

## ESSAY

# THE BAD MAN AND THE GOOD LAWYER: A CENTENNIAL ESSAY ON HOLMES'S *THE PATH OF THE LAW*

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Although Justice Holmes did not much enjoy listening to speeches (he once wondered "what makes the world throng to hear loose-fibred and coarse-grained men drool"<sup>1</sup>), he had a remarkable gift for writing them. Holmes's 1920 *Collected Legal Papers*<sup>2</sup> includes a dozen speeches and addresses, all delivered to student audiences or lawyers' associations, and there are unexpected pleasures to be found in every one.<sup>3</sup> He had published all but four in a previous book of speeches, where he described them as "chance utterances of faith and doubt . . . for a few friends who will care to keep them."<sup>4</sup> Among the four he omitted from his compendium of speeches are his only surviving full length addresses, *Law in Science and Science in Law*<sup>5</sup> and *The Path of the Law*.<sup>6</sup> These, Mark Howe observes, "evidently seemed to

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This paper originated in a comment I wrote on a paper by Robert Gordon for a centennial celebration of Oliver Wendell Holmes's *The Path of the Law* at the University of Iowa. But as I reread Holmes's essays and speeches, the paper took on a life of its own. I am grateful to participants in the University of Iowa conference, "The Path of the Law in the 20th Century," January 20-21, 1997, and to Richard Posner and Robin West for helpful comments.

<sup>1</sup> Letter from Oliver Wendell Holmes to Harold J. Laski (June 1, 1922), in 1 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935, at 430 (Mark DeWolfe Howe ed., 1953) [hereinafter Holmes-Laski Letters].

<sup>2</sup> Oliver Wendell Holmes, *Collected Legal Papers* (Harold J. Laski ed., 1920) [hereinafter *Collected Legal Papers*].

<sup>3</sup> *Collected Legal Papers* was edited and produced by Harold Laski, with a good deal of anxious kibbitzing by Holmes. See the various letters indexed under the heading, "Holmes, Mr. Justice, books: *Collected Legal Papers*," in 2 Holmes-Laski Letters, supra note 1, at 1581.

<sup>4</sup> Mark DeWolfe Howe, Foreword to *The Occasional Speeches of Justice Oliver Wendell Holmes* at ix (Mark DeWolfe Howe ed., 1962) [hereinafter *Occasional Speeches*] (quoting Oliver Wendell Holmes).

<sup>5</sup> Oliver Wendell Holmes, *Law in Science and Science in Law*, in *Collected Legal Papers*, supra note 2, at 210 [hereinafter *Law in Science*].

<sup>6</sup> Oliver Wendell Holmes, *The Path of the Law*, in *Collected Legal Papers*, supra note 2, at 167 [hereinafter *Path of the Law*].

Holmes to be something more significant than 'chance utterances of faith and doubt.'"<sup>7</sup>

This they surely are. Holmes published both addresses in the *Harvard Law Review*, a clear sign that he regarded them as self-standing statements of general interest; indeed, Judge Posner believes that *The Path of the Law* "may be the best article-length work on law ever written."<sup>8</sup> The year 1997 marks the centennial of its publication, and the remarkable number of conferences and symposia on *The Path of the Law* attest to its continued vitality. *Path* has been republished and cited so many times that few of us remember that it began as a speech, rather than an essay on jurisprudence.

Recently, Robert Gordon has emphasized that *Path* started not just as a speech, but a speech at a ceremonial occasion; and not just a speech at a ceremonial occasion, but a ceremonial speech belonging to a popular nineteenth-century legal genre, the vocational address, extolling the value of a lawyer's work and exhorting the audience to high professional ideals.<sup>9</sup>

But what a vocational address it is! Holmes virtually eviscerates the genre. The essay begins by dwelling at length, and with remarkable fondness, on the least appetizing of lawyer roles: paid counselor to the bad man. Perhaps his audience anticipated that this was merely rhetorical buildup for an argument that ultimately would vindicate the role by extolling the law's majesty. If so, however, they were in for a rude shock—for in the ensuing paragraphs Holmes briskly and brutally demolishes law's claim to occupy the moral or logical high ground. Nor does Holmes hold up virtuous practitioners as role models or paragons. Instead, what Holmes offers by way of explaining the value of lawyers' work is a variety of lawyer-thinkers or lawyer-scientists: the doctrinal systematizer, the critical historian, the economically minded policy analyst. Unfortunately, of course, these are roles occupied mainly by scholars and a few of the more cerebral judges, not by lawyers engaged in the daily practice of law.

What else does Holmes have to offer? In other essays, and especially in his official eulogies from the bench for recently deceased Massachusetts lawyers, Holmes adds the unconsoling consolations of stoical devotion to duty, devoid of sentiment and harboring no illu-

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<sup>7</sup> Occasional Speeches, *supra* note 4, at ix (quoting Oliver Wendell Holmes).

<sup>8</sup> Richard A. Posner, Introduction to *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* at x (Richard A. Posner ed., 1992).

<sup>9</sup> See Robert W. Gordon, *Law as a Vocation: Holmes and the Lawyer's Path*, in *Oliver Wendell Holmes, Jr., and The Path of the Law* (Steven Burton ed., forthcoming 1998 (manuscript at 1, 13, on file with the *New York University Law Review*)).

sions about higher meaning in lawyers' work. Holmes liked to describe himself as a member of the "imaginary society of the jobbists,"<sup>10</sup> and he once wrote to Morris Cohen, "I don't see why we shouldn't do our job in the station in which we were born without waiting for an angel to assure us that it is the jobbest job in jobdom."<sup>11</sup> The lawyer-jobbist simply soldiers on until he tumbles into an unsung grave, remembered by Judge Holmes and the courthouse regulars for a lugubrious afternoon before business resumes as usual. In these brief orations, Holmes seems to take special delight in twisting the knife by reminding his listeners how ephemeral lawyers' work is: "And the record which remains of them is but the names of counsel attached to a few cases."<sup>12</sup> Here is a typical Holmes finale as he commemorates two of the dear departed: "We are here—a few men in a room, unhelped, simply stopping for a moment to look the greatest of all facts in the face, to honor the dead, and then like soldiers to go back to the front and fight until we follow our brothers."<sup>13</sup>

By this time Holmes's listeners could surely guess how he would eulogize them when the time came, and I imagine that the solace they really wanted was a stampede to the saloon to drown the memory of his oratory. But Holmes was not done: "Both of those whom we commemorate were fighting men and so helped to teach us how to do our fighting—helped us to remember that when war has begun any cause is good, that life is war, and that the part of man in it is to be strong."<sup>14</sup> A few moments earlier, Holmes had described one of the deceased as being "intent as a man should be on making his will prevail, while always setting his will to ends which in his soul he believed right."<sup>15</sup> That doesn't sound so bad—but notice that in the final sentences I've quoted, Holmes jerks away even the consoling fiction that lawyers pursue causes they believe right: "[W]hen war has begun any cause is good, [and] life is war."<sup>16</sup>

Finally, there is the famous last paragraph of *The Path of the Law*, hinting at mystical rewards that await the true legal thinker: "an

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<sup>10</sup> Letter from Oliver Wendell Holmes to John C. H. Wu (Mar. 26, 1925), in *Justice Holmes to Doctor Wu: An Intimate Correspondence, 1921-1932*, at 27, 27 (1927) [hereinafter *Holmes-Wu Correspondence*].

<sup>11</sup> Letter from Oliver Wendell Holmes to Morris R. Cohen (May 27, 1917), in *The Holmes-Cohen Correspondence*, 9 J. Hist. Ideas 3, 10 (1948).

<sup>12</sup> Oliver Wendell Holmes, *Daniel S. Richardson* (Apr. 15, 1890), in *Occasional Speeches*, supra note 4, at 56, 57 ("His long career is spanned by the reports . . . . It is strange to think of that monotonous series as a record of human lives . . .").

<sup>13</sup> Oliver Wendell Holmes, *Edward Avery and Erastus Worthington* (May 2, 1898), in *Occasional Speeches*, supra note 4, at 102, 104 [hereinafter *Avery and Worthington*].

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law"<sup>17</sup> (202).<sup>18</sup> It's hard to imagine a weirder conclusion to an essay that begins, "When we study law we are not studying a mystery but a well-known profession" (167). Holmes's audience may well have wondered what he was talking about—a question I return to later. Assuming that Holmes's audience discounted his promise of mysteries revealed by the probability that their speaker had introduced them for purely oratorical purposes, they would have agreed with Gordon that "as a guide to 'living for' law as a vocation . . . Holmes is strangely disappointing."<sup>19</sup> Indeed, as a vocational address, *The Path of the Law* is a downright bummer.

One possible response is this: If *Path* offers slim pickings for the lawyer's vocation, that may be because it is *not* primarily a vocational address. As readers of his speeches know, Holmes had a marvelous sense of occasion, and the occasion of *Path's* delivery was the dedication of a law school building.<sup>20</sup> Perhaps the speech, delivered to law students, is not about how to practice law, but how to *study* law. After all, the first four words are "When we study law" (169), and Holmes reminds us of his topic no fewer than ten times.<sup>21</sup> If *Path* contains

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<sup>17</sup> The full paragraph reads:

And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

*Path of the Law*, supra note 6, at 202.

<sup>18</sup> In order to avoid multiplying footnotes unnecessarily, all subsequent references to *The Path of the Law* will appear parenthetically in the text; all will refer to the version in *Collected Legal Papers*, supra note 6.

<sup>19</sup> Gordon, supra note 9 (manuscript at 48).

<sup>20</sup> *The Path of the Law* was delivered at the dedication of a new building at Boston University Law School, and the dean, Melville Bigelow, had invited Holmes to address the student body. See Sheldon Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* 223 (1989).

<sup>21</sup> At the beginning of his argument for de-moralizing the law, he writes, "I wish . . . to lay down some first principles for the study of this body of dogma . . . which we call the law" (169); later he refers to "the object of our study, the operations of the law" (174). He sums up his argument for basing legal decisions on social advantage by recommending that "the training of lawyers" focus on it (184), then turns immediately to "law as a subject for study" (185). Next he launches his historical attack on unthinking traditionalism, only to conclude that it shows "the part which the study of history necessarily plays in the intelligent study of the law as it is to-day" (194). His point about Roman law is that students should skip it. When he turns to jurisprudence, he describes it as "another study," (195) and in his coda, Holmes repeats: "I have been speaking about the study of the law . . ." (200).

very little about a life in the law, perhaps that is because a life in the law is not Holmes's principal theme.

I don't find this reply persuasive, however. Whatever else it is, *Path* is undeniably a vocational address as well. Its opening paragraphs offer a capsule definition of the nature of lawyers' work, and the essay's jurisprudence unfolds organically from that description. Holmes surely intended the double meaning of the title, alluding to the lawyer's vocation as well as the historical development of law—although we should remember that the only path he mentions in the speech itself is “the narrow path of legal doctrine,” (178) bounded by the twin pitfalls of morality and logic.<sup>22</sup> Admittedly, whatever views of the lawyer's vocation Holmes expresses in *Path*, he expresses indirectly; the vision of law practice it contains has to be dug out by inference. In what follows, I want to continue the spadework and explore the connections between Holmes's ideas about law practice and his jurisprudence.

What we discover, or so I will argue, is an unfamiliar Holmes—a Holmes whose arguments differ in important respects from the standard positivist and realist ideas that later generations read back into *The Path of the Law*. I want to suggest that reading *Path* as proto-Hart, proto-Frank, or proto-Cohen distorts a good deal of what Holmes actually says. In my view, Holmes's penchant for radical rhetoric leads him to overstate the conclusions that he actually means to establish and lands him in fallacies that I explore in some detail. Holmes had a more moralistic picture of lawyers and clients than his own tough talk suggests, and I will suggest that this accounts for the fallacies. In short, reading *Path* as an implicit definition of the good lawyer helps us distinguish the sound from the specious in the essay's jurisprudence.

## I

### THE PATHS FORSAKEN

In the opening sections of *The Path of the Law*, Holmes moves quickly to block law's claims to be a moral science, a logical science, or a pace setter of civilization's progress. Gordon observes that an even more dramatic contrast with the standard vocational speech is

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<sup>22</sup> Sheldon Novick writes that Holmes's title “is probably a conscious reference to the Tao, a term that connotes both a path to understanding and a way of life; as in Bushido, the Way of the Warrior, a term Holmes almost certainly knew.” Novick, *supra* note 20, at 451 n.9. I am unsure on what basis Novick comes to this opinion; but the somewhat different double meaning I note in the text—path as evolutionary trajectory and path as way of life—seems closer to the surface of the English. Of course, the third meaning—path to understanding—may well be an overtone that Holmes also meant to sound.

that Holmes ventures not a hint of the familiar argument that the lawyer, as an officer of the court, is therefore a minister of justice and a trustee for society at large.<sup>23</sup> I would go further: it seems to me that *Path* contains the raw materials for an out-and-out demolition of this argument. The demolition carries contemporary resonance, moreover, because the minister of justice argument is as alive and well in the late twentieth century as it was in the nineteenth. It has been advanced, in somewhat differing forms, by contemporary legal ethicists including William Simon, Gordon, and me.<sup>24</sup>

The version of the argument I have in mind bears a close affinity to functionalist sociology. Talcott Parsons argued that the social function of the legal profession is to mediate between private and public interests, the former in the shape of clients and the latter in the shape of the law.<sup>25</sup> In a similar vein, Simon argues that lawyers lie under an ethical obligation to achieve justice, which he identifies with the purposes underlying the law.<sup>26</sup> In response to the obvious objection that some law has unjust purposes, he answers that if so, it is inconsistent with other, more fundamental legal values to which the lawyer must respond.<sup>27</sup> I have argued that versions of this view can be found in de Tocqueville, Brandeis, Durkheim, and many contemporary public interest lawyers.<sup>28</sup>

According to this way of thinking about legal practice, the key intellectual task facing a lawyer is analyzing the social purposes of legal rules, the better to align client interests with them. Readers of Simon's *Ethical Discretion in Lawyering* will remember the complex analyses of regulatory purposes the lawyers in his illustrative cases must undertake in order to decide whether to counsel a client to comply with a rule or resist it.<sup>29</sup>

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<sup>23</sup> See Gordon, *supra* note 9 (manuscript at 17).

<sup>24</sup> See, e.g., Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 Md. L. Rev. 255 (1990); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 Vand. L. Rev. 717 (1988); William H. Simon, *Ethical Discretion in Lawyering*, 101 Harv. L. Rev. 1083 (1988) [hereinafter Simon, *Ethical Discretion in Lawyering*]; Robert W. Gordon, *Lawyers as the American Aristocracy* (forthcoming 1998); William H. Simon, *The Practice of Justice* (forthcoming 1998) [hereinafter Simon, *The Practice of Justice*].

<sup>25</sup> See Talcott Parsons, *A Sociologist Looks at the Legal Profession*, in *Essays in Sociological Theory* 370, 375, 384 (rev. ed. 1954).

<sup>26</sup> See Simon, *The Practice of Justice*, *supra* note 24.

<sup>27</sup> See William H. Simon, *Should Lawyers Obey the Law?*, 38 Wm. & Mary L. Rev. 217, 225-28 (1996); Simon, *Ethical Discretion in Lawyering*, *supra* note 24, at 1115-16.

<sup>28</sup> See Luban, *supra* note 24, at 718-19, 723-25.

<sup>29</sup> See Simon, *Ethical Discretion in Lawyering*, *supra* note 24, at 1103-13. Simon provides several examples, such as a case concerning a lawyer whose client is subject under law to a flat reduction in her public assistance benefits because she lives rent-free with a relative, but who can avoid the reduction if she makes a nominal payment to the relative. According to Simon, the lawyer, in deciding whether or not to counsel her client to make

According to Holmes, however, there's simply no there there. When we begin probing into the purpose behind a legal rule, we must work back historically from the present, carefully dissecting away each era's reformulations of legal rules and scrutinizing them closely. What we typically discover is one of three things: a rote reiteration of an earlier rule, a flat-out misunderstanding of an earlier rule, or a bit of creative fiction as judges spin out conjectural purposes for rules that in reality are nothing more than vestigial solutions to forgotten problems. The acid drips when Holmes tells of Lord Kenyon, who "undertook to use his reason on this tradition, as he sometimes did to the detriment of the law, and, not understanding it, [made the right decision by accident]" (193).<sup>30</sup>

Sometimes, of course, today's legal rule has the same purpose as its predecessors, because legal practices and institutions continue to face the same problem. Even then, however, Holmes believes it's simply a mistake to hear harmony in that purpose. Instead, Holmes explains the purposes of law through metaphors of conflict, struggle, and tension. Usually they are war metaphors: social purposes are "battle grounds" (181), and "law embodies beliefs that have triumphed in the battle of ideas."<sup>31</sup> To Holmes, "while opposite convictions still keep a battle front against each other, the time for law has not come."<sup>32</sup> In *Law in Science* he invokes the rise and fall of civilizations: "After victory the law of covenant and debt went on, and consolidated and developed their empire . . . until they in their turn lost something of their power and prestige in consequence of the rise of a new rival, Assumpsit."<sup>33</sup> Occasionally the metaphor comes from physics: a judge's business is "to express . . . the resultant . . . of the pressure of the past and the conflicting wills of the present."<sup>34</sup> At least once, the language is Darwinian as well as military: legal rules "show a lively example of the struggle for life among competing ideas, and of the

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the payment, should determine whether there is a clear regulatory purpose to preclude such "financial planning" by examining the plain language of the regulation, the background case law, and the legislative history, as well as by weighing any fundamental interests of justice the lawyer identifies as not sufficiently addressed by the law. See *id.* at 1106-07. The more ambiguous the purpose of the regulation, the more appropriate it is for the lawyer to advise only formal compliance (a form of resistance), i.e., that the client make the nominal payment and avoid the benefit reduction. See *id.* at 1107.

<sup>30</sup> Holmes argues these points more fully in *Law in Science*, *supra* note 5, at 225-29.

<sup>31</sup> Oliver Wendell Holmes, *Law and the Court*, in *Collected Legal Papers*, *supra* note 2, at 291, 294.

<sup>32</sup> *Id.* at 295.

<sup>33</sup> *Law in Science*, *supra* note 5, at 220-21.

<sup>34</sup> Oliver Wendell Holmes, *Twenty Years in Retrospect* (Dec. 3, 1902), in *Occasional Speeches*, *supra* note 4, at 154, 156.

ultimate victory and survival of the strongest.”<sup>35</sup> In all cases, the alleged “purpose” of the law is simply the desire of the triumphant victors rather than that of the subjugated: he is jesting in earnest when he writes, “I used to say when I was young, that truth is the majority vote of that nation that could lick all others.”<sup>36</sup> Holmes describes the law in the most brutal terms, as the “stern monition that the club and the bayonet are at hand ready to drive you to prison or the rope if you go beyond the established lines.”<sup>37</sup> Why, then, would a lawyer be morally obligated to align his client’s interests with legal purposes? Prisoners of war have no moral obligation not to escape when they can, and their legal counselors have no moral reason to dissuade them from escape.<sup>38</sup>

This takes us directly to the picture of the legal profession in the opening paragraph of *The Path of the Law*. For Holmes, calling law a profession means simply that “people will pay lawyers to argue for them or to advise them” about “the incidence of the public force” (167). Law is a business, and the aim of legal study is “a business-like understanding of the matter” (169). Mark Howe wrote of Holmes’s law firm: “If any of the partners had a social conscience his practice did not reveal it.”<sup>39</sup>

Could it be, then, that Holmes had a principled belief in the adversary ethic of zealous partisanship? In one way, the answer is yes, because Holmes believed in the value of combat and of the sweet science of war. But in the sense of contemporary legal ethicists’ debates, the answer is clearly no. For one thing, Holmes had no special regard for the adversary system as a test of truth: for him, “the transition

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<sup>35</sup> Law in Science, *supra* note 5, at 220.

<sup>36</sup> Oliver Wendell Holmes, *Natural Law*, in *Collected Legal Papers*, *supra* note 2, at 310, 310 [hereinafter *Natural Law*].

<sup>37</sup> Oliver Wendell Holmes, *Admiral Dewey* (Oct. 14, 1899), in *Occasional Speeches*, *supra* note 4, at 109, 109 [hereinafter *Admiral Dewey*].

<sup>38</sup> I’m being a little loose on the law of war here. Article 8 of the 1907 Hague Convention stipulated that POWs “shall be subject to the laws, regulations, and orders in force in the army of the State in whose power they are.” Hague Convention of 1907, *Respecting the Laws and Customs of War on Land*, Oct. 18, 1907, Annex, § I, ch. II, art. 8, 36 Stat. 2277, 2297-98. They could be disciplined if they were recaptured trying to escape, but not if they successfully escaped and were subsequently recaptured. See *id.* However, the 1949 Geneva Convention allows only disciplinary punishment (a mild and nonphysical form of order-keeping punishment) for unsuccessful escapees and no punishment for successful escapees who are eventually recaptured. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, arts. 91-92, 6 U.S.T. 3116, 3388, 75 U.N.T.S. 135, 206. In my view, both documents treat attempted escape as a morally nonculpable offense; otherwise it would be hard to explain why both forbid punishment of a successful escapee who falls into enemy hands a second time.

<sup>39</sup> Mark DeWolfe Howe, 2 *Justice Oliver Wendell Holmes: The Proving Years, 1870-1882*, at 110 (1963).



through the priest's test of truth, the miracle of the ordeal, and the soldier's, the battle of the duel, to the democratic verdict of the jury" is of purely anthropological interest.<sup>40</sup> He comments, "I confess that in my experience I have not found juries specially inspired for the discovery of truth."<sup>41</sup>

Another way to defend the ethic of zealous partisanship is to insist that lawyers are merely offering arguments that their clients would, if the clients had the benefit of a legal education. The legal fiction that the client is speaking through the lawyer's words mirrors the moral basis of lawyers' ethics.

But this is not Holmes's argument. In his lectures on agency, he shows that the legal fiction identifying lawyer with client is simply a special case of the legal fictions identifying agent with principal and servant with master.<sup>42</sup> But Holmes's aim in the agency lectures is to criticize these fictions; he argues "that the whole outline of the law is the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust."<sup>43</sup> Holmes was simply too clearheaded to deny that agents sometimes work mischief on their own—mischief that can't sensibly be attributed to the principal. *Mutatis mutandis*, he understood as well that lawyers can't duck responsibility for the damage they do by attributing it to their clients. Otherwise he would have had no reason to praise his old partner Shattuck's tact in cross examination: "He could bring out the prejudices that unfitted a witness for just this case, and yet leave his general value and his personal feelings untouched . . . ."<sup>44</sup> If the client, not the lawyer, is responsible for cross examination, then the lawyer deserves neither blame nor praise for sparing witnesses' feelings.

No. For Holmes, there is *no* moral rationale for partisan legal combat except "that when war has begun any cause is good, that life is war, and that the part of man in it is to be strong."<sup>45</sup> Holmes always likened lawyers to soldiers, and his credo was "that the faith is true

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<sup>40</sup> Law in Science, *supra* note 5, at 212.

<sup>41</sup> *Id.* at 237.

<sup>42</sup> See, e.g., Oliver Wendell Holmes, Agency II, in *Collected Legal Papers*, *supra* note 2, at 81, 89-92.

<sup>43</sup> Oliver Wendell Holmes, Agency I, in *Collected Legal Papers*, *supra* note 2, at 49, 50.

<sup>44</sup> Oliver Wendell Holmes, George Otis Shattuck (May 29, 1897), in *Occasional Speeches*, *supra* note 4, at 92, 94 [hereinafter Shattuck].

<sup>45</sup> Avery and Worthington, *supra* note 13, at 104-05.

and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty."<sup>46</sup>

Notice that this conception of duty bears no relation to another familiar justification for law practice, namely service to clients. In all of Holmes's writing, I have found only two sentences that come within shouting distance of this idea: in his eulogy for Shattuck he writes, "He was a model in his bearing with clients. How often have I seen men come to him borne down by troubles which they found too great to support, and depart with light step, having left their weight upon stronger shoulders."<sup>47</sup> That's it. More typical is his description of law practice as "the greedy watch for clients and practice of shopkeepers' arts, the mannerless conflicts over often sordid interests."<sup>48</sup> Remember that the only client who appears in *Path* is the bad man.

Related to the "soldier's faith" is another idea that Holmes expressed once or twice, and which perhaps explains his radically non-moral approach to vocations. That is the idea that when you are doing your job at maximum intensity, you are neither an egoist nor an altruist.

I confess that altruistic and cynically selfish talk seem to me about equally unreal. . . . If you want to hit a bird on the wing, you must have all your will in a focus, you must not be thinking about yourself, and equally, you must not be thinking about your neighbor; you must be living in your eye on that bird.<sup>49</sup>

Perhaps Holmes is right, but of course this formula finesses the question of how you came to be shooting the bird or, in the lawyer's case, doing the job you're doing on behalf of the client you're doing it for.

In a few speeches, mostly grim eulogies, Holmes suggests that a lawyer can take satisfaction in making an anonymous contribution to the fabric of the social order or at least of the common law.<sup>50</sup> Perhaps

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<sup>46</sup> Oliver Wendell Holmes, *The Soldier's Faith* (May 30, 1895), in *Occasional Speeches*, supra note 4, at 73, 76.

<sup>47</sup> Shattuck, supra note 44, at 93.

<sup>48</sup> Oliver Wendell Holmes, *The Profession of the Law* (Feb. 17, 1886), in *Occasional Speeches*, supra note 4, at 28, 28 [hereinafter *Profession*].

<sup>49</sup> Oliver Wendell Holmes, *Speech at Dinner Given by the Bar Association of Boston* (Mar. 7, 1900), in *Occasional Speeches*, supra note 4, at 122, 125; see also *Letter from Oliver Wendell Holmes to John Wu* (Mar. 26, 1925), in *Holmes-Wu Correspondence*, supra note 10, at 27 ("I thought the true view [of the necessary foundation for a noble life] was that of my imaginary society of the jobbists, who were free to be egotists or altruists on the usual Saturday half holiday provided they were neither while on their job.").

<sup>50</sup> See, e.g., Oliver Wendell Holmes, *Remarks to the Essex Bar*, in *Occasional Speeches*, supra note 4, at 48, 49:

You argue a case in Essex. And what has the world outside to do with that, you say. Yet you have confirmed or modified or perhaps have suggested for the first time a principle which will find its way into the reports and from the reports into the text-books and so into the thought of the common law, and so

Holmes had in mind the anonymous sculptors of the Middle Ages, who lavished the same care and attention on cathedral decorations no human eye would ever see that they did on the most conspicuous. However, these artists were laboring for the greater glory of God. Holmes didn't believe in God, and even if he did he would have been unlikely to think that the common law was constructed to celebrate divinity. In his Shattuck memorial, Holmes says that "[w]hat we have done is woven forever into the great vibrating web of the world."<sup>51</sup> But the comfort in that thought is roughly the same as the comfort in knowing that your mortal remains will enrich the topsoil and eventually belong to a cloud of interstellar gas.

To conclude this brief survey of blocked escapes, let me return to his mystical final paragraph in *Path*. What are the insights into cosmic processes that law offers to the thinker? After all, Holmes wrote to Laski that "the law *strictu sensu* is a limited subject,"<sup>52</sup> and he once wondered "why the subject was worthy of the interest of an intelligent man."<sup>53</sup> Here is his idea: "as the facts of the law are facts of the universe they are worthy of their share of the only intellectual interest

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into its share in governing the conduct of civilized men. Our every act rings through the whole world of being.

Id.; Oliver Wendell Holmes, Sidney Bartlett (Mar. 23, 1889), in *Occasional Speeches*, supra note 4, at 53-54 [hereinafter *Sidney Bartlett*] ("The external and immediate result of an advocate's work is but to win or lose a case. But remotely what the lawyer does is to establish, develop, or illuminate rules which are to govern the conduct of men for centuries . . ."); Oliver Wendell Holmes, Daniel Richardson (Apr. 15, 1890), in *Occasional Speeches*, supra note 4, at 56, 57-58:

The glory of lawyers, like that of men of science, is more corporate than individual. Our labor is an endless organic process. The organism whose being is recorded and protected by the law is the undying body of society. When I hear that one of the builders has ceased his toil, I do not ask what statue he has placed upon some conspicuous pedestal, but I think of the mighty whole, and say to myself, He has done his part to help the mysterious growth of the world along its inevitable lines towards its unknown end.

Id.; Oliver Wendell Holmes, Anonymity and Achievement (June 3, 1890), in *Occasional Speeches*, supra note 4, at 59, 59-61:

The greater part of the work of the world is anonymous work; the greatest displays of intellect, force of character, and power of divination are shown, for the most part, in connection with private interests and are known to few beyond those immediately concerned. . . . We lawyers may take courage then. We are shaping the future, even if the future undoes all that we do. . . . Everything tells in its due proportion, in the organic processes of social growth.

Id.; Shattuck, supra note 44, at 96 ("[T]he heads and hands that built the organic structure of society are forgotten from the speech of their fellows, and live only in the tissue of their work. . . . What we have done is woven forever into the great vibrating web of the world.").

<sup>51</sup> Shattuck, supra note 44, at 96.

<sup>52</sup> Letter from Oliver Wendell Holmes to Harold J. Laski (Nov. 17, 1920), in 1 *Holmes-Laski Letters*, supra note 1, at 290, 291.

<sup>53</sup> Oliver Wendell Holmes, *A Provisional Adieu* (Nov. 14, 1902), in *Occasional Speeches*, supra note 4, at 150, 152.

there is—the interest of being seen in their universal relations.”<sup>54</sup> In other words, law is interesting, but only because everything is—and even then only when you view it in relation to everything else. Holmes said much the same in a Harvard address about why law is a subject worth pursuing:

All that life offers any man from which to start his thinking or his striving is a fact. And if this universe is one universe, if it is so far thinkable that you can pass in reason from one part of it to another, it does not matter very much what that fact is. . . . It would be equally true of any subject.<sup>55</sup>

You can get from the law to what’s interesting, but the law itself is not interesting. And what you get to—the “hint of the universal law” (202) Holmes speaks of in *Path*—turns out to be an appreciation of how savage life really is. Holmes was a Malthusian and a Darwinian, who firmly believed that legal reform can accomplish nothing much beyond shifting burdens to the losers in a zero-sum economic game. Now in one way, Holmes was every inch a philosopher in the mold of Spinoza and Nietzsche: all were thinkers who believed that self-command comes through thinking, and in particular thinking the impersonal universe through to its indifferent bottom. But, to say the least, redemption through contemplating a hostile universe is a life-ideal likely to freak out all but a small number of lawyers.

Indeed, Holmes’s notion of the lawyer-thinker, to which he returns again and again, is an idiosyncratic one, and in my view Holmes never really made up his mind how to reconcile the life of thought with the life of action. He insisted that “[t]he law is the calling of thinkers,”<sup>56</sup> and in one of his lawyer eulogies Holmes unfavorably contrasted the man of action with the advocate, who as a thinker “controls the future.”<sup>57</sup> Yet while he was practicing law, Holmes complained that “the men who really care more for a fruitful thought than for a practical success are few everywhere.”<sup>58</sup> He went on to say that apart from arguing cases he disliked practice, and added mournfully that “I console myself by studying toward a vanishing point

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<sup>54</sup> *Id.*

<sup>55</sup> Profession, *supra* note 48, at 29. Likewise this passage from his Brown commencement address: “One doubted oneself how [law] could be worthy of the interest of an intelligent mind. And yet one said to oneself, Law is human—it is part of man, and of one world with all the rest.” Oliver Wendell Holmes, Commencement Address (June 17, 1897), in *Occasional Speeches*, *supra* note 4, at 97, 98.

<sup>56</sup> Profession, *supra* note 48, at 28.

<sup>57</sup> Sidney Bartlett, *supra* note 50, at 54.

<sup>58</sup> G. Edward White, Justice Oliver Wendell Holmes: Law and the Inner Self 130 (1993) (quoting letter from Holmes to James Bryce (Aug. 17, 1879)).

which is the center of perspective in my landscape—but that has to be done at night.”<sup>59</sup>

Distaste for practice was his motivation for seeking an academic appointment; but within three months he quit his professorship to accept a seat on the Supreme Judicial Court of Massachusetts. Years afterward, he wrote Felix Frankfurter (in a letter that law professors are unlikely to tape to their office doors) that “academic life is but half life—it is a withdrawal from the fight in order to utter smart things that cost you nothing except the thinking them from a cloister.”<sup>60</sup> The same thought appears in *Law in Science—Science in Law*: “The professor, the man of letters, gives up one-half of life that his protected talent may grow and flower in peace.”<sup>61</sup> Holmes similarly rejected the notion of colleges “as collections of schoolmasters teaching others to be schoolmasters, that they may teach yet others, and so *ad infinitum*”<sup>62</sup>—but he then went on to praise useless knowledge, a theme he returned to again and again.<sup>63</sup>

In short, on the issue of the life of the mind versus the life of action, Holmes was a mess. At various times he asserted that “the place for a man who is complete in all his powers is in the fight”;<sup>64</sup> that all that makes the fight worthwhile is the thinker’s “infinite perspective”<sup>65</sup> on it; and that nobody engaged in the fight has the leisure or the inclination to assume that perspective.<sup>66</sup> It’s hard to avoid the suspicion that judging was the only legal profession that could satisfy

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<sup>59</sup> Id.

<sup>60</sup> Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913), in Holmes and Frankfurter: Their Correspondence, 1912-1934, at 12, 12 (Robert M. Mennel & Christine L. Compston eds., 1996).

<sup>61</sup> *Law in Science*, supra note 5, at 224; see also Holmes, Shattuck, supra note 44, at 95 (“It is one thing to utter a happy phrase from a protected cloister; another to think under fire—to think for action upon which great interests depend.”).

<sup>62</sup> Oliver Wendell Holmes, *The Use of Colleges*, in *Occasional Speeches*, supra note 4, at 62, 62-63.

<sup>63</sup> See id. at 63. At least twice Holmes quoted a Cambridge mathematician who boasted of one of his theorems, “The best of it all is that it can never by any possibility be made of the slightest use to anybody for anything.” *Law in Science*, supra note 5, at 211; see also Oliver Wendell Holmes, Rudolph C. Lehmann, in *Occasional Speeches*, supra note 4, at 90, 91 (praising the same “Cambridge don”). A later Cambridge mathematician, G. H. Hardy, made this the theme of one of the books that most affected me in my undergraduate days. See G.H. Hardy, *A Mathematician’s Apology* (1969). At that time I heard the French mathematician Dieudonné make a similar boast, without realizing that he had probably lifted it from Holmes’s anonymous mathematician. Oddly enough, I quoted Dieudonné in an earlier paper of mine, which I wrote before knowing these two passages in Holmes. See David Luban, *Doubts About the New Pragmatism*, in *Legal Modernism* 125, 143 (1994).

<sup>64</sup> *Law in Science*, supra note 5, at 224.

<sup>65</sup> *Profession*, supra note 48, at 29.

<sup>66</sup> See, e.g., text accompanying notes 58-59.

Holmes's inconsistent demands—and Gordon is probably right to read Holmes's views about lawyer-thinkers as largely personal and autobiographical.<sup>67</sup>

In this regard, the most perceptive study of Holmes's personality remains Yosai Rogat's 1964 essay, *The Judge as Spectator*.<sup>68</sup> Rogat situates Holmes alongside his friends and contemporaries, Henry Adams and Henry James.<sup>69</sup> In very different ways, each of them felt like an anachronism in the booming world of post-Civil War *laissez faire*. They call to mind Van Dyke's portraits of aristocrats, with their thoroughbred faces lost in the absurd pomp of their ruffs and velvets. Surrounded by the vulgar vitality of Dutch capitalism, they knew that their time was past and their values outmoded. As Rogat observes, Adams, James, and Holmes all wanted out, but only Holmes made the startling discovery that it is possible to escape from the world by assuming high public office.<sup>70</sup> (In the course of doing so, Holmes discovered as well that he could defend his chivalric values and his Calvinist sense of duty by heaping scorn on anyone nostalgic enough to believe that chivalry or duty have moral foundations.<sup>71</sup>)

<sup>67</sup> See Gordon, *supra* note 9 (manuscript at 26-27). Gordon rightly finds an affinity between Holmes's views and Max Weber's, as expressed in the latter's defense of scientific asceticism in *Science as a Vocation* and of political hardball in *Politics as a Vocation*. See From Max Weber: Essays in Sociology 77, 129 (H.H. Gerth & C. Wright Mills, eds. and trans., 1946) (reprinting both essays). I think the comparison goes further still: if Holmes was a mess over what it is to be a thinker, Weber was a worse mess. Karl Jaspers offers the following recollection:

[S]hortly after the publication of [*Science as a Vocation*] Max Weber, Thoma (a jurist), and I sat talking together one Sunday afternoon in the garden of the lovely house on the Ziegelhäuser-Landstrasse. Weber's talk, which had caused a great stir at the time, was of course the main topic of conversation. This talk was tough, implacable, and moving.

I said something to this effect: You say nothing about the meaning of scholarship. If it is no more than what you say it is, then why do you bother with it? I spoke about Kant's "ideas" and said that every branch of science and scholarship acquires a meaning that goes beyond scholarship only by virtue of an idea. Max Weber knew next to nothing about Kantian ideas and did not respond. Finally, I said, turning to Thoma: "He doesn't know himself what meaning scholarship has and why he engages in it." Max Weber winced visibly: "Well, if you insist: to see what one can endure, but it is better not to talk of such things."

Letter from Karl Jaspers to Hannah Arendt (Nov. 16, 1966), in Hannah Arendt-Karl Jaspers Correspondence 1926-1969, at 660, 660-61 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., 1992).

<sup>68</sup> Yosai Rogat, *The Judge as Spectator*, 31 U. Chi. L. Rev. 213, 228-33 (1964).

<sup>69</sup> See *id.* at 228 (stating that Holmes's withdrawal can "best be answered by comparing Holmes with [Adams and James], who were also 'set apart' [from other men]").

<sup>70</sup> See *id.* at 243.

<sup>71</sup> See, e.g., Letter from Oliver Wendell Holmes to John Wu (May 5, 1926), in Holmes-Wu Correspondence, *supra* note 10, at 34, 35 ("I suspect that all my ultimates have the mark of the finite upon them, but as they are the best I know I give them practical respect,

In another way, as I've argued in the past,<sup>72</sup> Holmes was a vitalist, who concluded that salvation lies in living out any ideals whatever, provided they're demanding enough that they call forth all our powers and still remain beyond us. In connection with the title *The Path of the Law*, it is interesting that he once wrote that "the true path is the line of most resistance."<sup>73</sup> Perhaps Holmes is right; but what is noteworthy is that he gives us no hint of what a lawyer's ideal might consist in, beyond having ideals.

Checkmate?

Only if Holmes's arguments in *The Path of the Law* are right.

## II

### HOLMES'S THREE THEMES

The opening pages of *Path* introduce three themes: the prediction theory of law (173), the critique of the "confusion between morality and law" (169), and the Bad Man Thesis, by which I mean the claim that "[i]f 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." (171). For the moment I will set the prediction theory to one side: although Holmes seems to believe that all three themes converge to roughly the same point, I will shortly suggest that the prediction theory and the Bad Man Thesis are distinct and separable.

#### A. *The Bad Man and the Confusion Between Morality and the Law*

There is a puzzle here, however, once we ask *why* we must adopt the bad man's point of view if we want to know the law. The answer can't be that we must adopt the bad man's point of view because law is one thing and morals something else. That would be a circular argument: the Bad Man Thesis used to prove the distinctness of law and morality, and the distinctness of law and morality used to prove the Bad Man Thesis.

It will help to address a prior question: Who or what is Holmes's bad man? Is he, as former U.S. Attorney General Richard Thornburgh has suggested, simply "the client in need of legal ad-

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love, etc., but inwardly doubt whether they have any importance except for us . . . ."); Natural Law, *supra* note 36, at 310, 314 ("I see . . . no basis for a philosophy that tells us what we should want to want.").

<sup>72</sup> See David Luban, Justice Holmes and the Metaphysics of Judicial Restraint, 44 Duke L.J. 449, 479-81 (1994).

<sup>73</sup> Oliver Wendell Holmes, Despondency and Hope (Oct. 21, 1902), in *Occasional Speeches*, *supra* note 4, at 146, 148.

vice"?<sup>74</sup> Is he the self-interested rational calculator of contemporary economics? Is he, as Catharine Wells suggests, an outsider to the legal system, for example, a feminist in a patriarchal society?<sup>75</sup> Is he, in Sanford Levinson's friendly amendment to Wells's idea, a self-reliant, morally autonomous individual, who may give way before superior force but won't let the law tell him what's right and wrong?<sup>76</sup> To answer these questions, it behooves us to look closely at the role the bad man plays in Holmes's argument.

Holmes introduces the bad man, he tells us, as a thought experiment to "dispel a confusion between morality and law" (169). What's fascinating in the experiment is that Holmes aims to demonstrate an abstract jurisprudential proposition by sketching the scenario of a lawyer advising a client. In effect, Holmes tells his audience that if they want to avoid confusion, they should imagine the bad man seated across the desk in their offices, and think the matter through from his point of view. But what is the confusion that they will avoid thereby?

Holmes explains the confusion between morality and law by discussing three typical instances of it: (1) the belief that if something is one of the rights of man in a moral sense, it must therefore be a legal right as well (171); (2) the belief that law "is a system of reason, . . . a deduction from principles of ethics . . . which may or may not coincide with the decisions" (172); (3) the belief that legal duty is filled "with all the content which we draw from morals" (173).

The first two propositions restate traditional natural law views, but they focus on distinct aspects of natural law: the first emphasizes natural law's claim of a necessary connection between law and morality, while the second emphasizes its claim that law and morality form a unified system grounded in reason. The general point of both (1) and (2), however, seems to be that moral precepts (or at least those dealing with subjects that concern the legal system) are *a fortiori* legal precepts as well. It appears then, that Holmes's root reason for describing both (1) and (2) as confusions is to deny what I will term the "morality-is-law thesis" that every moral precept dealing with the subject matter of law is a legal precept.

Holmes's example (3), on the other hand, concerns the content of legal duties, and his general point is that even when legal language employs moral terminology, it is a confusion to interpret the law morally.

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<sup>74</sup> U.S. Attorney General Richard Thornburgh, Address at the University of Iowa Conference, The Path of the Law in the 20th Century (Jan. 20, 1997) [hereinafter Iowa Conference].

<sup>75</sup> Catherine Wells, Address at the Iowa Conference (Jan. 21, 1997), *supra* note 74.

<sup>76</sup> Sanford Levinson, Address at the Iowa Conference (Jan. 21, 1997), *supra* note 74.



I've said that the bad man figures in thought experiments designed by Holmes to show that propositions (1)-(3) represent "confusion." By focusing on the morality-is-law thesis the reader might think that this will be an argument on familiar legal-positivist terrain, aiming to establish that it is not morality but institutional pedigree that makes a precept law. This is the so-called separation thesis—shorthand for the thesis of the separation of law and morality—defended most prominently in our century in H.L.A. Hart's celebrated 1958 essay, *Positivism and the Separation of Law and Morals*.<sup>77</sup> Shortly, I will suggest that Holmes's own aim and argument are actually rather different from Hart's and substantially less familiar. But for the moment let us follow through the idea that Holmes is a proto-Hart, and see what image of the bad man we find in that picture.

One of Hart's most important points in *Positivism and the Separation of Law and Morals* is that accepting the separation thesis strengthens rather than weakens the role of morality in human life.<sup>78</sup> If law is wicked, Hart says, it remains law nevertheless, but because legal duty is not the same as moral duty, there is no moral reason to obey it, and an upright person will defy wicked law.<sup>79</sup> Those who think that wicked law isn't really law at all are indulging in wishful thinking—wishful thinking that is immature in that it needs to fortify the autonomous conscience with the authority of law, and illiberal in that it fails to distinguish the individual from the state.<sup>80</sup>

If Holmes's aim was primarily to defend the separation thesis, then I think that the intriguing suggestions of Levinson and Wells<sup>81</sup> would indeed be very appealing. Holmes might well have dramatized their argument by picking some law his audience would have agreed was wicked—the Fugitive Slave Act,<sup>82</sup> for example—and making the bad man into an antebellum abolitionist who (unlike John Brown) did not want to risk penalties. Had Holmes done that, the *frisson* of outrage many of us still experience when the bad man steps onto the stage would dissipate, for we would understand that the bad man

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<sup>77</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958).

<sup>78</sup> See id. at 629 ("To use in the description of the interpretation of laws, the suggested terminology of a fusion or inability to separate what is law and ought to be will serve . . . only to conceal the facts, that here if anywhere we live among uncertainties between which we have to choose . . .").

<sup>79</sup> See id. at 620 ("[L]aws may be law but too evil to be obeyed.").

<sup>80</sup> See id. at 618-21 (discussing this position in context of post-World War II prosecution of Nazi informers).

<sup>81</sup> See *supra* notes 75-76 and accompanying text.

<sup>82</sup> Ch. 60, 9 Stat. 462 (1850), repealed by ch. 166, 13 Stat. 200 (1864).

needn't actually be bad. Or rather, we would understand that "bad" in the legal sense needn't mean "bad" in the moral sense.

Of course, Holmes did no such thing, and that is surely evidence that he wasn't trying to make Hart's argument. He *said* "bad man," and if any doubt lingers that he *meant* "bad man," let us recall that he contrasts the bad man with the good man, the latter being one "who finds his reasons for conduct, *whether inside the law or outside of it*, in the vaguer sanctions of conscience" (171; emphasis added). Note the italicized phrase, which makes it clear that 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.

The bad man does not figure in Holmes's supposed refutation of proposition (1)—his demonstration that moral rights need not be legal rights. Here, he argues that "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" (171). I call this a *supposed* refutation because it's not much of an argument. Of course hardly anyone who seriously entertains the morality-in-law thesis denies that positive law can be immoral, nor that immoral laws are enforced. Rather, those who argue that moral rights are legal rights don't identify positive law with law as such. They argue, in the words of the classical natural-law maxim, that unjust law is not law. Holmes, by contrast, believes the opposite: that *unenforced* law is not law—it is mere "empty words" (172). Holmes does not so much refute the natural lawyer's argument as assume it away.<sup>83</sup>

The bad man does put in an appearance in the discussion of (2), where Holmes notes that "our friend the bad man . . . does not care two straws for the axioms or deductions" of rules of law, "but . . . he does want to know what the . . . courts are likely to do in fact" (173). Here, the bad man comes closest to Attorney General Thornburgh's "client in need of legal advice."<sup>84</sup> You don't have to be morally bad to lack interest in how a law that affects you fits in with the whole system of law; indeed, it's hard to imagine why a client *would* be interested in the whole deductive structure. (On the other hand, if law and ethics

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<sup>83</sup> But sometimes the natural lawyer bites back, as in Fuller's devastating criticisms of positivism and realism, couched in language as strong as Holmes's. See Lon L. Fuller, Lecture II, in *The Law in Quest of Itself* 43 (1940). Fuller shows that positivism and realism rely on unrealistic abstractions and occult entities—ironically, exactly the charge that their adherents usually level at natural law theories.

<sup>84</sup> See *supra* text accompanying note 74.

together form "a system of reason," then to say that the bad man does not care two straws about it is to say that he is irrational, which even Holmes would agree is a criticism. Holmes doesn't take this possibility seriously enough to criticize; in his view, "morals are imperfect social generalizations expressed in terms of feeling,"<sup>85</sup> not truths of reason, and he was an instinctive ethical noncognitivist.)

But the most important use of the bad man is in Holmes's discussion of the nature of legal duty—his criticism of proposition (3). This is Holmes's famous argument that in much of private law, paradigmatically in contract and tort, the bad man will regard damages as nothing more than a tax on conduct (breach, negligence).<sup>86</sup> Of course, regarding damages as a tax would remove any moral onus from the conduct—the income tax doesn't mean that earning an income is reprehensible, and thus the "tort tax" doesn't mean that tortious conduct is reprehensible. That is why the bad man's point of view removes a confusion between law and morality: if a fine is a tax, then the supposed moral distinction between a penalty for wrongful conduct (the fine) and a levy on acceptable conduct (the tax) disappears, and with it the very point of calling one course of conduct wrongful and the other acceptable.

The problem is that Holmes must *show*, not merely assert, that the bad man is right to regard a fine as just a tax. He must make the bad man's point of view plausible, and that is what the ensuing argument is about. Holmes's argument is an analysis of what the law says, of the logical form of law. In Holmes's words: "If you commit a tort, you are liable to pay a compensatory sum. If you commit a contract, you are liable to pay a compensatory sum unless the promised event comes to pass, and that is all the difference" (175). Holmes's point is that civil laws, or at any rate those protected by what are nowadays called liability rules, should not be read as categorical commands—"Fulfill contracts!" or "Take due care!" Rather, they are disjunctive in form: "Fulfill contracts or pay compensation!" or "Take due care or pay compensation for damage that results!"

It is important to see that, contrary to appearances, Holmes is *not* arguing here about whether we have a moral duty to obey the law, that is, whether a legal duty creates a corresponding moral duty. The moral duty to obey a law in categorical form is exactly the same as the moral duty to obey a law in disjunctive form. Holmes may have be-

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<sup>85</sup> Letter from Oliver Wendell Holmes to Lewis Einstein (May 21, 1914), in *The Holmes-Einstein Letters: Correspondence of Mr. Justice Holmes and Lewis Einstein, 1903-1935*, at 92, 93 (James Bishop Peabody ed., 1964) [hereinafter *Holmes-Einstein Letters*].

<sup>86</sup> *Path of the Law*, *supra* note 6, at 173.

lieved that there is no moral duty in either case: when he speaks of obedience to law, he invariably speaks of people yielding to "what is so much stronger than themselves" (167), namely the "stern monition that the club and the bayonet are at hand ready to drive you to prison or the rope if you go beyond the established lines."<sup>87</sup> Other theorists disagree: Hart, for example, objects that regarding laws as commands treats the state as nothing more than a "gunman writ large."<sup>88</sup> (Not that this objection would have fazed Holmes, who *did* think of the state as a gunman writ large.) It doesn't matter who is right; the point is that the level of obligation attached to the law, whatever it is, is the same whether the law is categorical or disjunctive.

Holmes's own position in *Path* acknowledges that laws can create genuine duties, whenever "equity will grant an injunction, and will enforce it by putting the defendant in prison or otherwise punishing him unless he complies with the order of the court" (175-76); presumably, the same would be true when conduct is enforced by criminal statutes. Indeed, Holmes states explicitly that his argument "[l]eav[es] the criminal law on one side"<sup>89</sup> (173). Even in Holmes's sense, a *very* bad man who violates a contract *and* refuses to pay the judgment *and* obstructs the effort to collect the judgment has violated a duty, because the court can throw him in jail to make him pay. But it is clear that the duties Holmes is discussing here, namely those that the law will enforce through punishment, are *legal* duties, not moral duties. For we have already seen him emphasize that laws are enforced that "pass the limit of interference as many consciences would draw it" (171).

One might ask why Holmes doesn't treat the criminal law, or injunctions for that matter, on a par with contract and tort. That is, why regard a criminal statute as a categorical "Don't do the crime!" rather than a disjunctive "Either don't do the crime or do the time!" (the logical equivalent of the old saw that if you can't do the time, don't do the crime)?

The answer is partly that Holmes follows common sense, which does *not* consider a jail sentence as merely a tax. But *Path* also makes it clear that Holmes was in the grip of a hereditarian notion of crimi-

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<sup>87</sup> Admiral Dewey, *supra* note 37, at 109.

<sup>88</sup> Hart, *supra* note 77, at 603.

<sup>89</sup> In contemporary parlance, Holmes is arguing that a law creates a genuine duty when it is enforced through a property rule rather than a liability rule. In this respect, Holmes's position in *Path* has not changed from his early view that when a legislature has an "absolute wish" to prohibit conduct, the legal norm it creates is categorical, and the penalty attached cannot be regarded as a tax. See Oliver Wendell Holmes, Book Notices, in *The Formative Essays of Justice Holmes* 91, 92-93 (Frederic R. Kellogg ed., 1984) (arguing that duty is more than just a tax on certain conduct—a "legal duty cannot be said to exist if the law intends to allow the person supposed to be subject to it an option at a certain price").

nality. In the only truly embarrassing part of the essay, Holmes speculates that punishment cannot deter crime, because "the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite" (189). Admittedly, Holmes couches this point in the conditional and allows that the experts differ on the causes of crime, but his sympathies clearly lie with the innatist view of criminality: he cites three "weighty authorit[ies]" (189) on its behalf, none on behalf of the contrary position.<sup>90</sup> If criminality is innate, then the criminal law differs radically from contract and tort, because the *criminal* bad man has no more use for the private-law bad man's cost-benefit analysis than a rattlesnake does. (Here, at any rate, we find Holmes diametrically opposed to economic analyses of crime inspired by Gary Becker.<sup>91</sup>)

Reading all these passages together, as a consistent whole, we see that Holmes's argument is not an attack on the moral status of legal duties. Rather, it is an attempt to eliminate a confusion *within* the concept of legal duty: a confusion between reading moral words appearing in legal texts in their moral sense, which suggests categorical obligations, and reading them in their legal sense, which (Holmes claims) implies only disjunctive obligations.

This reading meshes smoothly with Holmes's two final points in the discussion of proposition (3): that he is trying to warn us against "the trap which legal language lays for us" (179), and that it would avoid confusion to eliminate moral terms from the law entirely and replace them with artificial words carrying no extralegal connotations. His point is not to criticize the beliefs that law deals with moral issues and derives its content from moral principles. If that were his view, he would never assert that "[t]he law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race" (170). Rather, his point is that the moral content of the law—the disjunctive duties it imposes—is simply different from what we would gather reading moral terms morally. From the bad man's point of view, "the notion of duty shrinks and at the same time grows more precise," because we have "expel[led] everything except . . . the

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<sup>90</sup> Holmes expresses a similar idea using similar imagery in a letter to Lewis Einstein, where he writes:

[I]f we have got to hate anything, I don't see why we mightn't as well invert the Christian saying and hate the sinner but not the sin. . . . The world has produced the rattlesnake as well as me; but I kill it if I get a chance, as also mosquitoes, cockroaches, murderers, and flies.

Holmes-Einstein Letters, *supra* note 85, at 93. Notice that murderers appear in the middle of Holmes's list, between cockroaches and flies.

<sup>91</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

operations of the law" (174). By so doing, we lose nothing except "the fossil records of a good deal of history and the majesty got from ethical associations" (179) built into legal language.

Here, however, I think that Holmes falls into confusion by overstating his point. On his own analysis, the moral and legal meanings of words are not simply unrelated, as they would be if it were really possible to replace morally loaded legal words with artificial terms. On the contrary, they are systematically related. Suppose that in its moral sense negligence is wrong, so that the moral reading of tort law includes the categorical command "Don't be negligent!" On Holmes's analysis, the correct understanding of tort law would substitute "Either don't be negligent or else pay for the damages that result." Here it is plain that the re-analysis leaves the meaning of the word *negligent* unchanged. The bad man trying to learn what kind of behavior will lead courts to make him pay compensation will have to know exactly what kinds of behavior count as negligent in the moral sense.

Holmes would respond that as they develop in the cases, moral words like *malice*, *intent*, and *negligence* (176) gradually change their meanings, and eventually become nothing more than homonyms of their ordinary-language counterparts. That is why it might "be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law" (179).

But Holmes exaggerates. As he himself argues, words initially enter legal language carrying moral baggage and nontechnical meanings. They may shed some of that baggage, and acquire specialized senses as the case law develops them—but that proves very little, because words lose and gain connotations in *any* shift in context. There's actually no such thing as *the* ordinary meaning of a word: in different contexts, words lose some of their inference-relations and gain others, without becoming mere homonyms.<sup>92</sup> Consider the expression I used in the previous sentence—"words lose some of their inference-relations"—and compare the word *lose* in this context with its appearance in some other ordinary contexts: *lose* his keys, *lose* her temper, *lose* his virginity, *lose* my train of thought, *lose* their way. No

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<sup>92</sup> Here I am following the contemporary view that identifies the meaning—the semantics—of an expression with the sum total of the inference-relations it enters into. On this view, synonymy is a matter of degree—two expressions that share most but not all of their inference-relations (or analogous inference-relations) have similar meanings, and the fewer the shared inferences, the more dissimilar the meanings. If the two expressions are uses of the selfsame ideograph, then in the former case it makes sense to refer to them as alternative meanings of the same word, while in the latter case they are mere homonyms.

two of these contexts permit the same inferences—a man who has lost his virginity was once a virgin, but a man who has lost his keys was never a key; a man who has lost his keys may find them, but a word that has lost an inference-relation will never find it. But it's not mere confusion to say that each of them employs the selfsame word *lose*. The words aren't mere homonyms, and if we introduced a different term for each of them, we certainly would not "gain very much in the clearness of our thought" (179), as Holmes suggests—just the opposite.<sup>93</sup>

My point is that the bare fact that legal words diverge from their extralegal counterparts doesn't mean that they are different words with different meanings. Some inference-relations are different, but plenty remain. Of course, some words, like *consideration*, have acquired legal meanings having so little to do with their ordinary meanings that the two really are little more than homonyms. But such examples are few and far between, and the safest generalization is that if a word has moral connotations in ordinary usage, it probably has them in law as well. Holmes to the contrary, the word *negligence* remains a moral term even in tort law: to say that someone has fallen below the standard of care that a reasonable person would meet is a moral criticism, although it is not necessarily a moral criticism of the defendant's character.

Indeed, Holmes's implication that private laws impose only a disjunctive obligation to obey or pay, without any suggestion that obedience is preferable, mischaracterizes the actual practice of courts and juries. The existence of punitive damages in contract and tort (and, contrary to popular myth, punitive damages are awarded in vastly higher proportion in commercial litigation than in personal injury litigation) clearly indicates that the legal system *is* willing to punish bad men who treat compensation as merely a cost of doing business.<sup>94</sup> Indeed, many of the largest and best-known punitive awards have been calculated to reduce defendants' wealth by precisely the surplus they

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<sup>93</sup> Similar examples are ubiquitous in language. See J. F. Ross, Portraying Analogy 4-5 (1981) (using as examples *see/light*, *see/point*; *collect/books*, *collect/friends*, *collect/debts*, *collect/barnacles*; *make a sandwich*, *make a bed*, *make a mistake*, *make time for*, *make a plane*, *make an appointment*).

<sup>94</sup> In arguing this, I am assuming that the level of punitive awards is determined on largely retributive grounds and certainly not solely on deterrence grounds. This, I believe, correctly states the doctrine and practice of punitive damages. For details, see Marc Galanter & David Luban, Poetic Justice: Punitive Damages and Legal Pluralism, 42 Am. U. L. Rev. 1393, 1432-38, 1448-51 (1993) (arguing that punitive damages are based not on theory of effective deterrence but rather on theory of retribution, in which punishment is measured according to heinousness of crime, and that purpose of retribution is to inflict "expressive defeats" (i.e., "poetic justice") on wrongdoer).

hoped to capture by paying rather than obeying, after plaintiffs introduced evidence that the defendants had done a cost-benefit analysis of compliance. Holmes's own predictive theory of law implies that if courts actually reason from moral connotations in legal terms, then the terms have moral connotations. Instead, of course, Holmes concludes, inconsistently, that the courts are confused.

Suppose we drop the homonym theory and ask why Holmes thinks that moral connotations in legal words are so misleading. In *Path*, he explains that "[m]orals deal with the actual internal state of the individual's mind, what he actually intends" (177). This explanation is perfectly in tune with his leading examples—the use of malice in the law of slander and the will or meeting-of-minds theory of contractual obligation (176-78). His chief point in both of them is that in law the words lose their mentalistic connotations.

But once we see this, we see that Holmes's attack on "confounding morality with law" (179) is much more modest in aim than it appears to be. Although Holmes's phrasings indicate that he was occasionally confused about the import of his own examples, they don't demonstrate that law can be identified by its pedigree alone, without any essential reference to moral concepts—contemporary positivism's separation thesis. Instead, Holmes's explanations yield only his familiar conclusions that even ostensibly subjective concepts must be identified through objective tests, and that moral concepts in the law regulate conduct, not intentions.

Ironically, even Kant could agree with Holmes about this. On the one hand, Kant makes morality turn entirely on issues of motive and defends a deductive natural law theory. He thus seems to be the perfect foil for Holmes's sarcasm.<sup>95</sup> But, like Holmes, Kant believes that law is supposed to regulate conduct, not intentions, and he famously argued that "the problem of setting up a state can be solved even by a nation of devils (so long as they possess understanding)."<sup>96</sup> If a nation of devils left Kant unfazed, it's unlikely that Holmes's bad man would make him blink.

Let me summarize the preceding discussion. I've been suggesting that Holmes's attack on the confusion of law and morality bears only a superficial resemblance to contemporary positivism's separation the-

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<sup>95</sup> See, e.g., Oliver Wendell Holmes, *Ideals and Doubts*, in *Collected Legal Papers*, supra note 2, at 303, 304.

<sup>96</sup> Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in *Political Writings* 93, 112 (Hans S. Reiss ed. & H.B. Nisbet trans., 1970); see also Thomas W. Pogge, *Kant's Theory of Justice*, 79 *Kant-Studien* 407, 410 (1988) (claiming that Kant's theory of justice makes little use of categorical imperative and yields set of duties aiming "to secure the external freedom of others" rather than focusing on agent's inner freedom).



sis.<sup>5</sup> The resemblance is at its strongest where Holmes's argument is at its weakest—his question-begging attack on what I have called the morality-is-law thesis. Where his argument is at its strongest, it aims to defend conclusions that have nothing to do with modern positivism: first, that private law rules should be analyzed disjunctively rather than categorically; second, that legal duties properly so called are only those enforced by property rules rather than liability rules; third, that the law relies on objective tests even when it invokes subjective concepts; fourth, that moral terms in the law are likely to mislead us unless we keep the first three points clearly in mind.

In addition, 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; and he carelessly proposed a homonym theory of legal language that isn't true. The first three of these ideas are central to Holmes's overall world view, but none of the four are essential either to *Path*'s attack on the confusion of law with morality or its discussion of the bad man.

### B. The Bad Man Thesis

On the reading offered here, it seems clear that the bad man is a version of the economists' rational calculator, utilizing legal advice to price behavior and complying with private law norms only when the benefit to himself of compliance exceeds the cost. For Holmes, however, the rational calculator is actually a pretty tame and law abiding bad man, because even though he is willing to ask unsentimentally which disjunct in the "obey or pay" formula is cheaper, he *is* prepared to obey or pay. A full fledged rational calculator, by contrast, would be just as interested in evaluating the likelihood that the state will actually put him to this choice by enforcing the law as it is written.

There is no hint in *Path* or elsewhere that Holmes understood that risk-benefit analysis by a genuinely bad man "who cares only for the material consequences" (171) would consider enforcement probabilities as well as enforcement outcomes. If Holmes had appreciated this point, I suspect he would have seen straightaway that the Bad Man Thesis is preposterous (for reasons I explain subsequently). Instead, he offers a bad man who asks his lawyer what a court would do if his conduct were litigated, but not how likely it is that his conduct will be litigated. The bad man chooses whichever disjunct in an "obey or pay" formula is cheaper but he fully complies with his legal

duties, including court orders to pay, injunctions, criminal statutes, and other norms in categorical form.

Within the context of Holmes's argument, then, the bad man is a law abiding rational calculator, and he functions principally as a rhetorical device to bring to life the four points in Holmes's analysis of legal duty I mentioned previously.<sup>97</sup>

The problem is that Holmes offers explicit definitions of the bad man which make him badder than the role that Holmes's argument requires or—as I now suggest—even tolerates. These define him as someone who cares only about material consequences (and thus not about legal duties) and someone who, in contrast to the good man, is not motivated by conscience either in or out of the law. Regrettably, it is these definitions that remain most vivid in the hearer's and reader's memory—and it is these definitions that appear in Holmes's statement of the Bad Man Thesis.

This brings us back full circle to our earlier question: *Why* must we adopt the viewpoint of someone who cares only about material consequences, and is unmoved by conscience, if we want to know the law? Let us consider three possible answers.

The first possible answer is that the Bad Man Thesis is an empirical hypothesis about clients. As Gordon suggests, the bad man is “a realistic picture of the usual corporate client of Holmes's day, inclined to treat all legal rules as prices on conduct, risks to be discounted by the probability of enforcement, data for cost-benefit analysis.”<sup>98</sup> This may be what Holmes had in mind, but if so the bad man weakens rather than strengthens the argument. My problem with it is that I doubt that many corporate clients—or noncorporate clients, for that matter—are really as reptilian as Holmes's definitions portray the bad man. Holmes cautions in *Path* that it is not “advisable to shape general theory from the exception” (176), and the bad man is the exception.

What's the harm in assuming that clients are Holmesian bad men? The problem is that if a lawyer assumes that every client is a bad man, the lawyer will shape the legal representation in a way that makes the assumption come true. Most of us, I expect, have known decent people going through a divorce who decided to retain a “bomber” to ensure that their interests were safeguarded—people whose decency quickly became irrelevant as the escalating battle of hired guns made life hell for their spouses and children, often for years on end. (Admittedly, I've also known people who said that re-

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<sup>97</sup> See text accompanying note 96.

<sup>98</sup> Gordon, *supra* note 9 (manuscript at 17).

taining a gunslinger for their divorce allowed them to keep their own decency intact, because the lawyer did all the really nasty things that were necessary. This assumes that nasty things *were* necessary—and that the gunslinger didn't throw in some unnecessary ones as well.)

The second alternative is that the Bad Man Thesis is not supposed to be an operational assumption, but only a heuristic device for analyzing the nature of legal duties. Because the stated topic of *Path* is the study of law, Holmes's advice to take up the standpoint of the bad man may be advice only about how to study law, not how to practice it.

However, it's not very good advice about how to study law. Look closely at the Bad Man Thesis: "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" (171). There is something paradoxical on its face in Holmes's claim that to understand the law *and nothing else* you must look at it from the standpoint of someone who is interested *only* in extralegal consequences, that is, *only* in something else. How could it be that you can't understand the law except from the standpoint of someone who doesn't give a damn about the law?

If Holmes's formula is right, then the lawyer whose client asks, "What are my legal obligations?" will advise the client about material consequences and nothing more. For example, a tax lawyer will answer the question not primarily by explaining the client's tax liability but by explaining the audit lottery—the fact that the IRS selects only two percent of returns for random audits. Similarly, a client who asks the lawyer what he needs to do to comply with the Occupational Safety and Health Act<sup>99</sup> (OSHA) will be told that OSHA's starvation-level enforcement budget permits inspectors to examine fewer than four percent of the nation's workplaces each year<sup>100</sup>—and that OSHA inspectors need a warrant, backed by probable cause, to undertake a nonconsensual inspection.<sup>101</sup>

I'm not arguing that the lawyer should withhold this information if the client asks for it, although I see no good reason for the lawyer to volunteer it. My objection is a conceptual one: it is that thinking of law from the bad man's point of view creates confusion, not clarity. It

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<sup>99</sup> 29 U.S.C. §§ 651-678 (1994 & Supp. 1995).

<sup>100</sup> See Kathleen F. Brickey, Corporate and White Collar Crime: Cases and Materials 702 n.24 (2d ed. 1995) (citing Kenneth B. Noble, Work Safety Agency Never Checked Fatal Factory, N.Y. Times, June 27, 1985, at 16).

<sup>101</sup> See *Salwasser Mfg. Co. v. Municipal Court*, 156 Cal. Rptr. 292, 296 (Ct. App. 1979) (holding that warrantless nonconsensual Occupational Safety and Health Act (OSHA) inspection violates Fourth Amendment).

conflates advice about what the law requires with advice about how to violate the law without getting caught. More bluntly, it confuses advice about how to comply with the law with advice about how to evade the law. Holmes's protest (170) to the contrary, it's hard to imagine a more cynical theory of law. It calls to mind, of course, Ambrose Bierce's definition of a lawyer as one skilled in circumventing the law.

The problem is that Holmes defines the bad man as someone who cares only about material consequences, but overlooks the point that the bad man so defined will care about enforcement lotteries, not just the judicial decisions that Holmes focuses on. Holmes's thought-experiment about the bad man envisions him asking his lawyer what the courts will do to him; but of course someone who really cares only about material consequences, and who is not guided by conscience in or out of law—and these are Holmes's official definitions of the bad man—will be even more interested in whether he can avoid getting caught. Moreover, the bad man will ask not just what the courts will do to him, but also what his lawyer can do to the courts. He comes to the lawyer for advocacy and not just for advice, and Gordon rightly criticizes Holmes for omitting all consideration of lawyers' active, shaping role in determining what legal obligations courts will find.<sup>102</sup>

The third possibility is that the Bad Man Thesis is an ethical ideal for lawyers. Holmes doesn't ever argue this way, but one could defend the Bad Man Thesis as follows: whatever legal duty is, it must be the same for the bad man as for the good. Since the bad man cares only about doing the minimum that forestalls unpleasant consequences, the legal duty must be that minimum, which can be ascertained only by adopting the bad man's viewpoint and analyzing the consequences to the actor of different courses of action. It can't be that legal duty requires something in addition—compliance in spirit, for example, not just in letter. "For the law does not mean sympathetic advice which you may neglect if you choose . . . ."<sup>103</sup>

In that case, a lawyer would betray the client who is a good man by advising him that the law holds him to a higher standard than the bad man. Indeed, doing so would create an utterly perverse result: the good man pays while the bad man prospers. According to this argument, the Bad Man Thesis again becomes a heuristic principle—this time not for understanding the law, but for treating clients fairly when explaining their legal duties to them.

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<sup>102</sup> See Gordon, *supra* note 9 (manuscript at 19).

<sup>103</sup> Admiral Dewey, *supra* note 37, at 109.

There are two problems with this argument. The first is one we've just seen: the bad man is not interested in his legal duties. He is interested in the material consequences of his legal duties, and that is all he wants his lawyer to explain to him. Is it really the case that a lawyer who tells her client, Mr. Good, what it will take to comply with OSHA has not informed him of his legal duty, because she hasn't mentioned the enforcement lottery? Is it really the case that she's treated Mr. Good unfairly compared with Mr. Bad, who wants to know only about the enforcement lottery? And is it really true that she's an unethical lawyer if she counsels Mr. Good not to play the enforcement lottery? I think it's clear that the answer to all three of these questions is a resounding *NO*.

The second problem is that if all lawyers treat all their clients "fairly" by advising them as if they are bad men, the race to the bottom that results will require legal standards and enforcement practices to toughen in response—a consequence that the bad man surely does not intend. The bad man can prosper from legal advice only in a world containing relatively few bad men—and that isn't the world the supposed ethical ideal recommends.

In sum, there really is no good reason for adopting the bad man's standpoint, either to understand law or to practice it. If you adopt the bad man's standpoint to study law you will learn little about law, although you may learn about consequences, including unintended ones. And if you adopt his standpoint to practice law, you will probably disserve your client, unless he happens to *be* a bad man, in which case your quasi-legal advice will no doubt be helpful. There is likewise no good reason for believing that legal duty has nothing to do with morality—and the more it has to do with morality, the less welcome your helpful advice will be to the bad man.

### C. *The Bad Man Thesis and the Prediction Theory*

What is the logical connection between the Bad Man Thesis and the prediction theory? Does one entail the other? Are they indeed, as Holmes's rhetoric suggests, logically equivalent? I believe not; to see why, let's examine the supposed entailments one direction at a time.

Suppose first that the prediction theory is true, that is, that law is "prophesies of what the courts will do in fact" (173). It simply doesn't follow that legal duties must be understood as the bad man understands them. Imagine that there is some argument establishing a moral obligation to obey the law (as I believe there is when the law is just and reasonable); imagine further that this obligation requires us

to obey the law in spirit as well as in letter. Admittedly, the bad man doesn't acknowledge this obligation, or at any rate doesn't care about it. But that is no objection; after all, the bad man doesn't acknowledge or care about *any* moral obligations. Under our stipulation, the Bad Man Thesis, which holds that legal duties provide prudential rather than moral reasons for acting, is false. That doesn't undercut in the least bit the prediction theory: even if laws provide moral reasons for acting, it might still be true that the law is predictions of what the courts will do. Holmes's reason for focusing on the courts, remember, "is that in societies like ours the command of the public force is intrusted to the judges in certain cases" (167): his argument is a jurisdictional and empirical one about who gives the orders. In our stipulated world where the law is shot through and through with morality, a parallel argument might establish that the authoritative interpretation of the law is entrusted to the judges, in which case the prediction theory will still hold. The prediction theory doesn't imply the Bad Man Thesis.

To establish the converse, suppose that the Bad Man Thesis is true. Suppose, that is, that law and legal duty can be understood only in terms of the material consequences of violating them, not as a source of moral reasons for acting. The prediction theory follows only if the empirical-jurisdictional premise that "the whole power of the state will be put forth, if necessary, to carry out . . . judgments and decrees" (167) of the courts is true. Manifestly, it is not, as anyone knows who has ever tried to collect a small claims judgment from a defendant who doesn't want to pay. Courts, possessing neither the power of the purse nor the power of the sword, rely on other officials to carry out their decrees: governors, school boards, executive agencies, and ultimately sheriffs and police. A court order that isn't worth the sheriff's time to enforce is a legal nullity from the bad man's point of view.

I am simply revisiting Fuller's argument against the positivists' identification of law with commands of the sovereign.<sup>104</sup> In modern societies, Fuller observed, the sovereign power is subdivided among multitudes of public employees.<sup>105</sup> Thus, the positivist must either concoct a conceptual fiction to stand in for the sovereign, like Kelsen's *Grundnorm*<sup>106</sup> or Hart's rule of recognition<sup>107</sup>—in which case positiv-

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<sup>104</sup> Fuller, *supra* note 83, at 53-55.

<sup>105</sup> See *id.* at 27-28.

<sup>106</sup> Hans Kelsen, *Pure Theory of Law* (Max White trans., 1967); see Fuller, *supra* note 83, at 69-70.

<sup>107</sup> See H.L.A. Hart, *The Concept of Law* 92-93 (1961) (defining "rule of recognition"). Of course, it is my claim, not Fuller's, that the rule of recognition is a conceptual fiction

ism turns out to be just as metaphysical as natural law theory—or else the positivist must turn radically realist, like contemporary law and society researchers, and investigate the actual points where the rubber hits the road.<sup>108</sup> The problem is that once you begin to trace the operative public force through the hierarchy of officials, there is no place to stop. Indeed, there is no reason to stop with officials: even the police rely ultimately on acquiescent citizens; as Holmes himself observes in *Path*, a law that can't be enforced "because the community would rise in rebellion and fight" is mere "empty words" (172). The same is true if the community engages in passive noncooperation rather than overt rebellion. So the sovereign power turns out not to be King Rex, and not to be the courts; as some realists acknowledge, it turns out to include subsets of everyone, subsets that vary from case to case. Ultimately, the bad man has to predict not merely what the courts will do, but what a nebulous set of other people—officials, fellow citizens, family members, business associates, even partners in crime—will do. In sum, even if the Bad Man Thesis is true, Holmes's prediction theory is not *necessarily* true, because it rests on the empirical premise that courts alone determine the material consequences of the bad man's actions. In fact, it isn't even *contingently* true, because the empirical premise is false.

#### D. The Prediction Theory

I've just been arguing that the Bad Man Thesis and the prediction theory are independent of each other. In Part II.B., I criticized the Bad Man Thesis. What about the prediction theory?

On one natural construction, the prediction theory fails in the face of a familiar objection. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" (173) makes a certain amount of sense from an advocate's point of view, but it 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 predic-

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rather than an empirical reality: Hart was writing two decades after Fuller. My basis for the claim is that even though Hart insists on "the essentially factual character" of the rule of recognition, *id.* at 106, he also concludes that "there are certainly situations in which questions as to the precise content and scope of this kind of rule, and even as to its existence, may not admit of a clear or determinate answer." *Id.* I believe that in real-life legal systems, with complex and divided authority, the "precise content and scope," *id.*, of the rule of recognition is always indeterminate—and that is another way of saying that the very notion of a rule of recognition is a conceptual placeholder and thus a conceptual fiction.

<sup>108</sup> See Fuller, *supra* note 83, at 45-47.

tion 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.

I said that this is a familiar objection. It's certainly familiar to me, because (I'm embarrassed to say) I have used it in four publications prior to this one.<sup>109</sup> But I don't assert anything more than squatter's rights to the objection that judges don't decide cases by predicting their own decisions. This objection has been made previously by Robert Summers,<sup>110</sup> Yosai Rogat,<sup>111</sup> H.L.A. Hart,<sup>112</sup> and Lon Fuller.<sup>113</sup> As a matter of fact, it dates back at least to 1937, when Felix Cohen wrote, "When a judge puts [a question of law], in the course of writing his opinion, he is not attempting to predict his own behaviour."<sup>114</sup>

As I now think, however, this objection doesn't really touch Holmes's version of the prediction theory in *Path*. Let's look at his language carefully.

On the first page of *Path*, he states that "[t]he object of our study . . . is prediction" and "[t]he means of the study are a body of reports, of treatises, and of statutes." (167). He continues, "In these sibylline leaves are gathered the scattered prophecies of the past upon the cases in which the axe will fall. These are what properly have been called the oracles of the law" (167-68). We see straightaway from this passage that, for Holmes, judges no less than lawyers are engaged in a fundamentally predictive enterprise: the law reports are filled with "prophecies," and it was judges, not advocates, who wrote them. So Holmes does intend the theory to apply from the judge's point of view. Not only do judges prophesy, but Holmes clearly believes that they can prophesy *wrongly*:

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<sup>109</sup> See David Luban, *Lawyers and Justice: An Ethical Study* 20-24 (1988); David Luban, *Fish v. Fish: Some Realism About Idealism*, 7 *Cardozo L. Rev.* 693, 698-700 (1986); David Luban, *Lawyers Rule: A Comment on Patterson's Theories of Truth*, 50 *SMU L. Rev.* 1613, 1623 (1997); David Luban, *What's Pragmatic About Legal Pragmatism?*, 18 *Cardozo L. Rev.* 43, 68-69 (1996).

<sup>110</sup> Robert S. Summers, *Instrumentalism and American Legal Theory* 101-15 (1982) (analyzing process by which law becomes "valid").

<sup>111</sup> See Rogat, *supra* note 68, at 248-49 (stating that Holmes's "law as prediction" remarks did not apply to his concept of functions of judge).

<sup>112</sup> Hart, *supra* note 107, at 10 (discounting prediction theory in context of judicial decisions relating to punishment).

<sup>113</sup> See Fuller, *supra* note 83, at 94-95 (discounting prediction theory in context of judicial decisions relating to punishment).

<sup>114</sup> Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 *Mod. L. Rev.* 5, 17 (1937).



If a man goes into law it pays to be a master of it, and to be a master of it means to look straight through all the dramatic incidents and to discern the true basis for prophecy. . . . I have in mind cases in which the highest courts seem to me to have floundered because they had no clear ideas on some of these themes. (196).

In that case, what does Holmes think the "true basis for prophecy" is? Evidently, it is supposed to be the "sibylline leaves" of the case reports, treatises, and statutes. In the root image, a perplexed individual seeking to know the future beseeches a divinely inspired sibyl, who delivers an oracle: a prophecy, usually enigmatic, often ambiguous, of what is to be.

It is easy to see why Holmes would liken legal materials to something enigmatic and ambiguous. But who are the sibyls of the law reports? They are only a group of past judges, each of whom was himself consulting law reports, treatises, and statutes.<sup>115</sup> Hence, no divine inspiration, and presumably no infallibility. And who is the perplexed seeker? It is today's judge, whose interpretation of the oracles will tomorrow be included among them. Yesterday's seeker—yesterday's judge—is today's sibyl; today's seeker becomes tomorrow's sibyl.

It follows that the judge who thinks she is merely deciding a case—and of course she *is* deciding a case—is simultaneously prophesying about which future cases the axe will fall on. One Holmesian conclusion that falls neatly out of this imagery is that even if a judge thinks she is laying down a clear rule to govern future cases, it can really be no better than a prediction that future judges will follow that rule rather than distinguish it away or overturn it.

What is less neat, however, is the idea that judges are simultaneously deciphering and composing prophecies, and indeed, are composing prophecies in the very act of deciphering them. Holmes's metaphor appears careful and consistent, for in the next sentence he reiterates that the law reports "are what *properly* have been called the oracles of the law" (168; emphasis added), but that makes it all the more puzzling. He can't really mean that today's prophecy is based on nothing more than yesterday's prophecy of what today's prophecy will be. Even ignoring the vicious circles and infinite regresses lurking in this formulation, it doesn't make sense of Holmes's embrace of policy analysis, or his belief that judges have *always* "weigh[ed] considerations of social advantage," even if their judgments are "inarticulate, and often unconscious" (184). Holmes's critique of traditionalism and

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<sup>115</sup> A few lines further, Holmes suggests that treatises and statutes exist principally to make the case law easier to remember, see *The Path of the Law*, *supra* note 6, at 168, so we may restrict our attention to the reports of judicial decisions.

embrace of policy analysis can perhaps best be understood as an effort to break out of the closed circle of sibyls deciphering the oracles of other sibyls to create their own. If it is revolting to have no better reason for a rule than that so it was laid down in the time of Henry IV, it is even more revolting to have no better basis for a prophecy than that it was prophesied in the time of Henry IV that so you would prophesize based on the previous prophecy.

The antitraditionalist judge Holmes favors still will be making prophecies—but of what? At this point, the title of his essay looms large. Holmes held an evolutionary and dynamic view of law, and it seems to me most likely that the Holmesian judge will be making prophecies about the future evolution of the law: the path of the law. Each judge is prophesying about what future judges will do, knowing that they too will be prophesying about the future. That is why the “sibylline leaves” of the reports contain prophecies of the past about the present. Past, present, and future prophecies can converge, and if so, the prophecies come true. If, on the other hand, they diverge, Holmes has made sense of how a judge can be said to get a prophecy wrong.

In effect, the Holmesian judge decides cases by predicting that the law is headed in a certain direction. But how does that square with Holmes insisting that judges have a “duty of weighing considerations of social advantage” (184), echoing *The Common Law*’s claim that “the secret root from which the law draws all the juices of life” is “considerations of what is expedient for the community concerned”?<sup>116</sup> The answer is quite straightforward: for Holmes, “social advantage” just *means* going with the evolutionary flow.<sup>117</sup> Holmes, a self-professed moral skeptic, simply had a brute reverence for the victors in life’s struggles.

Now we can see why the prediction theory joins the bad man and the purge of morality from law at the opening of *Path*: Holmes simply substitutes prophecy for morality, the famous “judgment of history” for moral judgment.

I think this is a fallacy in itself. At any rate, I’ve argued that the law has more to do with morality than Holmes allowed. For anyone who doesn’t identify pursuing the good with backing the winners, Holmes’s argument in *Path* falls apart at just this point: “weighing considerations of social advantage” simply isn’t the same as prophecy, and the prediction theory of law turns out to be *morally* wrong.

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<sup>116</sup> Oliver Wendell Holmes, Jr., *The Common Law* 31-32 (Mark DeWolfe Howe ed., 1963).

<sup>117</sup> I’ve argued this in some detail in my article, *Justice Holmes and the Metaphysics of Judicial Restraint*. See Luban, *supra* note 72, at 496-501.

### III THE GOOD LAWYER

As I've been arguing, the basic elements of *Path's* jurisprudence—the bad man, the critique of morality in law, the prediction theory—all incorporate serious confusions. The implications of this for legal ethics are important. If there's no need to assume the bad man's point of view, if legal duty has a moral dimension, and if there is more to law than anticipating its future development, then it seems to me that the lawyer's moral convictions about the rightness of law have a role to play in legal advice.

This is not quite a resurrection of the structural-functionalist argument discussed earlier, because basing advice on moral convictions isn't the same as basing advice on the social purposes imminent in the law. (This, I might add, marks the major difference between William Simon's approach to legal ethics and my own.) But it *is* an explanation of why a public-minded lawyer like Louis Brandeis offers not only a more inspiring but also a more defensible ideal than Holmes's lawyer-as-thinker.

### IV AND YET . . .

And yet, in the end, I'm not confident that I have done Holmes justice by taking him at his word. Intuitively, it just seems to me that Holmes is a more admirable, even lovable, lawyer than his own fierce rhetoric and tough talk would suggest. In the teeth of his own theoretical views, Holmes appears to have had an unselfconsciously *decent* notion of what lawyers should be. Indeed, I've argued above that he held a relatively decent notion of what clients are, for his bad man—who wants to know what courts will do but not how to evade detection—is tamer than Holmes's own definitions imply.

Consider a few passages in which Holmes conveys his sense of lawyers, the first from one of his eulogies: "I am happy to think that his example has prevailed and that now it is the rule that a lawyer will try his case like a gentleman without giving up any portion of his energy and force."<sup>118</sup> Well, perhaps this is merely a formulaic puff for civility. But I think it more likely that Holmes really was happy that a lawyer will try his case like a gentleman. Let us proceed:

I should say that one of the good things about the law is that it does not pursue money directly. When you sell goods the price which you get and your own interests are what you think about in the af-

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<sup>118</sup> Oliver Wendell Holmes, William Crowninshield Endicott (Nov. 24, 1900), in *Occasional Speeches*, *supra* note 4, at 127, 128.

fair. When you try a case you think about the ways to win it and the interests of your client.<sup>119</sup>

Add two passages from *The Path of the Law* itself: "The practice of [law], in spite of popular jests, tends to make good citizens and good men" (170); and "Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it . . ." (194).

Take the final passage first, with its easy-to-miss play on two meanings of the word *devotion*, as preoccupation and reverence. Many lawyers *devote* their lives to the business of law without showing it the *devotion* of trying to improve it. In this passage, Holmes describes law as a business, but he doesn't treat it as one.

Working backwards to the second-last passage, notice that Holmes insists that the practice of law tends to make good men just one paragraph after he has introduced the bad man. The contrast must be intentional. The bad man *always* treats business as business, and Holmes once again seems to think that lawyers are different.

The previous passage states his reason why: lawyers, unlike businessmen, pursue money indirectly, putting the interests of their clients in the driver's seat. Gordon is clearly correct, then, when he observes that "Holmes's views would still have to travel a long way before they reached the ultimate reduction of lawyers' work our own day has achieved . . . to a strictly commercial metric . . ."<sup>120</sup> Gordon's examples of what he means center around the relentless babbity of partners in large law firms with their eyes fixed on the *Am Law* 100 while they run the meter on their clients;<sup>121</sup> but the same could be said of plaintiffs' lawyers in settlement class actions bidding down the value of their clients' claims in return for the franchise to sell them.<sup>122</sup> The "ultimate reduction" Gordon speaks of is nothing less than the transformation of the lawyer from Holmes's good man to Holmes's bad man. Indeed, one remarkable point about the opening of *Path* is that while Holmes is willing to assume that the client is a bad man, it never seems to cross his mind that the lawyer might be as well.

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<sup>119</sup> Oliver Wendell Holmes, *The Bar as a Profession*, in *Collected Legal Papers*, *supra* note 2, at 153, 153.

<sup>120</sup> Gordon, *supra* note 9 (manuscript at 18).

<sup>121</sup> *Id.*

<sup>122</sup> See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1367-84 (1995) (exposing abundant room for potential collusion by settlement class plaintiffs' attorneys); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 *Cornell L. Rev.* 1045, 1051-85 (1995) (discussing allegations of collusion by plaintiffs' lawyers in *Georgine*, 157 F.R.D. 246 (E.D. Pa. 1994)).

What I'm suggesting here is that in these and other occasional passages in his writings, Holmes displays the ultimate sign of good character: it never even occurs to him to be dishonorable. In the end, Holmes's personality might be a stronger argument against moral skepticism than his philosophical arguments for it.



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