions, such as astrological forces or, as some would now have it, Freudian “ids” and “egos.” Put in neo-pragmatic or postmodern rather than skeptical terms, “morality,” if understood as something more than a product of shifting discourses of societal power, is an illusion, and a dangerous one at that. In fact there is nothing more than those shifting discourses; there is nothing “out there” independent of whatever might be produced by varying constellations of power. The “morality,” then, that must be separated so as to be banished, both according to some parts of Holmes’s Essay and more emphatically—or just more precisely—according to the writings of

11 See BENTHAM, supra note 6, at 3-273.
12 See Hart, supra note 7, at 594.
postmodernists, some neo-pragmatists, and various moral skeptics and relativists, is not, then, the particularized moral expressions or commitments produced by the society's particular political history. In fact, as Holmes emphasizes at the end of his Essay, it is entirely to be expected that law will facilitate in part the recordation on conscience of the triumphs and losses of factions, of the undisguised and non-morbid desires of victors to secure in social learning their own vision of the desired social good. Nor is the morality to be banished, necessarily, the critical morality—the set of ideals—necessary for the reformer. The "morality" that ought be separated from law, for the skeptical positivist—whether postmodern, pragmatic, or relativist—is, rather, the "true" morality that claims an "archimedean point" independent of the perspective of the empowered actor, group, class, or nation who holds it, or alternatively the morality that claims a "foundation" in our universal shared nature rather than in our particular desires, whims, or ambitions. Such a purported "universal" morality, if not weeded from the law, is nothing but an irrational and unjustified drag on the workings of and struggle for power: It weighs down and hampers both the victories of the strong and the aspirational quest of the ascendant.

Finally, there is yet a third reason—or rather, a third motive—for finding appealing Holmes's and positivism's invitation to "separate" law and morality, and that is dissatisfaction with the particular norms of positive morality that currently find expression in positive law. The invitation to "separate out" morality from law, for this positivist, is an invitation to free the legal actor from the imperative force of utterly relativistic and non-universal, but nevertheless unnecessarily oppressive and counterproductive, communitarian moral norms—in Holmes's day, and to some degree in our own, norms counseling obedience to duties of contractual performance and attentiveness to the possibilities of injuring others, where such performance or attentiveness may in fact be inefficient. The "morality" that is to be separated from law, for this positivist, is the positive, duty-laden, common morality of the community, not the moral truths necessary to the critical reformer, and not the false universals targeted by the skeptical neo-pragmatist. The terms and concepts employed by law, once "separated" from the terms and concepts of positive morality, can be reinterpreted as imposing, not duties and obligations that restrain and that do so in unnecessarily oppressive ways, but rather, as presenting choices that liberate: The contractual promise presents the actor not with an obligation, but with a choice between performance and damages; and the tort presents not a duty of care, but a choice between acting in compliance with a particular standard or compensating for the harm consequent to not doing so. The more thoroughly we effectuate this separation of positive law from the community's positive morality of duty, furthermore, the more choices are revealed and the freer the agent, whatever may be his social and political roles. According to the same logic by which

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we come to see that the contractor faces a choice between performance and damages, as noted, not an obligation to do as promised, and the potential tort-feasor faces a choice rather than an obligation as well. We can also see that the judge deciding the law faces a quasi-legislative choice between policies, rather than an obligation to follow the rules laid down by the dead hand of the past. We can readily extend the point in a Holmesian spirit: The industrialist faces a choice between not polluting, polluting and paying off those polluted, or being paid not to pollute, rather than a simplistic and overly constraining moral imperative not to expel filth in the air; the criminal is faced with a choice between either the crime and the time on the one hand, and law abidance on the other. When we “separate” law and morality in this fashion, we do more than promote clear understanding, and far more than protect the integrity and coherence of criticism: We free up our choices, and by so doing, we expand upon and deepen our commitment to individual liberty.

The political visions underlying, as well as consequent to, these three understandings of the “separation thesis” are strikingly divergent. The first interpretation of the separation thesis, according to which law is to be separated from critical morality, squarely grounds the political sensibility of the enlightened legal reformer. This “positivism” urges separation so as to facilitate criticism of power. What is “separated” when we separate law from morality is the authority that derives from the barrel of a gun and the authority derived from sweet reason; the reason to do so is largely to employ the power of the latter against the power of the former. By seeing clearly that law is whatever it is—whatever the sovereign commands, or the boss dictates, or the rule of recognition generates, or whatever the process has yielded—we can better appreciate the distance between what it is and what it ought to be. This is the positivism inspired by enlightenment virtues—by the instinct to speak truth to power—and precisely for that reason it is this positivist “separation” of the concreteness of power and law from the dictates of our moral sense of what ought to be, which led H.L.A. Hart at mid-century to defend legal positivism as the jurisprudential complement to an enlightened and modern critical liberalism.15

The second interpretation I suggested above, according to which we should “separate” law from the bogus claims of universal morality because of the existence of the former and non-existence of the latter, also grounds a political sensibility—a political sensibility in some ways pragmatic and in some ways post-modern, but in all ways skeptical, that has its roots not only in early American pragmatism, but also in Nietzsche, in Foucault and, these days, in the much milder writings of Stanley Fish16 and Richard Rorty.17 At

16 See, e.g., STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1994); STANLEY FISH, DOING WHAT COMES NATURALLY (1989); STANLEY
the heart of this second form of skeptical positivism is a heightened sensitivity to the political dimension of social life—in the extreme, to the presence and operation of power quite literally everywhere, but most emphatically, in whatever societal force tries to restrain it in the name of something other. In his iconoclastic and critical mode, the skeptical and politically attuned positivist pierces the pretense of the moralizer, whatever or whoever claims authority other than or beyond the political, and then uses that bogus authority to diminish the reach of those questing for power, and particularly the moralizer who exerts an undue influence on law. In Holmes’s time, of course, that meant primarily piercing the pretenses of the natural lawyer and the formalist, while in contemporary times, it generally means, at least within American legal academia, piercing the pretenses of the modern, non-positivist liberal legalist, who, like the formalist before him, restraints law and hence in part defines it by reference to universal moral truths. In his critical mode, prominent, unsurprisingly, in the critical legal studies movement, the skeptical positivist exposes these “truths” as subtle or overt exertions and expressions of power.

The skeptical positivist, however, also has a celebratory side, originating not so much in his skepticism toward the moralistic claims of the powerful—a skepticism he shares, although for different reasons, with the critical positivist—but rather, in his Nietzschian affirmation of undisguised power: Think of the “And It’s a Good Thing, Too” of Stanley Fish’s title to his celebrated book on the First Amendment. The celebratory skeptical positivist exposes power not so as to hold it out for criticism by reference to apolitical moral truths, as does the reformer, but so as to celebrate it: With Nietzsche, he celebrates the life-force, the manifest will to power, the energy and organization of acted-upon desires, of political power held by any and all victors. But more particularly—and perhaps more importantly, because this is certainly the source of its charm, as well as its contemporary but momentary alignment in this country with the political left—the modern skeptical positivist celebrates the power of the “not-quite-there-but-gaining” politically ascendant: the adolescent destined for but not quite enjoying maturity, the struggling but emerging labor union, the still-unpopular-but-gaining-fast socialist speaker, the hate speech or pornography victim newly gaining voice, representation and power. For Nietzsche—although not so much for Holmes, and even less so for the postmoderns—this celebration of ascendant, “coming-into-being” power coexists with a distrust of pontification and ressentiment; the preference for the workings of evolution

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Fish, Is There a Text in This Class: The Authority of Narrative Communities (1982).


18 See Fish, There’s No Such Thing as Free Speech, and It’s A Good Thing, Too, supra note 16.
and for the natural struggle of persons, groups, classes, or nations for social power and dominance coexists with a distaste for artifice and for the civilized leveling instincts of the egalitarian; his attraction to the man of instinct, passion, and action who seeks power and domination coexists with a repulsion for verbosity. Whether or not Holmes himself shared this blanket Nietzschian condemnation of the blatherings of the egalitarian and civilizing instincts, he clearly embraced the jurisprudential politics of it: The universal moralisms that the natural lawyer envisions encircling and constraining law, for the Holmesian no less than the Nietzschian skeptical positivist, unduly circumscribe the will, the passion, and the politics of the man, class, or nation of action. By separating law from the sway of these false universals, we not only free ourselves from the haze of their obfuscating sway, but we also and perhaps more importantly free up and facilitate health, life, nature, and above all, power and all of its manifestations. And again, what we free power from, essentially, is an unnecessary and false sense of moral restraint—the brooding, omnipresent drag of a shame-based nanny-istic moralism that urges restraint, and that is borne of envy, of fear, or of a loathing of power—either that of others or paradoxically of one's own.

The third interpretation of the positivist separation thesis—that we should separate positive law from the positive and duty-based morality of the community—grounds a libertarian political philosophy that celebrates, relentlessly, choice, and denigrates, just as relentlessly, a morality of obligation, of duty, and of responsibility. For the libertarian or economic positivist, choice—not power per se, and certainly not reason—is liberated by the separation of law and morality trumpeted by the The Path of the Law, and it is liberated by ridding law not of the false universals that circumscribe all of a culture's law, but rather, by ridding it of the local moral particulars that inform a particular society's legal practices. It is not the moral absolute that hinders and burdens the man of power and action, per se, that is the target, but rather, the community's smothering imposition of particular affirmative moralistic duties and obligations. Again, what is hindered is not so much the power of persons, groups, classes, or nations, but the choices of individuals. For this positivist, it is the operation of individual choice that is the source of value, and individual freedom, not the unburdened struggle of persons, tribes, classes or nations for dominance and power, that is the treasured goal.

Thus, the political and philosophical differences between these three positivisms are clear enough. There is, though, as mentioned above, one final dimension, or measure, of the differences between these three conceptions of positivism that might fruitfully be drawn, I think, and that is the aesthetic. The best way to highlight that difference, in turn, may be to reconceptualize each version of positivism as a narrative, and then sketch for each version a composite of the implied hero: who it is, precisely, that stands to benefit, or be freed, by the positivist's invitation to separate law from morality. For the Hartian, or critical positivist, I think, the story of positivism is essentially comedic and ironic—as, I have argued elsewhere—is the story of liberalism
The action of the story of legal reform moves a society mired in outmoded, arid, formalistic, and slightly inhuman and legalistic modes of being toward an ultimate reconciliation in a truer, happier, less formalist, and more generous community. This transformation is done through the lightly ironic method of puncturing and discarding worn and useless—but for the most part benign and invariably parental—shibboleths inherited from the past, so as to clear the way for a forward-looking and happy age of reason. The hero of the Hartian story of critical positivism, unabashedly, is the legal reformer: the public minded citizen—not the legislator, and not the judge—who unselfishly aims to better our laws by holding them up to ideals that are themselves drawn from the realm of moral truth, and does so, more or less, by revealing and then discarding the useless hangovers from a less enlightened past. The heroic liberal critic aims not for wholesale revolution—for which a militant version of natural law is a more natural ally—but for improvements at the margin and uses the persuasive powers of reason, and, at his most harsh, perhaps, and only where needed, of ridicule, to achieve that end. For the skeptical positivist, by contrast, the story of positivism is not so clearly a comedy and not so purely ironic: It can, and often does, tend toward dark romance instead of light irony and tragedy instead of comedy. The hero is not a disinterested tinkerer who, with the tools of reason, leads his community toward a more reasonable and happier state. Rather, he is a man of action who for the most thoroughly selfish of self-interested reasons—that may or may not be noble but that are at any rate not petty—leaves his natural and powerful mark on the natural and predetermined landscape, with consequences that may or may not be for the better but that are both momentous and, when viewed in retrospect, inevitable. He is decidedly not the public spirited tinkerer, but rather, the man of action who seeks to survive, dominate and leave a mark: the union organizer and the union buster, the general who commands and the soldier who obeys, the socialist who seeks egalitarian levelling change and the aristocrat who seeks to prevent it, the lobbyist seeking votes, the demagogue seeking followers, or the victims aggressively fighting for compensation: in short, whoever it is and for whatever cause, who has the will to fight it out. For the economic positivist, finally, the story of positivism is purely ironic: As there is no point of reference external to behavior, there is no tendency toward either romance or comedy. Experience is the path of the law and of everything else besides because experience—behavior, choice, preference, and the fulfillment of desire—is all there is; there is neither subjective wellbeing in any meaningfully measurable sense nor objective moral truth. The heroes of the efficiency-maximizing positivist story are the producer and consumer—decidedly not the obedient soldier or general so beloved by Holmes—who create value both for themselves and others through the repetitive play of conscious choice rather than through a life lived in accordance with obligation.

19 See ROBIN WEST, NARRATIVE AUTHORITY AND LAW 387-93 (1993).
All of these heroic figures—the critical reformer, the political fighter and the consumer—have a stake in positivism: They all want to rid the law of moralisms. But each stake is utterly different from the other two: The critical reformer needs to keep his external standards of evaluation distinct from the interests and self-interests of politics; the political and skeptical fighter needs to shake off the mantle of brooding universal obligation; the consumer/entrepreneur needs to rid himself of the illusion of moral obligation so as better to appreciate the sovereignty of his choice. That the critical reformer, the political and skeptical fighter, and the consumer/entrepreneur converge on legal positivism as necessary to meet their divergent political, philosophical, and aesthetic ends is only barely more than a linguistic accident.

Let me summarize with some three-way contrasts. All three versions of positivism that I am trying to delineate subscribe to what is loosely called the separation thesis, and, for all three, in this country and in this century, some version of “formalism” is the natural foil, as in England and Europe a more developed natural law jurisprudence fills the bill. They all see law as an expression of sovereign power; they all see law as that which is “posited” by very earthly and utterly political mortals; they all see law as a product of politics; and they all accordingly want to differentiate this product of the posited, political acts of will of the powerful from “morality,” which, whatever it is, is not that. This commonality, however, masks profound differences. They all embrace the separation thesis and the positivism of law for drastically different philosophical reasons and with vastly different political consequences. (I make no claim and have no inkling as to which is predetermining which.) For the critical positivist—Hart is the prototype—moral truths are to be separated from legal commands, so that we may see and think clearly about law and most emphatically about its shortcomings: If we don’t separate the law that is from our ideals for it, we won’t be able to see what’s wrong with it. We separate law and moral truth to ensure that we can use the latter as a mode of criticizing and hence improving upon the former—an utterly sensible instinct. ¹² The skeptical and economic positivists have no such instinct, sensible or not. Neither seeks to separate the contingent and posited legal command from the universal and categorical moral truth so as to, primarily, preserve the integrity, and hence the utility, of the latter as a mode of enlightened criticism against the former. Their philosophical conception of, and hence attitude toward, the “morality” to be separated is simply radically at odds with this straightforward enlightenment stance: They are both, for different reasons, as skeptical of the liberal critic’s insistence on the transcendent or universal scope of moral truth as the latter is skeptical of the

¹² But Cover sees that the implication of such a commitment to the positivism of law, while it may indeed free the outsider, citizen legal critic, seemingly restricts the interpretive power, and hence the felt moral options, of the insider judge. See ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 193-256 (1975).
The formalist's claim that law possesses it. They both then are inclined to "separate" law from morality primarily because of their skeptical conviction that the latter, at least if understood as universals independent of power, does not exist, and that the belief as well as assertion that they do is typically nothing but a mask for the self interest of whomever is making the claim. Neither are they, however, nihilists. For both, the moralistic claim that moral truth circumscribes or informs law is pernicious—but not because, as for the liberal critical positivist, it confuses criticism by conflating the is and ought, but rather, because, and to the degree that, the conflation unduly suppresses release of the real source of societal and individual value.

The similarities, however, between the skeptical and economic positivist end there. They have radically different conceptions of the value unduly repressed by moralism and radically different conceptions of the moralism doing the repressing. For the skeptical positivist, whether speaking skeptically or affirmatively, value is a product of power, whether "power" be the power of persons, families, groups, classes, nations, armies, or species, while for the economic positivist, value is a product of individual choice, perfectly manifested in the unfettered private bargain. The moralism that in the eyes of the skeptic hinders the workings of power and hence the production of value is the brooding, omnipresent, universal—the universal with its point of origin outside all political struggle that inhibits and represses the emerging, evolving, forms of life. By contrast, the moralisms that in the eyes of the economic positivist hinder the working of choice and hence the production of value is decidedly not the brooding universal—indeed the economist is given to a few of his own of those—but rather, the quite local, particular, community-generated and socially embedded positive morals of the community—morals that mask, and hence restrict, individual choice with their language of obligations, imperatives, categoricals, duties, and the virtues of civil obedience.

II. THE POSITIVIST PATHS OF THE LAW

All three of these positivist paths—not just one—are clearly foreshadowed in The Path of the Law. First, the central metaphors that have come to define the Essay—the "bad man," the "cynical acid," and the "prediction theory" of law—can easily be interpreted or reinterpreted in a way that sustains the philosophical, political, and aesthetic thrust of each of the three positions described above. The enlightened, insider-outsider, reform-minded, critical positivist obviously has an interest in developing the capacity to see law from the perspective of the bad man, or, what comes to the same thing, to wash the law in cynical acid. To add, mix, and stir in yet another metaphor, these are no more than ways of dropping the rose colored glasses. We would give the same advice to someone about to accept a marriage proposal when still in the first throes of passion, or to a parent incapable of seeing fault in a child. If we insist on defining the object of our affection—whether he be a King or a Constitution or a lover or a child—as virtue itself, then we will have a very
difficult time seeing in precisely what fashion or to what degree virtue is lacking. If the Prince is defined by the sun’s radiance, or the Constitution defined as a document that embodies the requirements of justice, it simply becomes all the harder to see the Prince’s faults, or the Constitution’s evil.

It is not impossible, perhaps. We might declare the Prince who is cruel or incompetent to be a pretender, or we might declare the Constitution enforced by the Court, when evil, as but a shadow of the transcendentally real, pure, and good Constitution, or we might declare the unjust law passed by the legislature a sham. We might then reconceive our reformist efforts as the effort not to rid ourselves of bad or unjust laws and to make better ones, but the effort to rid ourselves of pretense and to make the law more true to itself. Of course, we should do so with caution: whatever the rewards for such an exercise in heaven, Holmes, and other positivists as well, are surely right to point out that this stubborn counterfactual stance is not a propitious vantage from which to advise clients. That, however, is a secondary point: What I want to urge here is that it is also a peculiarly poor frame of mind to address the Constitution’s, the legislature’s, or the King’s fallibilities. It is, after all, sometimes the Constitution itself, or the statute itself, or the common law itself, and not the Court, or the interpreter, or the particular interpretation, or even the best possible interpretation, that is the source of injustice; and when that is the case, it surely behooves the would-be critical reformer to concentrate on its origin in various acts of political will and to seek out various political paths of its reform. A positivist definition of law as the product of politics facilitates just such clear-headedness; a definition of law as necessarily just (or moral) retards it.

I am not as sure as both most modern critical positivists and their critics that this liberal, Hartian positivism, even when applied to the Constitution, is incompatible with what Ronald Dworkin has now called a “Moral Reading of the Constitution,”21 or that, more broadly applied, it is inconsistent with Dworkin’s general insistence that judges, when interpreting the Constitution or any law, should do so in the morally best light.22 The morally best light, after all, has limits: The morally best interpretation, for example, that might be given the “Jew laws” of Vichy France, or the apartheid restrictions of South Africa, or the slave laws of the American South, or the Fugitive Slave Act of the United States, might not be even minimally just. Again, a liberal reformer intent on creating better law and hence a better society will be well advised to do as Holmes urged: Look at the law from the perspective of the bad man, even assuming the bad man will be interested in knowing the best light a moral judge might give it, to see just how bad the law actually is. Surely the same point can be made, albeit not so obviously, about our own constitutional scholarship. It may well behoove us as judges or law clerks to

22 See id. at 7-12; see also RONALD DWORIN, A MATTER OF PRINCIPLE (1985).
read the document as generously as possible—of course it does. It also may well behoove us, if we are interested in assessing the justice or injustice of our fundamental structure of government, to assess even that most generous, best, most moral possible reading, for its compatibility with our ideals. It may also be the case—I have argued elsewhere that it is the case—that a judge is ill-equipped institutionally to do both these tasks: The judge who seeks the morally best interpretation of a law is not well situated to also critically assess the limits of even that “best light” reading. But we are not, after all, all judges. Surely for the citizen-critic, it will do little but confuse rather than clarify issues to simply define the Constitution, law, the Rule of Law, or any particular legal enactment, as the necessary embodiment of moral ideals.

Whether or not the prediction theory is central to the perspective of the reform-minded critical positivist is a much closer question. H.L.A. Hart, quite famously, did not think so and criticized the prediction theory on precisely this point, and from a squarely positivist perspective. For Hart, the Holmesian—and later, realist—insistence that the healthy positivist instinct to define law by reference to its posited, human, political origin implied that “law is nothing but what the Courts will do” reflected nothing so much as the peculiar American obsession with courts and judicial process, the peculiar American legal academic’s obsession with penumbral cases, and, perhaps, the peculiar American institution of judicial review. It may be true, according to Hart, that law is at bottom nothing but what various political entities do and say, but there is simply no reason to imply from that that law is nothing but what courts will do in the future. Realism, Hart insisted, is indeed a variant of positivism, but a peculiar American offshoot, and an unfortunate one at that.

In the next Part, I want to defend the prediction thesis, and hence Holmesian-styled realism, against a quite different objection. The objection that recurs in critical scholarship about realism, but that is made most forcefully in this generation by David Luban, is that the prediction theory must be wrong because it suggests what is absurd: that judges, when deciding what the law is, sit around predicting their own conduct. I think that that particular argument against the prediction theory fails, and that it fails for reasons that go to the heart of realism. What I want to focus on here, however, is a rather different objection, and that is that the prediction theory has little to do with the “separation of law and morality” and no obvious connection with the

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24 See Hart, supra note 15, at 141-44.

25 See David Luban, The Bad Man and the Good Lawyer 43 (unpublished manuscript on file with author).
Three Positivisms

The animating purpose of critical positivism: to define law by reference to its political origin, so as to promote clear headed moral criticism. I think this—quasi-Hartian—objection to realism may well be right: The spirit of critical positivism directs us to distinguish the posited law from moral truth—and to do so as to unleash critical thinking—not to define law as that which is posited by courts. There does indeed seem to be little connection between the two. Nevertheless, it is possible, I think, to understand the spirit of the prediction metaphor in a manner that underscores the central critical positivist perspective. Defining law by reference to the prediction of judicial behavior focuses the positivist on political acts of empowered people rather than abstractions. As a metaphorical or heuristic device, it forces the reader, predictor, advisor, or reformer to acknowledge the human, posited, willed, political foundation of law. It asks us to acknowledge that judges are doing something proactive—something political and legislative and consequential. That it directs our attention to only the judge, and only forward in time, and only with an eye toward remedies and sanctions as the substance of law, may well be unduly narrow. But the spirit of the directive—that if you want to understand law, you must think of it as the acts of power of some people over others—is not so at odds with the spirit of critical liberal positivism developed by Hart.

The skeptical positivist also has good reason to see the law from the perspective of the bad man, wash it in cynical acid, and keep focused on the positive pronouncements of courts rather than the ideal pronouncements of hypothetical oracles. The “cynical acid” and the “bad man” so central to Holmesian positivism serve two simultaneous skeptical ends. First, in the minds of the bather, and whether the bather is lawyer, judge, or citizen, the cynical acid bath reduces to a minimum the constraints on power imposed by the disingenuous moralistic language of law. Similarly, the bad man, by virtue of his sociopathology, will see through the same deceptive haze the cynical acid should pierce: He is deaf to moral language in any event, so his is the perfect perspective from which to clearly see the politically interested foundation of purportedly universal and disinterested moral categoricals.

But second, the cynical acid and the bad man’s perspective, if adopted, serve more than the ends of skepticism. They also go some distance toward ensuring that law is a vehicle for and reflection of the struggle for power between factions, rather than simply the suppression of it through the force of false and dishonest moral universals, and this is at least of equal importance to the skeptic. For the Constitution to be read as draping over the legislative output of the battle between workers and capital a moral mandate of universal individual freedom, or for tort law to be read as draping over the competitive workings of businessmen a moral duty of due care, or over their contractual responsibilities toward each other a duty of good faith, does little but inhibit the struggle of workers and capital, or competing businesses and interests, for social impact or dominance. The brooding omnipresence dampens the enthusiasm for the fight, and in language that disingenuously declares...
its own disinterest. Again, the bad man unwittingly sees through the duplicity—because of his sociopathology, he's deaf to the moral language. The good man, whether or not he's truly good or simply foolish, by definition will respond to the dictates of conscience, and there is no reason to constrain him doubly—once by conscience, and again by the demands of conscience folded into and masquerading as legal compulsion. By ridding the law of the language of false universal moralisms, we liberate struggle—struggle in which the demands of conscience may or may not come to the fore and may or may not prove a part of victory, but either way, ought not do so through disingenuity and oppression.

The economic positivist as well can readily embrace the Holmesian metaphors. The bad man will be no less deaf to the particularized judgments of the community that suppress choice as to the universal categorical truths of objective morality that suppress power. The bad man will indeed read the "duty of due care" in tort as presenting a choice between negligence and careful conduct, and will see no moral distinction between them, rather than a duty to behave well; he will indeed read a contract as presenting a choice between performance or damages, rather than a duty to perform—as should we all. Whether or not there are such moral duties—and Holmes's argument quite directly implies that there are not, as I will urge below—what the law presents are choices, and choices, unlike moralisms, produce value. The bad man, the cynical acid, and the predictive theory of law all minimize the role of positive morality in the construction of positive law—a transformation to be desired for its own sake. Positive morality is demonstrably inefficient: By precluding choice, it dictates performance of contracts where it would be efficient, and hence desirable, to breach, and it dictates careful conduct where it would be efficient, and hence desirable, to pay damages or compensate for an injury instead. Where positive morality inhibits the choices of rational producers and consumers, it not only unduly limits freedom, but it overdeters the moral as well as the immoral from socially desirable behavior. The bad man's perspective, precisely because he is inattentive to positive morality, better promotes both freedom and social welfare.

The central metaphors of Holmes's Essay are compatible with three quite different versions of legal positivism, and that goes a long way toward explaining the Essay's century-long appeal. Further, each version of positivism is squarely underscored by various sections of the remaining text. Begin with what I have above called liberal, reform-minded positivism. There is surprisingly little direct textual support for this interpretation, but there is some, and what there is, is important. The quick reference to constitutional law, and the clear criticism of an overly reverential attitude toward the constitution, constitute, by my reading, the only explicit endorsement of anything resembling the liberal, Hartian, critical positivist's understanding of the sepa-

26 See Holmes, supra note 1, at 460, 78 B.U. L. Rev. at 701.
RATION THESIS. Nevertheless, the critique of an historical method, which occupies a substantial portion of the text and argument, constitutes important indirect support. It deeply resonates with liberal enlightenment themes, as does the equally substantial critique of the logical methods of formalism.

Skeptical positivism, on the other hand, can go some distance toward explaining the otherwise obscure passage in the middle of the Essay, in which Holmes praises the law for embodying a society's moral convictions. Again, from a skeptical positivist perspective, it is not the relative, local moral judgments that offend and oppress, but the disingenuous, purportedly apolitical universals. And economic positivism can make straightforward sense of Holmes's forthrightly positive legal agenda of ridding the private law—for the most part—of particular bits and pieces of positive morality: the various duties and requirements of good faith, contractual performance, and careful conduct that not only hamper clear understanding—after all, depending on the content of the law, they might promote it—but also unduly constrain individual choice and hence societal welfare.

But for precisely the same reason, the Essay cannot possibly be read as a particularly strong endorsement of any one of these positivisms. These three positivisms are, after all, utterly incompatible with each other. The critique of an historical method in the law, which resonates so nicely from a liberal critical positivist perspective, should be anathema to the skeptical positivist. After all, to do what has been done in the past for no reason other than that it was done that way in the past, illiberal and uncritical though it may be, does give credit to history's victors where credit is due. Yet it surely seems illiberal and unenlightened to wash a law in cynical acid, drop the rose-colored glasses, see it from the perspective of the bad man in its undiminished evil—and then embrace it with gusto. Similarly, to view law favorably as the repository of a particular society's moral struggles makes good skeptical or cultural-relativist sense, but no sense at all from an economic point of view.

What does The Path of the Law teach us to do, for example, should it ever come to pass that a sub-community of moralizers emphatically and clear-headedly decides that contractors should keep their promises even where breach would be efficient, or that the Hand formula for negligence should be re-evaluated with a thumb on the side of prevention of harm, and then win legislative majorities and mandate as much? Clearly, the Holmes of Lochner—so willing to defer to legislative folly even in the face of an arguably decisive constitutional mandate—would happily defer to this madness, but to do so would do obvious violence to Holmes's clearly economic understand-

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27 See id. at 469-77, 78 B.U. L. Rev. at 708-715.
29 See id. at 459, 78 B.U. L. Rev. at 700 (“The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.”).
30 See id. at 462, 463, 471, 78 B.U. L. Rev. at 702, 703, 710.
The aesthetic tensions within this Essay are, if anything, even more palpable. The “bad man” in the ironic-comedic liberal and critical interpretation of positivism is quite cleanly heroic and quickly revealed as such. He is, after all, only “bad” from the perspective of a bad law—he is bad in the Harrison Ford sense, not the Jack Nicholson sense. He is the bad outsider who reveals to the community the silliness, folly, or evil of some overly rigid and outmoded part of a legal regime; he is at first greeted with hostility, but eventually convinces all, and is finally embraced by the community he helps rejuvenate. In *The Path of the Law* as well, the “bad man” quickly becomes not so bad and indeed quite heroic: After all, it is the bad man whose perspective helps us see that we ought to rethink tort and contract by discarding tired, formal, parental sounding moralisms of duty, good faith and what not, all the better to promote efficiency, a breezy freedom, a light liberty, and a happier, busier, more bustling and rich community. The bad man of *The Path of the Law* is “bad” only in the sense that any successful reformer is initially perceived as bad, and only in the sense that heroes of ironic comedies are likewise; his badness—his initial alienation from the community and from community norms that sets the tension and gets the plot going—is alleviated through reform of the community—not of the bad man, who, as it turns out, was right all along—and then eventually is resolved with acceptance by it and reconciliation to it. The “bad man”-as-hero underscores the ironic-comedic, and hence the liberal, reading of the Essay.

But what of the “bath in cynical acid”? This doesn’t sound so funny. Acid, after all, destroys: Anyone who uses it, particularly with gusto, looks more like Jack Nicholson than Harrison Ford, looks more like a real psycho-path. If the bad man’s method is to use cynical acid, rather than the gentle persuasive powers of reason, humor, or simply exposure, then the story is much more bleak. We have no good reason to think, or even to hope, that the man of action and power—the force of nature—from whose perspective we should view law, and whose force we should do so little to impede, is leading us toward the happier community so familiar to all of us from the last act of Shakespeare’s comedies, rather than to hell in a handbasket. We know only that he’s leading us somewhere—the hero of romance is, after all, strong—and that motion is better than stagnation. But the cynical acid Holmes uses to jolt us from our complacency is not a comedic metaphor. The stakes are high, the going is rough, and the injuries sustained through this journey of evolutionary, near-inevitable change are real enough. And there is absolutely no reason to assume that the journey this particular Path maps out is going to turn out to be worth the cost.

III. FOUR OBJECTIONS

Finally, what are the merits and shortcomings of each of the positivist paths foreshadowed in *The Path of the Law*? It is fair to say that each of these three paths has had more than a foothold in the century now conclud-
THREE POSITIVISMS

ing. Each of them, to stick with Holmes's imagery, is a path well traveled. Some of us have gone quite a distance down each one of them; a few of us have made a lifetime in the law on one or the other of the three. Surely we ought to be able to say something now, based on these shared experiences, about where each path has led.

By way of conclusion, I want to quickly rehearse and respond to two familiar theoretical objections, and then I will raise my own objection to the first of these three paths, to wit Holmesian—or realist—styled critical positivism. I will then put forward a concern about what is surely the most well trod of the three paths Holmes foreshadows: the on-going economic attempt, in this century, to rid our private law of moralistic constraints and open ourselves instead to the sovereignty of individual choice. I will not discuss possible objections to skeptical or neo-pragmatic positivism; to my mind the salient objections to such a view entirely converge with objections to relativism and raise questions far too vast and difficult to touch upon here.

Let me start with two familiar objections to the realist version of critical positivism, made most recently and most clearly by David Luban in a recent article on Holmes's The Path of the Law. The first objection is simply this: If the "separation of law and morality" means nothing more than that we should maintain critical distance from that which is, then it is both obvious and trivial: Everyone, including natural lawyers, realizes that there are bad and unjust laws in need of changing. This objection, I think, fails, and even a cursory glance at twentieth century American constitutional scholarship shows why. The temptation to identify the law that is with the law that ought to be is clearly as powerful now as it was in Blackstone's time: Constitutional scholars, no less than judges, invariably see in the true Constitution a robust justice, and find error, evil and fault only in its foolish, wrong-headed and misguided interpreters. This is a much remarked upon but nevertheless undiminished phenomenon at the heart of American legal and jurisprudential thought and has been for two hundred years: Legal commentators as well as judges find replicated in the miraculous American Constitution the commentator's or judge's best conception of political morality. It is indeed rare that one will find either in scholarship or adjudication the claim that the Constitution positively commands something evil, or positively forbids what justice compels. The positivist separation thesis, designed precisely toward the end of demystifying legal authority, no matter how obvious it may sound in the abstract, is clearly the required antidote for the critical muddle we have in-

See generally Luban, supra note 25.

herited, at least in this culture, in our constitutional thinking. At least in the context of American constitutional scholarship and law, the separation thesis is neither trivial nor obviously true.

The second objection Luban raises goes not to the heart of positivism per se, but to Holmes's "prediction theory," which in turn became a cornerstone of American realist—but not English positivist—thinking. The prediction theory, Luban argues, leads to absurdity. The work of judges, after all, is to state what the law is. If the "law" is, as Holmes and the realists found it to be, nothing but a prediction of what the courts will do, then the positivist committed to the prediction thesis is quickly led to the absurd conclusion that judges, when deciding what the law is, in fact and in theory sit around predicting their own conduct. They do not do that, and hence the prediction thesis must be wrong.34

This objection as well, I think, fails, and it fails for the straightforward reason that it rests on a false, or at least a question-begging, premise—to wit, that the work of the judge is to declare the law, to decide what the law is. If that premise is right, then the realists were wrong about many, many things; but, whether that premise is right or wrong, it is quite clearly a premise that the realists themselves did not share. The judge, according to Holmes and realism quite generally, is not in the business of declaring what the law is; rather, much like the legislator, he is in the business of making the law. The judicial decision, the realists argued again and again, is largely a legislative one. Rules are playthings, Llewellyn taught us; they don't really constrain. Judges decide cases on the basis of their own best assessment of what would be consequentially best for society. It would be a great leap forward if judges would just be honest about that fact. Now again, whether they were right or wrong to so describe the judicial act, it is overwhelmingly clear that they did so describe it: The reinterpretation of the judicial act as a willful, powerful, existentially responsible, legislative command, rather than an intellectual, passive, obedient act of discovery was central, not peripheral, to realism. Given this realist description of the judicial act, they surely cannot be charged with the absurd conclusion that judges predict themselves in deciding what the law is. Judges do not decide what the law is; judges make the law. Lawyers decide what it is, and if judges are the ones making it, then it is perfectly sensible to suggest to lawyers that they are engaging in an essentially predictive enterprise.

But is their account of the judicial decision an accurate one? Are judges truly as free as their description contends? This may be what is in fact behind Luban's analytic objection and, if so, I want to sign on. The answer may be no, and for two reasons. First, and as Hart claimed forty years ago,35 the realist account seems wildly belied by the facts, broadly described: This insistence on judicial freedom is perversely at odds with literally everyone's ex-

34 See Luban, supra note 25, at 43-44.
35 See HART, supra note 15, at 132-37.
periential understanding of the scope of judicial discretion. It seems much more accurate to go with the judgment of common sense: The judge is sometimes bound and sometimes not, and the size of the core and the penumbra depend on the area of law and the time period under discussion.

The second reason, though, that I would urge for resisting the realist’s invitation to conflate the judicial with the legislative act is avowedly political and pragmatic: The belief that it is so leads to unacceptable, and paradoxically, unacceptably conservative consequences. A deeply held conviction that legal rules never constrain judges, and that the law is as a result nothing but a series of judicial decrees, I think, will retard and hamper critical legal inquiry no less than the opposite conviction, that legal rules are iron-clad, retards and hampers judicial innovation. A belief, for example, in the Constitution’s utter fluidity of meaning—that it is through and through permeable, fluid, utterly ambiguous, an urn into which we pour meaning and nothing else—will blind us to constitutional evil no less than will a Panglossian faith in its invariable justice. The belief, to take some specific examples, that the Constitution’s utter ambiguity makes it possible to read it as a brief for socialism surely hampers appreciation of the extent to which the Constitution has locked us into a cultural commitment to private markets, complete with not just a preference for private property, but with a right to opulence, and hence has gone a long way toward ensuring a cultural mindset so predetermined as well. Similarly, a belief that the Constitution can easily be read either to grant or withhold a right to die, that it can be read either to mandate or not mandate or forbid a colorblind society, will hamper, not further, the critical capacity for faulting the Constitution for providing no such right, or for mandating or forbidding such a culture. Again, if the goal is progressive judicial innovation—to make the best of a bad but partly ambiguous situation—then an appreciation of ambiguity is to be hoped for: Such a judge will push the envelope for a just interpretation. But if the goal is a frank appraisal of the merits or demerits—the virtues or evils—of our foundational law, an insistence on ambiguity, and the studied, cultured, and somewhat precious capacity to see it everywhere, is going to frustrate, not further, our progress toward it.

Finally, I want to pose a question regarding the third Path described above: the economic project, which continues today, of ridding the content of our private law of the words and constraints of moral obligation, toward the end of expanding our sense, as well as the reality, of our consumptive and productive choices, in turn toward the end of maximizing the rationality of our shared social life. The objections to the Chicago-inspired economic quest to render the law efficient and to promote efficiency as the goal of law are certainly now too varied and many to catalogue adequately. What I want to suggest here is that behind many—not all—of them might be a quite basic objection to a fundamental but largely undertheorized premise of that project,

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but one that is cleanly articulated, and even trumpeted, in Holmes’s Essay.

The question is simply this: Do we give up something, and something quite precious, when we abandon, in our law, the language and concepts of moral obligation and embrace in its stead the sovereignty of choice? It is easy enough to make the case that the answer has to be no, even logically must be no. After all, its clear enough that what we gain—or what might be gained were we to take the project to its logical conclusion—is substantial: We gain the added wealth of efficiently breached contracts, of industrial production not over-deterred by inefficient mandates not to pollute or be negligent, of lower prices for products the manufacturers of which are not forced to internalize higher costs for more personal injury insurance than their purchasers desire, of the fulfillment of our current desires, undiminished by the paternalistically determined needs or interests of future generations. And, on the other side of the ledger, what could possibly be lost when the project aims only at clarifying the cost of non-compliance and making palpable and vivid the choice already there in any event? The change, in other words, wrought by the transformation of common law norms and regulatory regimes suggested by Holmes’s Essay is additive: Nothing is taken away or diminished. If the moral act is, say (a), how can it possibly harm anyone, or diminish anything, to provide the actor with a choice between (a) or (b), where, furthermore, a pre-condition of (b) is that everyone affected by opening up the actor’s eyes to the fact that he has such a choice, is indifferent? The good man can, after all, still proceed according to conscience, if he doesn’t mind needlessly assuming an inefficient cost. Why should he care that another similarly situated contractor has preferred to compensate an indifferent promisee? The good man doesn’t have to sell his kidney, or reproductive labor, if he thinks one ought not. Why should he mind that another man has found a willing buyer? The good man can not commodify his body if he so chooses and can certainly do so on moral grounds; he can keep the inefficient contract, act according to a heightened level of care, not pollute or design safe products regardless of his customers’ preferences for dirtier air, higher risk, and cheaper products. All that Holmes’s Path would have us do is make clear what is true in any event and that is that in fact the good man has a choice: From the law’s perspective, he can either take the path of conscience or the path of productivity, so long as compensation is forthcoming. If he takes the latter, the law will not censor him.

There is, though, this possible loss. By re-defining the moral act as simply one of several possible desired choices, we may sacrifice in the bargain the

37 Those generations may, after all, assuming “sour grapes,” have much less desire for a clean environment than we might project onto them, and if so, they may have every reason not to want us to paternalistically predetermine the desirability or undesirability of their soured world and limit their wealth accordingly. See Mark Sagoff, We Have Met the Enemy and He is Us or Conflict and Contradiction in Environmental Law, 12 ENV’L L. 2283, 2301-02 (1982).
essence of moral decision-making: It is, after all, central to the moral act as a moral act that it be obligatory. If so, then it does indeed destroy the essence of (a) to present to the actor the choice between (a) and (b): By opening the choice, the nature of (a) is transformed. To say that we are morally obligated to keep our promises means precisely that: that we are obligated. The promise imposes an imperative from an earlier to a later self to be obeyed, not an option to be weighed. To say that we have a moral duty to take care not to hurt others similarly asserts a moral imperative to be obeyed, not a choice between acting prudently and paying damages; and to say that we have a moral obligation of prudence toward our own future well-being means that we are obligated to promote it, not that we are free to price it and then go with what's cheapest. If we have a moral obligation to keep the planet relatively clean for our descendants, then we have it regardless of whether or not their future preferences, soured by foul smelling alternatives, would not hold the wilderness in particularly high regard. Moral obligations—obligations to keep promises, not to injure others, to promote the flourishing of others, and to clean up one's room and one's planet—stem from imperatives, not from preference, desire or will. The moral act is quintessentially the act in compliance with an imperative; it is an act of obedience. Kant stressed the categorical imperative; Bentham, Hume, and Mill the imperative to promote well-being. No credible moral philosopher, at least in the Western canon, has held otherwise.

But what of Holmes's rejoinder—that he speaks only of our obligations and choices imposed by law, and that what he says does not touch and is not meant to touch the felt imperatives of the man of conscience, including, he obsessively points out, himself? The rejoinder doesn't work, and for at least two reasons. First, it presupposes a distinction in culture as well as in theory between legal and moral norms that is simply preposterous. Legal language affects the language of culture, which in turn affects our moral intuitions, and vice versa. There is no possible "cabining" of this proposed reform. But second, and more importantly, the arguments posed for choice and against obligation, if persuasive in the legal context, are certainly persuasive as well in the moral. If it is desirable to encourage efficient breaches of legally enforceable contracts, then it is certainly desirable to encourage efficient breaches of promises more widely construed, so long as compensation is forthcoming, and perhaps even where it is not. We should, in other words, be teaching our children that a social promise imposes an obligation to either perform or pay off the promisee, and that where the latter is the cheapest option, by all means to pursue it. If it is desirable to encourage dangerous and cheap products on the grounds that that combination mirrors consumptive desires, then it is desirable to reconfigure our moral intuitions accordingly, and not just our legal remedies. The notion that the argument for choice and against obligation leaves unaffected the strength of moral arguments to the contrary obviously undersells the power of its own central logic.

And what of that central logic? I think that what 100 years or so of experi-
ence on this particular path of the law has taught is that, again and again, the power of that logic reduces to a single intuition: that our moral norms must be tested against felt desires, and where there is a conflict, desires trump. If it is as simple to produce a low cost and riskier product than a higher priced safer one, and the consumer desires the former, then by all means defer to desire: This is simply the essence of consumer sovereignty. If consumers evidence no interest in first party insurance against risks of dangerous products, then don’t force them to purchase such insurance in the form of higher priced goods. If consumers want less wilderness and more amusements, then by all means provide them. And, if what Mark Sagoff calls our “citizen preferences” for clean air or workers’ safety conflict with our manifest consumer preferences, then so much the worse for the former: We’ve just failed to put our money where our citizens’ mouths are, and we have only ourselves to blame.

All I want to suggest here, in closing, is that there’s no obvious reason we should refrain from exploring alternative paths. Rather than acquiesce in the whittling away of our moral compass by the constant erosive effect of our sovereign “first party” consumptive desires, we might try a different path: We might consider evaluating those “first party” desires by reference to the conflicts they present with our moral intuitions. If we have a moral and prudential obligation, for example, truly to care for ourselves—to attend to our own personal flourishing, to see to our own well being—then perhaps we should question, rather than cave to, our apparent consumerist first order preference, reflected in our insurance purchases—or lack thereof—for lower priced and riskier—or dirtier—products. If we have a moral obligation to preserve the conditions requisite to the flourishing of our descendants, then perhaps it follows that we should re-evaluate, rather than acquiesce in, their projected soured low valuations of the wilderness. If we have an obligation to keep our promises, perhaps we should re-evaluate, rather than endorse, the wealth earned by paying off our promises. Perhaps what we lose in the bargain is real and substantial, even if incalculable.

I suggest that we explore this alternative path for this reason: If we do not explore it, it will become overgrown with weeds and disappear from disuse. Our desires do have corrosive affects on our moral sense, and our moral sense is profoundly impacted by our legal norms. If we redefine our moral obligations by reference to our felt desires, we will eventually come to lack the feeling of having obligations that are in conflict with desire. If so, then the path Holmes has laid out—that in law we should view our obligations contingently rather than categorically, or disjunctively rather than absolutely—will have a distinctly unappealing endpoint: The moral option, for the perversely inefficient-minded actor, will have disappeared. And should that day come to pass, we will no longer be in any position whatsoever to evaluate the relative costs and benefits of the paths less traveled.