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TAKING A GOOD LOOK AT THE BAD MAN'S POINT OF VIEW

William H. Wilcox†

In 1897, Oliver Wendell Holmes addressed an audience at the Boston University Law School, telling them, "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. . . ." ¹ Holmes continued by claiming that from the bad man's point of view it can be seen that law consists of "prophecies of what the courts will do in fact, and nothing more pretentious." ² Holmes's paper has been enormously influential in the development of twentieth-century jurisprudence, causing jurists to react to his views in extreme ways. His views laid the foundation for the school of jurisprudence known as American Legal Realism, which maintains that a concern for law is primarily, or even solely, a concern for predicting judicial decisions. ³ Legal realism has survived as the accepted legal theory within the American legal profession for much of this century, and law school faculties largely still comprise people who believe that little more needs to be said about what law is than what can be found in Holmes's *The Path of the Law*. Reactions against realism have been equally strong and extreme, leading generally insightful philosophers to believe that it can easily be dismissed. ⁴

As one might suspect, neither of these reactions can be fully justified. A sympathetic reading of *The Path of the Law* reveals that Holmes's approach to legal theory makes a significant contribution to our understanding of law. This contribution, however, is less significant than Holmes's followers have thought. As I argue below, realism cannot provide the complete answer to the question, "What is law?" A sympathetic but critical examination of Holmes's theory demon-

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¹ O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 171 (1920).

² *Id.* at 173.

³ It should be obvious from this very brief description that legal realism has no similarity to current doctrines of philosophical realism.

⁴ See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 121 (1961).

strates that although it is an important and insightful contribution to legal theory, its results are not as conclusive as Holmes may have thought. At times, it will be necessary to develop arguments that were at most only suggested by Holmes; his actual arguments were usually much too brief, and he often failed to provide support for claims that are far from obvious. I shall therefore have to go far beyond the text of *The Path of the Law*, but my purpose is to develop the best theory possible in the spirit of Holmes's thought rather than to prove that Holmes's paper must be read in some particular manner.⁵ Although Holmes did not sufficiently develop a defense of his bad man theory, his contribution is substantial enough to make it profitable for us to ask what might be said in its favor.

In the following discussion I will address three major issues. First, what reasons are there for adopting the bad man's point of view? Second, what does the bad man theory tell us about the nature of law and, in particular, about the relation between law and morality? Finally, is the bad man theory undermined by a consideration of the judicial role?

I

THE BAD MAN BECOMES PRUDENT

Holmes claimed, "When we study law we are not studying a mystery but a well-known profession."⁶ This claim was the basis for all of his subsequent claims about the nature of law. He argued that we can understand what law is by understanding the role played by professional lawyers. There are, however, several ways in which one can be professionally concerned with the law, and Holmes focused on only one of these—that of the practicing lawyer who must advise a client.⁷ The choice of this legal role is somewhat surprising given the

⁵ This is not the only recent attempt to provide a sympathetic reconstruction of Holmes's legal theory. See, e.g., Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275-303 (1973). Nevertheless, Holmes's theoretical work is still thought to be discredited too easily, and there is need for a more exact understanding of what the bad man theory shows and what it fails to show.

⁶ O.W. HOLMES, *supra* note 1, at 167.

⁷ Attorneys, of course, do much more than advise clients about what the law is. For example, they are also "officers of the court," and a clear separation between law and morality probably would not aid the pursuit of this role. Although the different roles of the attorney can conflict in certain situations, I think it is possible to isolate the advisory role, and that Holmes's position that this role leads the attorney to be concerned with prediction is substantially correct.

Consider the following illustration: an attorney is asked by a client to determine what the law requires in some specified matter. The attorney believes that the courts will in fact render decisions that are incompatible with a correct interpretation of the relevant statutes and case

predominant interest of twentieth century jurisprudence in the role of the judge as the decisionmaker.⁸

Holmes did not, however, completely ignore the decisionmaking judge in favor of the advising attorney. He observed that judges wield the power of the state, and it is the judge's capacity for directing the state's coercive power that creates a need for professional lawyers whose expertise allows them to advise citizens about the circumstances under which and the ways in which judges will exercise state power. According to Holmes, it is because they serve this purpose that lawyers are in the business of making predictions about the occasions on which the state will interfere with the lives of its citizens.

It is not obvious why reflection on the role of advising attorneys should lead us to adopt the bad man theory of law. Holmes argued that the judge's power to direct the use of state coercion provides a reason for the existence of a legal role in which professionals advise citizens about the content of law. In this respect, it is reasonable to maintain that an interest in the content of law is an interest in the ways in which judges will exercise their power. Holmes's claims about prediction should be understood as an empirical generalization about what advising attorneys actually do: They advise people about how judges and, consequently, the state will react to their behavior.

Holmes seems to have thought that concentration on the advising attorney's role of providing predictions would illuminate the advantage of adopting the bad man's point of view. About the bad man he wrote, "You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force"⁹ Apparently, Holmes believed that this obviously true claim should justify adoption of the bad man's point of view, but it is

law. He could advise his client by saying that although the law requires one thing, the courts will probably decide otherwise, and this would certainly be an adequate response. Let us suppose, however, that because of some unusual circumstances, the attorney only has time to tell the client either how he believes the matter ought legally to be decided or how he believes the court will actually decide the case. He has begun by saying, "The law is . . ." when he realizes that he is short of time. How should he complete his sentence?

Suppose the attorney recognizes that his client is evil and that the knowledge of what the courts will actually do will be used for evil purposes. In this situation, it is reasonable to conclude that the attorney should tell his client the "legal" answer if doing so will frustrate the client's evil pursuits. In order to fulfill his role as a *legal adviser*, however, it seems clear to me that the attorney must provide his client with the *prediction* about how the courts will decide. Whether or not he should fulfill that role is another matter.

⁸ Several jurists have criticized Holmes's theory for restricting its interest to one legal role. See, e.g., K. LLEWELLYN, *JURISPRUDENCE* 139-42 (1962); Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 843-44 (1931).

⁹ O.W. HOLMES, *supra* note 1, at 170.

not clear why it should.¹⁰ Although Holmes failed to elaborate further, we shall see that there is an interesting argument he could have used.

As established thus far, Holmes's bad man theory maintains that people seek legal advice to avoid state interference with their lives. It would be foolish to suggest that this is the only reason people seek legal advice. Some people wish to obey the law simply out of respect for its authority. Perhaps Holmes would have thought of these as good people. But even bad people seek the advice of attorneys for reasons beyond the desire not to be coerced, and these reasons presumably differ from those of good people. Nevertheless, the good man's and the bad man's reasons for consulting attorneys coincide to some extent. Regardless of what other reasons they may have for their interest in the content of law, they both wish to avoid having their pursuits foiled by state interference. In fact, Holmes could well have argued that all people, good and bad, have this reason for seeking legal advice, and that this is the only universally held motive for seeking it. It is therefore plausible to claim that if we are to understand law, we need to adopt a point of view under which only this universally held motive is operative.

Holmes's argument attempts to answer the question, "How should we think about law?" It is reasonable to suppose that our answer to this question would depend on the reasons we might have for seeking legal knowledge, but different people have different reasons. A legal theorist, however, should want to understand the law in some general way, a way that would be appropriate for all people. It is reasonable therefore to look at the law from a point of view that stresses the only universal reason for seeking legal knowledge, because the universality of this motive makes it central to a general understanding of law. Holmes attributed this universal reason to the bad man, but its very universality makes this attribution misleading. It would have been more appropriate to have attributed it to the merely *prudent man*, even though the suggestion that we view the law through the eyes of the prudent man might not have sparked as much debate.¹¹

¹⁰ Henry Hart observes, "Why [adopting the bad man's point of view] helps, unless to make us more effective counsellors of evil, I have never understood." Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 392 (1951).

¹¹ In the remainder of the paper, I shall follow Holmes in speaking of the bad man's point of view, but it should be remembered that one with this point of view does not necessarily possess evil motives. We should assume nothing more than that he is motivated by prudential concerns.

It is important that Holmes could present such an argument for the centrality of the bad man's (prudent man's) point of view. Without it, Holmes's reasoning would seem circular. As we have seen, Holmes maintained that the bad man theory is connected in some way with predictivism, but it is not obvious whether the bad man theory is supposed to support Holmes's predictivism or whether Holmes's predictivism is supposed to support the bad man theory. Indeed, it seems that he claimed both. Holmes's argument allows any one of three interpretations. First, since the bad man has the correct view of law, we can see that the predictive theory of law is correct. Alternatively, since predictivism is correct, we should adopt the bad man's point of view because he is primarily concerned with prediction. Holmes, however, seems to have combined these claims to create a third interpretation: If we adopt the bad man's point of view, we can see that predictivism is correct, and we should adopt the bad man's point of view because he is a predictivist. This third claim is viciously circular unless there is an independent reason for accepting the bad man theory or for believing a predictive theory of law. Fortunately, Holmes did offer independent reasons for both predictivism and the bad man theory. He supported predictivism by claiming that it is an empirical fact that advising attorneys are in the business of predicting judicial decisions; the bad man theory is supported by the universality of the desire to avoid state coercion as a reason for seeking knowledge of law. Thus, the third claim, which appears circular at first glance, is actually a convincing result of two independent arguments.

II

THE BAD MAN AND THE RELATIONSHIP BETWEEN LAW AND MORALITY¹²

Holmes clearly believed that the bad man theory is closely connected to the characteristic contention of legal positivism¹³ that law

¹² While discussing Holmes's position on the relationship between law and morality, it will often be necessary to distinguish between *conventional* (or positive) morality and *critical* morality. Conventional morality consists of those moral beliefs widely accepted in a society; therefore, what is required by conventional morality depends on matters of social fact. The conception of critical morality is one of a set of principles, the validity of which is not dependent on what people believe. What is required by critical morality is a matter of moral (rather than social) fact.

Holmes was a value skeptic, so he probably would have had little use for this distinction. His arguments, however, can be improved if they can be interpreted in such a way as to allow for the distinction. See H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 20 (1963).

¹³ Legal theories can be classified in different ways. Here, I characterize a theory as positivist if it adheres to the separation thesis; therefore, legal realism is a positivist theory. One could, however, perceive realism as being opposed to positivism by viewing positivists as

and morality must in some way be kept separate (the separation thesis) but it is difficult to tell exactly what connection he had in mind. He did observe that the "practical importance"¹⁴ of distinguishing law and morality can be seen in the fact that, although the bad man may have no concern for what is morally required, he still wishes to know what is legally required in order to avoid the unpleasant application of governmental power against himself.

Why should the bad man's interests show that it is important to distinguish law and morality? Holmes could have adapted an argument that has been used by philosophers, but which is nonetheless fallacious. A Holmesian adaptation of this argument would hold that since the bad man is concerned with law but not morality, law has a property which morality lacks—the property of being of concern to the bad man. Thus, the argument continues, since they differ in properties, law and morality cannot be identical. Arguments of this form are notoriously unsound. Given that intensional properties such as "being of concern to a bad man" are genuine properties, which probably should be denied, such properties still cannot be used to support the argument that law and morality are not identical.¹⁵

Even if this were not a fallacious argument, it is unlikely that Holmes intended to argue merely that law and morality are not *identical*. Only a very radical natural lawyer would claim that they are, and it would be better to analyze the dispute between positivists and natural lawyers in a context less radical than this. The claim that law and morality must be separated is sometimes intended to suggest that our beliefs about what the law ought to be easily can obscure our vision of what it is, and thus, to avoid confusion, we must be careful to keep our consideration of what law ought to be separate from our investigation into what it is. We shall see a bit later that Holmes had something like this in mind, but first we must ask what the bad man's interests have to do with the relationship between law and morality.

As we have seen, Holmes claimed that one who has no interest in morality nonetheless has *reason* to care about the law, because even a bad man has goals, and the state is likely to interfere with his pursuit

essentially engaged in the analysis of what legal rules are. For a recent example of a jurist who thinks that positivism and realism are opposed, see T. MORAWETZ, *THE PHILOSOPHY OF LAW* 70 (1980).

¹⁴ O.W. HOLMES, *supra* note 1, at 170.

¹⁵ To see the fallacy in such an argument, consider the following example: The sum of one and one has the property of being computable by most first graders. The fifth root of 32 lacks the property of being computable by most first graders. Therefore, $1 + 1 \neq \sqrt[5]{32}$. Obviously, this argument is unsound.

of those goals unless his actions remain within the bounds of law. It should be noticed immediately, however, that Holmes's claim does not adequately distinguish law and conventional morality. The bad man has the same reason for knowing about conventional moral requirements as he has for knowing about legal requirements; many bad men succeed largely because of an ability to pretend to be good men and, hence, to avoid moral censure. Therefore, the reasonableness of the bad man's concern with law does not distinguish law from conventional morality.

There is, of course, a difference between law and conventional morality that will not go unnoticed by the prudent bad man. A salient characteristic of the law is that judicial decisions (and, for that matter, legislative decisions) are *coercively* enforced by the state, thus limiting the ways in which one can live one's life. The imposition of these limits comes about because an individual limits his activities in order to conform to law, against the threat that the state may curtail his freedom. It is this characteristic that makes law of interest to the bad man, and this characteristic distinguishes law from conventional morality. Both law and conventional morality give rise to prudential reasons for action. Both limit rational behavior, so this feature alone does not distinguish them; the distinguishing factor is that the limits on rational action arising from the law depend on state action, or on the actions of officials.

Holmes's contention that the bad man theory supports the separation of law from morality ultimately *depends* on the familiar conception of the law as institutional in some way that morality is not.¹⁶ The bad man's point of view is supposed to emphasize the institutionality of law. It is undoubtedly true that law is institutional and that morality need not be institutional in the same way. This is especially true for *critical* morality, the distinguishing feature of which is that its validity does not depend on what people believe is moral.

Nevertheless, demonstration of the institutional nature of law fails to prove that law does not necessarily incorporate critical morality; such an incorporation would fulfill the hopes of even the staunchest natural lawyer. If law necessarily incorporated critical morality, it

¹⁶ It is far from obvious that merely pointing to the institutionality of law establishes a crucial distinction between law and conventional morality. Although much more should be said about the exact nature of law's institutionality, Holmes failed to elaborate on this issue. I shall not discuss the matter further except to say that a reasonable explanation of the institutionality of law that does distinguish it from conventional morality can be found in H.L.A. Hart's discussion of the transition from a pre-legal society to a society with law. See H.L.A. HART, *supra* note 4, at 85-96.

would almost certainly be a mistake to ignore moral reasoning when attempting to ascertain what the law is. Thus, Holmes's theory does not provide conclusive reason to believe that the institutional nature of law supports a distinction between law and critical morality. It is, however, relatively easy to see the strength of his reasons for insisting upon the distinction. To say that law is essentially institutional is to say that the content of law is determined by the actions of officials in characteristic legal institutions. If one accepts this proposition and still maintains that law necessarily incorporates critical morality, one must prove that legal officials will always act in such a way that makes critical morality a part of law.¹⁷ In the absence of such an argument, there is little reason to believe that critical morality is necessarily incorporated by the actions of legal officials.

Since the content of law is determined by the action of officials, an empirical investigation into how officials act seems appropriate. Holmes, following a long positivist tradition, asserted that officials often make immoral law: "Yet it is certain 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"¹⁸ While Holmes's allusion to "opinion" may make it difficult to interpret his assertion as addressing critical morality, his moral skepticism probably prevented him from directly arguing that law can deviate from true moral principles.

Citing the enforcement of immoral laws is a popular way of defending the separation thesis. The argument can succeed only insofar as the test for what law is depends on what courts actually enforce. Holmes's adoption of this test was not arbitrary. He adopted the point of view of the advising attorney and attempted to construct a theory of law appropriate for that point of view; Holmes could reasonably claim that it is appropriate for an advising attorney to use enforcement as the test for what is required by law. Some legal theorists, however, reject mere enforcement as the test for what law is, arguing either that the alleged examples of immoral laws are not really laws at all or that they are not really immoral.¹⁹ If they are truly to take issue with

¹⁷ One might argue that critical morality contains only the single requirement that one obey positive law. I shall ignore this argument simply on the grounds that it is too implausible. Such an argument should more reasonably be understood as an attempt to demonstrate the nonexistence of critical morality.

¹⁸ O.W. HOLMES, *supra* note 1, at 171.

¹⁹ See, e.g., L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969). See also R. DWORKIN, *Civil Disobedience*, in *TAKING RIGHTS SERIOUSLY* 206 (1977) (civil disobedient can reasonably and truly claim he has acted lawfully even when the Supreme Court has decided otherwise).

Holmes by arguing that mere enforcement is not the proper test for law, they should argue that some central role other than that of the advising attorney should be selected when we try to ascertain what the law is.²⁰

As mentioned earlier, the separation thesis can be interpreted to suggest that the determination of what law is and the moral evaluation of law should be undertaken separately in order to avoid confusion. Holmes presented a similar argument—he claimed that law and morality should be separated because of the confusion generated by their common vocabulary. As an example, Holmes used the word “malice,” claiming that in law, whether or not an agent has acted with “malice” is independent of his actual motives.²¹ Holmes’s argument for the separation thesis is plausible if words do indeed differ in meaning when used in law and morality; we must look further, however, to determine which version of the separation thesis this argument supports.

The difference in meaning gives rise to the obvious danger of misreading either law or morality, because the meaning of words may be incorrectly imported from one context into the other. This danger is more likely to lead to misunderstanding law than conventional morality, simply because the conventional morality of one’s society is probably better known and understood than the law; this is especially true for those who lack legal training in societies with complex legal systems. Given this danger, it is practically important to view legal codes and moral codes as independent entities. It might even be beneficial to shed all of one’s knowledge about morality when trying to understand the law, lest this knowledge lead one to misunderstand the meaning of words in the law. Hence, there is at least a practical reason for maintaining some version of the positivist’s separation thesis.

It remains to be seen whether Holmes’s argument can support any version of the separation thesis that is stronger than the separate-because-practical thesis. For instance, would not the claim that law is necessarily moral—that legal standards necessarily incorporate moral standards—be compatible with the different uses of a common vocab-

²⁰ Both Dworkin and Fuller do seem to think a central role other than that of the advising attorney should be chosen. See R. DWORKIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 19, at 81; Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376-95 (1946). Both adopt the point of view of the decisionmaking judge.

²¹ O.W. HOLMES, *supra* note 1, at 176-77. See also O.W. HOLMES, *THE COMMON LAW* 41-42 (M. Howe ed. 1963) (arguing that throughout its history, law has been moving from a concern with actual motives to the use of “external” standards for judging conduct).

ulary by law and morality? There is no reason to assume that different uses of a common vocabulary necessarily prevent extensive overlapping between moral and legal norms. For example, it is arguable that "murder" has a different meaning in legal contexts and moral contexts. The legal conception of murder includes "felony murder," some applications of which may seem morally questionable.²² Clearly, however, some moral norms that forbid the killing of human beings (the articulations of which would, or could, use the word "murder") are probably always legal norms as well. Holmes should have argued that his point about different meanings permits exclusion of the sort of connection between law and morality that satisfies natural lawyers. His point might not even rule out the *possibility* that all norms of morality must be included among the norms of any legal system. If Holmes's point cannot rule out this preposterously strong thesis, it certainly cannot rule out weaker, more plausible theses that connect law and morality. I can see little reason to think that his point can rule out the strong claim. Therefore, Holmes's argument cannot go beyond his earlier contention that immoral laws have in fact been enforced.

I may be treating Holmes unfairly by reading him as arguing against opponents whom he did not even undertake to engage. After all, Holmes may have been doing nothing more than offering practical advice to law students. In fact, Holmes explicitly stated his reason for addressing the relationship between law and morality: "When I emphasize the difference between law and morals I do so with reference to a *single end, that of learning and understanding the law.*"²³ This does seem like a bit of practical advice, and it is clear that the sort of understanding Holmes had in mind is that of the lawyer who can accurately describe the behavior that is legally required, rather than the more theoretical understanding sought by a philosopher or anthropologist of law. Perhaps the arcane disputes between legal positivists and natural lawyers were insignificant for Holmes's purposes. Nonetheless, Holmes's paper is much more interesting if we take its purpose, at least in part, to be one of laying the foundation for a legal theory. It is worthwhile, therefore, to see which, if any, opponents are vulnerable to a Holmesian attack.

²² For example, a man could be charged with felony murder if he and a friend held up a bank and a guard shot and killed his friend.

²³ O.W. HOLMES, *supra* note 1, at 170 (emphasis added).

III

THE BAD MAN AND THE JUDGE

Although Holmes used his bad man theory to explain what law is, he also discussed what law ought to be; in doing so, he attributed a duty to judges: "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage."²⁴ Holmes seems to have attributed a moral rather than a legal duty to judges here. Since he believed that law ought to provide for social advantage, he also believed that judges ought to make socially advantageous decisions.²⁵

Let us suppose that judges either recognize this duty or come to recognize it and that their decisions are affected by considerations of social advantage. These considerations would be moral considerations,²⁶ so that judicial decisions would, according to Holmes, be affected by moral considerations. Would the bad man theory apply under these circumstances? The bad man wants to know what judges will decide, so he will also want to understand all of the factors involved in judicial decisionmaking. If moral considerations play a significant role in the determination of judicial decisions, then the bad man must attempt to achieve an understanding of those considerations. As Lon Fuller once argued,²⁷ the bad man must adopt the point of view of the good man if he is to succeed. One wonders whether this ironic turn raises a serious problem for Holmes's bad man theory or, more generally, for any theory that attempts to maintain a significant distinction between law and morality.

According to Holmes, law consists of prophecies of what courts will decide. In recent philosophical jargon, this claim should probably be considered a category mistake, because laws and prophecies appear to be entities of radically different types. A more reasonable conten-

²⁴ *Id.* at 184.

²⁵ When Holmes shifted his focus from what law is to what law ought to be, he also began to emphasize a different legal role—that of the deciding judge. One might ask whether positions taken by legal theorists about the relationship between law and morality correspond with the legal role considered by the theorist to be primary. I believe that there is such a correspondence. Generally, one can account for the difference between legal theories by recognizing that the theorists have adopted points of view of those occupying different legal roles and have then attempted to describe law as it would be seen by the occupants of those roles.

²⁶ One need not be a utilitarian to believe that considerations about social benefits and harms are relevant to moral decisionmaking. Most moral theories would hold that the effects of one's decisions on society are relevant to evaluating those decisions—especially if those effects are substantial.

²⁷ L. FULLER, *THE LAW IN QUEST OF ITSELF* 94-95 (1940).

tion is that propositions of law, or claims about what the law is, amount to prophecies of what courts will do. This revision, however, leaves unanswered the question of what law is. A plausible (though ultimately inadequate) response is that if propositions of law are predictions of what courts will do, then law consists of those factors upon which accurate predictions can be made. This account of law would suggest a very close connection between law and morality if judges in fact were to consider social advantage when making decisions. This, in turn, would lead to the following conclusion: Because law consists of those facts upon which successful predictions can be made, law consists of facts about social advantage, or at least facts about what judges believe to be socially advantageous.

These considerations suggest that if judges accept the duty that Holmes attributed to them, then law becomes connected with morality (at least conventional morality) in such a way that threatens Holmes's separation thesis. The severity of this danger, however, is easily exaggerated. The danger appears only if judges conform to the duty; no argument has been presented to suggest either that they must do so or that the connection between law and morality is maintained if they do not. No sane positivist has denied the causal connection between the content of law and morality as it is perceived by the creators of law, and no greater connection than this has been established here. It may be true that the successful bad man must adopt the point of view of the good man, but it is true only if judges typically are good men. Although I am hesitant to express too great a cynicism about the character of judges, it seems likely that Holmes's bad man need not fear too great a contamination from the good man's point of view. The threat to Holmes's general position therefore fails to materialize fully; any connection between law and morality that results from the duty attributed to judges by Holmes depends on what judges *actually do*, and it seems quite possible that they will fail to do what they ought.²⁸ Hence, the separation between law and morality is maintained.

We are led by these considerations to look at Holmes's bad man theory as it relates to judges. The bad man theory attains its plausibility by emphasizing the advisory role of the attorney, but there are many other legal roles. The judge's legal role is at least as important

²⁸ This discussion does not address the claim that the content of law depends on the considerations judges *ought* to use in deciding cases rather than on those they *actually* use. According to Ronald Dworkin, for example, the concept of law is "the concept of the standards that provide for the rights and duties that a government has a duty to recognize and enforce . . . through the familiar institutions of courts and police." R. DWORGIN, *supra* note 19, at 47.

as the attorney's advisory role chosen by Holmes. Indeed, the judge's role has been a cornerstone for most legal theories advanced in this century. What significance, if any, does the bad man's point of view have for judges? Holmes's theory is a predictive theory, and predictive theories often have been criticized as inadequate to account for the judicial role.²⁹ When a judge is making claims about what is required by law, he is not simply predicting his decision. If the essence of the bad man's point of view is that it is concerned only with what judges will do, it is absurd to suppose that judges can adopt that point of view; they must have reasons beyond a desire for prediction for concluding that the law demands something or other.³⁰

Although judges cannot reasonably adopt the bad man's point of view, it does not follow that Holmes's theory ignores the judge's role in the legal system. The bad man theory itself does not confront questions about the reasons behind judicial decisions and, hence, it does not add to our understanding of the judicial function; any *application* of the bad man theory will improve understanding, however, because the bad man must understand the judicial function in order to make successful predictions. As previously noted, the bad man may have to understand the motives of the good man if he is to succeed. More generally, the bad man must acquire an understanding of the way others view the law, and it is most important to understand how the judges of his legal system view it. This approach to the relationship between the bad man theory and the judicial role suggests a hierarchy of legal theories with different questions from the philosophy of law answered on different levels. The bad man theory is at a higher level than a theory about the nature of judicial decisionmaking, because one must formulate the latter theory in order to apply the former.

It is therefore possible to characterize the bad man's point of view as a methodological starting point for the construction of other legal theories; it is the point of view that will be of service in formulating more specific theories. Consider Ronald Dworkin's theory of adjudication, which appears to conflict with Holmes's bad man theory.³¹ Dworkin's theory might represent what the bad man would come up

²⁹ See, e.g., H. L. A. HART, *supra* note 4, at 143-44.

³⁰ This is not to say that a judge would never be interested in predicting what other judges will decide. For instance, a judge about to make a "landmark ruling" may want to predict whether other judges will immediately overrule him. This may be because he believes that justice requires consistency in judicial decisions, so even here the judge's concerns go beyond mere prediction.

³¹ R. DWORKIN, *supra* note 20, at 81.

with as a result of his attempts to predict the outcome of American cases. Dworkin asserts that his theory is an accurate description of judicial reasoning in hard cases (though perhaps with an imperfect understanding of what they do). If this is true, the bad man should understand this method and use it himself when he tries to predict what judges will decide. Thus, insofar as Dworkin's theory is meant to be descriptive, it is perfectly compatible with Holmes's bad man theory.³² The bad man theory applies to any legal system; Dworkin's theory of adjudication applies only to those legal systems that operate consistently with this theory. Thus, in this respect, the bad man theory is of a higher order than particular theories of adjudication.

It is therefore incorrect to say that the bad man theory ignores the judge's point of view. Whether a judge can, or should, adopt the bad man's point of view is irrelevant. The bad man theory tells us what we need to do to develop an adequate theory about what judges do. It is not itself a theory about what judges do, and any attempt to criticize the bad man theory on the ground that it fails to emphasize properly the role of judicial decisionmaking merely reflects a misconception of Holmes's claims.

As suggested above, one can characterize several non-Holmesian legal theories as particular applications of Holmes's bad man theory rather than as competing theories. Holmes appeared to undermine this contention by dismissing much legal theory as unimportant:

You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges, or you may think that law is the voice of the *Zeitgeist*, or what you like. It is all one to my present purpose. Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules which he laid down. In every [legal] system there are such explanations and principles to be found.³³

Although Holmes did dismiss much of what has passed for legal theory, this passage does not suggest that the bad man theory is the final word in legal theory. In fact, Holmes claimed that every legal system is subject to a rational explanation and possesses some discern-

³² Dworkin, of course, intends his theory to be normative as well as descriptive since he believes that his theory is the morally correct theory of adjudication. The bad man, however, would have no interest in the normative implications.

³³ O.W. HOLMES, *supra* note 1, at 179.

ible order; thus, he suggested a way for legal philosophy to progress beyond the bad man theory.

Holmes's claim might be read as an endorsement of the type of legal philosophy pursued by Lon Fuller, who appeared to be antagonistic to a Holmesian approach. This endorsement, however, does not require desertion of the bad man theory. Fuller claimed that law can be understood only by understanding the purposes law serves; once these purposes are understood, it can be seen that the legal rules of a system relate rationally to one another. In Holmesian terms, an understanding of this order would facilitate the prediction of official action. The bad man therefore has reason to engage the Fullerian approach to jurisprudence. If Holmes's contention that legal decisions are inevitably subject to rational explication is correct, and if the bad man theory is, as Holmes maintained, compatible with an attempt to discern such rational principles, then Fuller was wrong to suggest that this theory is radically opposed to any form of legal positivism.

CONCLUSION

Holmes attempted to construct a theory of law by focusing on the role of a practicing lawyer who advises clients about the law. The study of law for someone in this role is aimed at producing accurate predictions of judicial decisions. The concern for prediction justifies viewing the law through the eyes of the bad man. According to Holmes, the bad man's point of view effectively prevents confusion of law with morality. Holmes's bad man, however, is really only the prudent man; the prudent man's point of view is central to our understanding of law because everyone with an interest in law has at least a prudential reason for this interest.

Holmes supported a separation between law and morality by reasoning that while the content of law depends on the behavior of legal officials, the content of morality is largely free from such dependence. Although this reasoning alone does not prove that the contents of law and morality differ, Holmes referred to the de facto enforcement of immoral laws to further support his position. De facto enforcement is the correct test for the content of law, because Holmes was considering the point of view appropriate for the advising attorney.

Holmes's legal theory cannot be dismissed as easily as some jurists have thought. A predictive theory of law may not explain all facets of a legal system, but it does increase our understanding of one significant role within a legal system—that of the legal adviser—and it

emphasizes the central reason for which people are interested in law. Nevertheless, the bad man theory cannot stand on its own; it must be supported by a theory of adjudication. The bad man theory itself can be used to show where further theoretical work is needed, however, so rather than being undermined by other theories, it is strengthened by them.

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