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THE BAD MAN REVISITED*

William Twining†

On the first day of my last visit to the United States I found myself with half-an-hour to kill in one of your most famous railroad stations. Naturally I visited the bookstore. One of the first items to catch my attention was a work entitled *The Bust Book*,¹ written by four young members of something called "the Movement," about which you probably know more than I. Most of the book is devoted to advice to participants in political demonstrations on how to behave when confronted with what is sometimes called "The Law," but which is referred to by a number of other terms in this particular work. The volume contains a good deal of information and advice not normally to be found in law books, ranging from what to wear in a demonstration to what factors to take into account when deciding whether to conduct one's own defense in court. It more than hints at a particular point of view. It also has pictures, the exact relevance of which is not entirely clear.

The subtitle of *The Bust Book* is "What to do Until the Lawyer Comes." It might well have been "The Bad Man—Modern Style."² Indeed, there seems to be emerging a new genre of writing for which such a title seems eminently suitable, including books on draft counselling, manuals—flippant, semi-serious, or professional—on the manufacture of homemade bombs and booby traps, radical critiques of the American judicial system, and miscellaneous pieces in the underground press. Confronted for the first time by this new fashion in literature, I could not help but wonder what Holmes would have thought of such works and whether they represent an application of his Bad Man theory. The spirit of these works does not seem to be the spirit of Holmes, but is the underlying premise so very different? Has the Bad Man theory now come into its own?

* This article is a revised version of a paper read to the Society for the Humanities at Cornell University in April 1971. I am indebted to Professors Robert S. Summers, James O. Freedman, and Geoffrey Wilson for valuable comments on an earlier draft. The present version does not necessarily represent their views.

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¹ K. BOUDIN, B. GLICK, E. RASKIN & G. REICHBACH, *THE BUST BOOK* (rev. ed. 1970).

² The reference is to the Bad Man of Oliver Wendell Holmes's legal classic, "The Path of the Law." See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) [hereinafter cited as *The Path of the Law*].

Shortly thereafter I had occasion to ask a class of about forty senior law students in a very prestigious institution how many of them had read Holmes's "Path of the Law."³ Barely half-a-dozen claimed, or confessed, to have done so. This article represents a modest attempt to keep alive interest in this legal classic, since it would be a pity if concern for the Bad Man should be confined to subterranean circles. For it is a classic, and not only by Mark Twain's definition of that word as a work "which people praise and don't read." Holmes's piece has qualities which stand the test of time: it has the capacity to survive powerful, and sometimes valid, criticism; as circumstances change it invites reinterpretation and fresh criticism; it continues to strike a responsive chord among lawyers and law students who read it; and it contains memorable phrases which have achieved the double-edged distinction of becoming clichés. Moreover, either the Bad Man is very much alive today or there is some imposter about who deserves to be exposed for what he is.

I

"THE PATH OF THE LAW"

Although "The Path of the Law" is often treated as a contribution to general jurisprudence, it was intended first and foremost as a discussion of legal education. In addition to the fact that much of it deals explicitly with legal education, the structure of the address, the occasion, and Holmes's concerns at the time justify such an interpretation.

Holmes begins as follows:

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.⁴

³ *Id.*

⁴ *Id.* at 457.

The occasion was the dedication of a new hall at Boston University Law School, an appropriate site from which to launch a few thinly disguised missiles at a more renowned institution located across the river. Langdell had recently retired from the Deanship of the Harvard Law School and, as is well known, Holmes had been a persistent but discreet critic of Langdell's approach to law, which he considered to be generally too redolent of the ivory tower.⁵ Holmes, who was at the time still on the Massachusetts Supreme Court, treats his audience as future practitioners of law. It is not unreasonable to suggest that the bulk of his address is directed to the question of what kind of legal education is best suited to the intending attorney's needs. It is also not unreasonable to interpret his answer to this question as being, in large part, a veiled attack on certain aspects of the philosophy of legal education which had become established at Harvard under Langdell's leadership and which was rapidly beginning to influence other law schools.⁶

⁵ I finished Langdell's *Equity Jurisdiction* yesterday It has his acumen and patient discussion of detail, but I think brings out the narrow side of his mind, his feebleness in philosophising, and hints at his rudimentary historical knowledge. I think he was somewhat wanting in horse sense

1 HOLMES-POLLOCK LETTERS 140 (M. Howe ed. 1941).

Holmes's ambivalent attitude towards Langdell is further illustrated in another letter to Pollock:

[T]o my mind he represents the powers of darkness. He is all for logic and hates any reference to anything outside of it, and his explanations and reconciliations of the cases would have astonished the judges who decided them. But he is a noble old swell whose knowledge, ability and idealist devotion to his work I revere and love.

Id. at 17.

⁶ This statement is subject to a number of caveats. First, there was common ground between Holmes and Langdell which was as significant as their differences. Holmes did not seriously challenge Langdell's famous assertion that all the available materials for the study of law are contained in printed books. He echoes the view that "the number of fundamental legal doctrines is much less than is commonly supposed" (C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871) (Preface)); he shares, to a large extent, Langdell's case-law orientation; he accepts that the study of legal history can be of value, provided that it does not decline into antiquarianism (*The Path of Law* 474); he even concedes that there has been an improvement in modes of teaching, but hastens to add that "ability and industry will master the raw material with any mode." *Id.* at 477.

Second, not all of Holmes's barbs are directed against Langdell's Harvard. It would hardly have been appropriate to charge that institution with consistently failing to distinguish between law and morals, with overemphasizing the importance of Roman Law, or even with regularly succumbing to the pitfalls of antiquarianism. And when Holmes chides the "practical-minded" for undervaluing jurisprudence and the judges for failing adequately to weigh considerations of social advantage (*id.* at 478), he is explicitly spreading his fire quite widely.

A third, and final, caveat. Although the main focus of "The Path of the Law" is on legal education, it does not follow that the significance of the piece is limited to that relatively parochial topic. Worthwhile discussions of legal education often lead directly

"The Path of the Law" is diffuse and rambling. Much of its charm lies in its individual *aperçus* and obiter dicta. But there is a discernible central argument, for the core of the address is devoted to criticizing what Holmes considered to be two fallacies: the confounding of morality and law, and what he termed "the fallacy of the logical form."⁷ Although the main targets of Holmes's criticism were certain ideas associated with Langdell's Harvard, at first sight only one of the two fallacies is attributable to Langdellism, and the Bad Man plays no part in its exposure. However, I propose to argue that in dealing with the alleged fallacies Holmes was attacking on three main fronts, not two, and that the main function of the Bad Man device was to expose a basic flaw in Langdellism.

We need not spend long on that part of the attack which deals with the idea that "the only force at work in the development of the law is logic."⁸ In other contexts Holmes had quite explicitly associated this idea with Langdell;⁹ here he is content to say that this is "the natural error of the schools, but it is not confined to them."¹⁰ Holmes's arguments for bringing into the open the unarticulated policy assumptions embedded in legal reasoning and his plea for a closer integration of law and economics are well known.¹¹ For present purposes it is sufficient to note that the Bad Man plays no part in this particular argument.

to the questioning of accepted theoretical assumptions, and Holmes's address is not a unique example of provocative jurisprudential statements stimulated by educational concerns. There has been, especially in America, a close connection, both historical and analytical, between legal theory and discussions of legal education. It is not necessary to expound a theory of law every time one talks or writes about curriculum changes or professional training, but any such discussion presupposes at least some assumptions about law and lawyers (or law-trained people). See text following note 15 *infra*. Often introspection on the part of legal educators leads them straight back to consideration of fundamentals. Further, as a matter of history, a significant amount of legal theorizing in the United States over the past 100 years has been stimulated in large part by educational concerns—witness, for example, the early theoretical writings of Corbin, Llewellyn, Lasswell, McDougal, and, to a lesser extent, Jerome Frank. See generally Comment, *Legal Theory and Legal Education*, 79 YALE L.J. 1153 (1970).

⁷ *The Path of the Law* 468.

The relationship between law and morals and the place of logic in law are familiar topics to students of jurisprudence; some issues concerning them are perennial subjects of controversy. I do not propose to deal with these issues here, except as they have a direct bearing on the concept of the Bad Man.

⁸ *Id.* at 465.

⁹ See note 5 *supra*.

¹⁰ *The Path of the Law* 465.

¹¹ "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics." *Id.* at 469. "[E]very lawyer ought to seek an understanding of economics." *Id.* at 474.

Holmes's second line of attack deals with the confusion of law and morality, and the related, but not identical, error of failing to distinguish law as it is from law as it ought to be. Rather than identify particular offenders, Holmes is content to remark that the error "sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness."¹² The Bad Man is introduced ostensibly as a device to clear up the confusion. Holmes's point is that whereas the good and law-abiding citizen who looks to both morality and law to tell him how he ought to behave may not distinguish clearly between legal sanctions and "the vaguer sanctions of conscience,"¹³ the Bad Man is indifferent to morality (including its sanctions) and is only interested in the actual consequences of his actions. He has a practical reason for observing the distinction between law and morality. In other words, while the Good Citizen asks "How should I behave?," the Bad Man inquires "What will happen to me if I embark on this course of action?"

Perhaps it is because the Bad Man's question is in the form of a request for a prediction that Holmes was led to link the distinction between law and morality to the idea of prophecy.

The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.¹⁴

This passage is one of the most quoted and criticized in all American jurisprudence. It is often treated as the *locus classicus* of the so-called prediction theory of law.¹⁵ Given the context and Holmes's objectives, there is a suggestion of hyperbole in treating it as out-

¹² *Id.* at 459. It is unlikely that Holmes considered Langdell to be a prime offender in this respect.

¹³ *Id.*

¹⁴ *Id.* at 460-61.

¹⁵ See, e.g., E. PATTERSON, JURISPRUDENCE 118-22 (1953); W. RUMBLE, AMERICAN LEGAL REALISM 41-44 (1968); cf. H.L.A. HART, THE CONCEPT OF LAW (1961); G. PATON, JURISPRUDENCE (2d ed. 1951).

lining a general theory of law. By purporting to answer the question "What constitutes the law?" he could be said to have been advancing a definition of law or even an embryonic theory of law, and thus to have invited criticism on this basis. But it was not an essential part of his argument. It is not necessary to outline a theory of law every time one talks or writes about legal education, although it is often important to make one's assumptions explicit in such contexts. Holmes's main arguments did not depend upon defining law in terms of prophecies or predictions. The gist of his educational thesis would have been unaffected if he had adopted, for example, Austin's analysis of the concept of law.¹⁶ The quoted passage, read in context, is best treated as a dramatic or rhetorical device rather than as a necessary step in Holmes's argument. Yet the Bad Man and the idea of prediction play an important part in his thesis. Holmes did not himself develop these ideas at length either in "The Path of the Law" or in his other writings. More recently, however, the idea of prediction has regained a central place in discussions of the concept of law, and the Bad Man has become a not inconsiderable character in juristic literature.¹⁷ Accordingly, at the risk of being charged with reading too much into Holmes, I propose to consider first, the significance of the Bad Man for legal theory; second, the significance of the main arguments in "The Path of the Law" for legal education; and, finally, the connections, if any, between Holmes's Bad Man and the addressees of *The Bust Book*.

II

THE BAD MAN AND LEGAL THEORY

A. *Who is the Bad Man?*

In the present context, the Bad Man is not a revolutionary nor even a reformer out to change "the system." The Bad Man's concern is to secure his personal objectives within the existing order as painlessly as possible; he is not so much alienated from the law as he is indifferent to all aspects which do not affect him personally. Unlike Sartre's Saint Genêt, he is not one who has a problem of identity—who defines his being in terms of the system and who is driven to do acts *because* they are criminal or antisocial.¹⁸ Nor is he a subscriber to

¹⁶ See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 82-83 (1954).

¹⁷ See L. FULLER, *THE LAW IN QUEST OF ITSELF* 92-95 (1940).

¹⁸ J.P. SARTRE, *SAINT GENÊT* 66-67 (B. Frechtman transl. 1963).

some perverse ethic which turns conventional morality upon its head. The Bad Man is amoral rather than immoral. He is, like Economic Man and Bentham's "civilized" actors, a rational, calculating creature. In this and in other respects he does not necessarily reflect in a realistic manner the characteristics of actual deviants. Like Dahrendorf's *homo sociologicus*, he "can neither love nor hate, laugh nor cry. He remains a pale, incomplete, strange, artificial man."¹⁹ Indeed, there appears to be no reason why the Bad Man should not be an artificial person, such as a corporation. In short, he is a theoretical construct with as yet unexplored potential as a tool of analysis.

Perhaps we can go a little further and suggest that the Bad Man can be defined in terms of prediction. He is the person whose only task is to predict what will happen to him if he embarks on some particular course of action. Here we may anticipate a possible objection. Although it may be granted that prediction is central to the role of the Bad Man, it is admitted that there are others who are similarly concerned—for example, the lawyer who has to decide whether it is worth appealing an adverse decision, the advocate who needs to predict how the personnel of a particular court will react to some line of argument or to the testimony of some witness, the judge who may wish to predict the likelihood of reversal on appeal or the possible effects of sending an offender to jail, the legislator who is concerned with the likely effects of a legal provision on patterns of behavior. And the scientist—is he not also concerned with prediction?

A simple response is that although these may all be valid observations, they are not objections to defining the Bad Man in terms of prediction. A comprehensive prediction theory would need to give a comprehensive answer to a question such as "Who is concerned with predicting what events at what point in time for what purposes using what means?" With the exception of the scientist, whose standpoint raises special difficulties, all the other characters are predicting as part of some other task; for example, the advocate predicts in order to perform the task of persuasion. For some purposes it may be useful to isolate the task of predicting *simpliciter*; for other purposes prediction is more usefully seen as part of a cluster of tasks. In other words, the Bad Man is a device for isolating for special consideration the task of predicting certain kinds of events.

The idea of prediction provides no basis for distinguishing be-

¹⁹ R. DAHRENDORF, *Homo Sociologicus*, in *ESSAYS IN THE THEORY OF SOCIETY* 76 (1968). This essay explores at length the relationship between constructs like *homo sociologicus* and actual people. See also H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 78 (1950).

tween the standpoints of the Good Citizen and of the Bad Man. It is not incompatible with good citizenship to be concerned with predicting the likely consequences of one's actions. The Bad Man, however, is affected by guidance as to his actions *only* insofar as such guidance predicts the ultimate consequences of those actions. Take, for example, the situation of a law-abiding individual seeking advice on his liability to pay income tax. If his conscience permits him to make a clear distinction between tax avoidance and tax evasion (as far as the law recognizes such a distinction), he may ask what lawful course of action will leave him with the most money. If he has a tender social conscience, he may reject certain kinds of lawful avoidance devices as immoral; nevertheless, he may wish to predict what his net income is likely to be. There may also be occasions when the Good Citizen can be said to have a moral duty to predict the likely consequences of his actions. The difference between the Bad Man and the Good Citizen does not rest on the latter's indifference to prediction, but on the former's indifference to morality.

Of course, the distinction between law and morality is not exclusively the concern of the Bad Man. Bentham's legislator draws a sharp distinction between law as it is and law as it ought to be. Statements such as "This is a court of law, not of morals" are commonplace; typically, those who are concerned with analyzing and expounding legal doctrine draw similar distinctions. What distinguishes the standpoint of the Bad Man from the standpoint of the legislator, the judge, and the advocate is his exclusive concern with prediction; however, in this respect the standpoint of the Bad Man is very close to that of the Good Citizen and to that of the legal advisers of both of them.

Thus, the Bad Man has two characteristics: his badness and his citizenship.²⁰ The distinction between law and morality is related to the former characteristic, the idea of prediction to the latter. When Holmes advised his audience to adopt the standpoint of the Bad Man, he was not seriously urging them to use the Bad Man as an ethical model; rather, he was suggesting that they look at law from the perspective of a citizen who is concerned with predicting the consequences of his actions. He was in effect saying that as intending private practitioners of law they should put themselves in the shoes of the legal adviser of citizens, good or bad. From that standpoint their main concern should be with prediction.

²⁰ "Citizenship" as used here refers to the condition of being subject to the laws of a particular legal system rather than to nationality or legal status.

B. *What Events Does the Bad Man Desire To Predict?*

According to Holmes, the Bad Man is anxious to predict what the "courts will do in fact."²¹ Even if we allow that by "do," Holmes refers not only to judicial decisions on questions of fact and law, but also to the sanctions courts are likely to impose, this still seems to be an unduly restrictive answer. Such a response reflects, perhaps, a court-centeredness on Holmes's part, with possible overtones of "appellate court-itis."²²

Suppose, for example, that our friend the Bad Man is in Boston (or Cambridge) wondering whether or not to do some specific act. He may ask, "What are the chances that a Massachusetts court would hold this type of act to be criminal?" But this is only one of a series of questions pertinent to the decision whether or not to do the act. He needs to estimate the likelihood of the authorities discovering the commission of the act; how energetically, if at all, they are likely to investigate it and other matters related to detection and apprehension; if apprehended, whether there will be a decision to prosecute and, if so, the likelihood of conviction; the likely effect of pleading guilty or not guilty; and the probable nature of the sanction if he is convicted. If he wants to follow the total process through, the Bad Man may also need to consider a whole range of possible post-conviction decisions. The decisions of courts are merely a single phase in what Lasswell terms a "flow of determinative activities" which go to make up the total process which may affect the Bad Man.²³ And, of course, if one is talking about actual people who are in danger of being "busted," not only do they need to predict a wider range of possible events, but they also need to perform tasks other than prediction.²⁴ A comprehensive picture of legal process on the Holmesian model would take all of these considerations into account.²⁵

²¹ *The Path of the Law* 461.

²² Cf. J. FRANK, COURTS ON TRIAL 222-24 (1949). The broadening of the focus of attention to include all officials was suggested by Karl Llewellyn. See K. LLEWELLYN, *A Realistic Jurisprudence—The Next Step*, in JURISPRUDENCE 16-18 (1962).

²³ H. LASSWELL & A. KAPLAN, *supra* note 19, at 81; see McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915, 921 (1952). See generally text accompanying note 42 *infra*.

²⁴ Thus, for example, *The Bust Book* is addressed to people who are presumed to have political aims which they are advised to bear in mind at each stage of their encounters with "the system."

²⁵ Holmes never fully developed such a comprehensive picture, although he is sometimes treated as if he had. At least he is treated, especially by critics, as being primarily responsible for the so-called prediction theory of law. The Bad Man passage (see text accompanying note 4 *supra*) is a somewhat slender pedestal for such a target, but it is not enough to dismiss the critics merely by suggesting that they have succumbed too easily to the temptation of elevating what they have sought to attack.

C. *Criticisms of the Bad Man Concept as a Theory of Law*

One standard criticism of the Bad Man passage is that concepts like "court" or "official" presuppose the idea of a legal system. They are, it is said, rule-defined concepts. To purport to define or elucidate "law" in terms of prophecies or predictions of what courts or officials will do involves an element of circularity, for the terms "court" and "official" must themselves be defined in terms of law. Thus Holmes's statement is inadequate as a general definition of law (and, if it deserves to be so treated, as a theory of law in the restricted sense).²⁶

Another standard criticism of the so-called prediction theory of law is that it confuses the notion of prediction with the notion of rule. The point is simply illustrated by reference to the proposition "In circumstances X there is a duty not to" To say that such a proposition is a prediction or a prophecy involves a distortion of ordinary language and is likely to lead to confused thinking. In ordinary usage the statement "Y has a duty" means "Y ought"; it is a normative proposition, whereas a prediction is an empirical statement which is, *inter alia*, capable of verification. To equate rules with predictions blurs useful distinctions, such as the distinction between the existence of a rule and its actual enforcement. It also may lead to misdescription of situations in which rules in fact influence behavior. Furthermore, it obscures the point that many concepts take their meaning from legal rules.

Such an analysis is valid and important, but it is not necessarily applicable to "The Path of the Law," since Holmes limits his discussion to the standpoint of the Bad Man, who is, by definition, unconcerned with the normative. It may well be, however, that some followers of Holmes are vulnerable to this criticism. Another way of making the same point is to say that to equate rules with predictions is to confuse rules with roles or tasks involving the *use* of rules. Although a rule is a normative proposition, it can be used as an aid to making predictions. But rules have a variety of uses. The Bad Man may use propositions of law (statements of legal rules) as aids to predicting the likely consequences of his actions, but the Good Citizen also uses them as guides to correct behavior; the judge may use them as a guide to deciding and may invoke them to justify his decision; and the legislator may formulate rules to control, regulate, or guide behavior and expectations, and perhaps to educate or to assert some moral standard. Conversely, even in predicting the outcomes of court decisions the Bad

²⁶ On "theory of law," see note 36 *infra*; on "officials," see generally the works cited in note 22 *supra*.

Man and his advisers may resort to other aids in addition to or instead of formulations of legal rules. When predicting other phases of legal process, such as decisions whether or not to prosecute a suspected offender, resort to other aids to prediction will be essential. Rules are only one of the Bad Man's aids to prediction, and predicting is only one of the uses of rules.

A third criticism, closely related to the others, is that the prediction theory is inadequate as a theory of law because it does not take into account the standpoints of other participants in legal processes, such as the judge, the advocate, and the legislator.²⁷ What is particularly interesting about this criticism is its assumptions about the concept of an adequate general theory of law and, related to this, its seeming acceptance of a switch from a traditional model of law as a system of rules to a model of legal process as a system of roles.

The first assumption is that an adequate general theory of law must take into account a variety of standpoints. What is meant by standpoint (or its approximate synonym "point of view") in this context? In ordinary usage it is possible to identify several primary, but related, meanings of these terms.²⁸ First, standpoint may refer to vantage point or point of view in an observational sense, for example, as "a vantage point of the sort that a photographer might seek."²⁹ Second, adopting a standpoint or point of view may be a matter of adopting some principle or ideology or intellectual system, as when someone approaches a subject from the standpoint of a utilitarian or a Marxist. Similarly, standpoints are sometimes distinguished by reference to disciplines or specialized fields of expertise, as in the expression "from the standpoint of an economist" (or an anthropologist or a moral philosopher). Typically in such usages the viewer is seeking to understand, describe, depict, interpret, analyze, or explain the subject of his viewing without necessarily having any immediate practical objectives in mind.³⁰ Third, standpoint may be defined in terms of some

²⁷ As an indicator of some of the limitations of the Bad Man theory, this is obviously correct. It is another matter whether or not it is a fair criticism of Holmes, who identified himself with the Bad Man for a specific purpose. For an incisive account of Holmes's stance in other contexts, see Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213 (1964).

²⁸ For a useful general discussion, see Moline, *On Points of View*, 5 AM. PHILOSOPHICAL Q. 191 (1968). See also Summers, *Notes on Criticism in Legal Philosophy*, in MORE ESSAYS IN LEGAL PHILOSOPHY 8-11 (R. Summers ed. 1971).

²⁹ Moline, *supra* note 28, at 192; see note 33 *infra*.

³⁰ We might categorize these first two usages as referring to observer standpoints, as contrasted with participant standpoints. The distinction between observers and participants is emphasized by Harold Lasswell and Myres McDougal in their forthcoming work, *Law, Science and Policy*. See H. LASSWELL & M. MCDUGAL, *LAW, SCIENCE AND POLICY*

task or role or objective.³¹ Often such tasks or roles or objectives are expressed as personifications, such as "the legislator," "the advocate," or "the judge."³² The Bad Man, as here interpreted, is an example of such a construct. To investigate law "from the standpoint of the Bad Man" can mean to investigate what the Bad Man needs to know and to understand in order to be able to make effective predictions to further his own ends. Standpoint in this third sense implies some *criteria of relevance* determined by the conception of the task or role or objective in question. Thus, "the standpoint of the judge" assumes some more or less clearly defined notion of "the judge's role" which provides, *inter alia*, a basis for determining what the judge needs to know and to understand in order to do his job, as he or as others conceive it.

These three primary usages sometimes coalesce when the standpoint in question is that of an actual or imaginary person or class of persons. For example, "the standpoint of a typical Wall Street lawyer" may encompass not only what such a person needs to know in order satisfactorily to do his job, but also what he has the opportunity to observe by virtue of his special vantage point. Furthermore, for us to assume such a standpoint may (or may not) require that we adopt the ethos and attitudes of people who typically occupy such positions. It would be useful to treat this as a fourth and distinct usage of standpoint, if only to emphasize the lack of precision of ordinary usages of the term.³³ Moreover, it is only too easy to confuse notional constructs

(forthcoming). In some contexts the distinction is difficult to maintain. See, e.g., L. WILKINS, *SOCIAL DEVIANCE passim* (1964); THE PARTICIPANT OBSERVER *passim* (G. Jacobs ed. 1970).

³¹ See generally M. BANTON, *ROLES: AN INTRODUCTION TO THE STUDY OF SOCIAL RELATIONS* (1965); R. DAHRENDORF, *supra* note 19; N. GROSS, W. MASON & A. MGEARCHERN, *EXPLORATIONS IN ROLE ANALYSIS* (1958); Nieman & Hughes, *The Problem of the Concept of Role—A Re-survey of the Literature*, 30 *SOCIAL FORCES* 141 (1951); Seidman, *The Judicial Process Reconsidered in the Light of Role-Theory*, 32 *MODERN L. REV.* 516 (1969).

³² For a typically confused example of such use of standpoint, see 2 R. POUND, *JURISPRUDENCE* 129-32 (1959).

³³ There is admittedly a close and complex relationship between the various usages of standpoint discussed in the text. Nevertheless, failure to distinguish between them in legal contexts may lead to confusion. For example, an English solicitor may in the course of his practice have an opportunity to learn a great deal about property values in his locality, yet he may not consider it as part of his role to advise a client on the value of a particular piece of property. Similarly, a solicitor may have ample opportunity to observe the functioning of property law in practice. On the basis of such observation he may conclude that the law is either in need of change or in need of preservation from attempts to reform it. In short, he may be qualified by his experience to contribute to law reform activities, and thus to share in the tasks of the legislator. He may, however, take the position that such reform is "none of his business," if in his opinion the job of the solicitor is to work within the existing system, not to change it; on the other hand, he may claim that when participating in law reforming activities he is acting in his capacity

which are defined in terms of some particular role or task (*e.g.*, the legislator defined in terms of the task of making rules of law) with stereotypes of actual people (*e.g.*, the legislator defined in terms of membership in some particular legislative body). This distinction, facilitated by an understanding of the fourth use of standpoint, is important because in real life few persons have roles which consist of a single type of task, and few functionaries have a monopoly on particular tasks. Thus, in the United States judges sometimes legislate (*i.e.*, participate in making legal rules), and legislators are often called upon to advise, persuade, and predict.

The concept of standpoint may be used with reference either to constructs personifying particular tasks or groups of tasks (*e.g.*, "the legislator") or to actual or imagined people (*e.g.*, Wall Street lawyers). The former conception is more intellectualized and accordingly more susceptible to rigorous development; the latter may be used to promote a more realistic identification with typical participants in actual processes. In "The Path of the Law" this distinction is glossed over. The latent function of the Bad Man in Holmes's argument is to support a plea for a more realistic identification on the part of law students and law teachers with the problems of practicing lawyers. But, as we have seen, the Bad Man is much more plausibly treated as a personification of the task of predicting decisions (which is only one of many tasks performed by practicing lawyers) than as a realistic stereotype of any kind of actual person.³⁴ Thus, the third and fourth usages of standpoint are directly relevant to an analysis of "The Path of the Law," although the first two should be kept in mind.

D. *The Significance of Standpoint*

The distinctions between the four usages of standpoint may help to clarify some obscurities in the expressions "the Bad Man theory (of law)" and "the prediction theory (of law)." Several possible meanings are attributable to these terms. First, either can be used to refer to a general definition of law in terms of prediction. Apparently this is what is meant when the prediction theory is criticized along the lines considered above.³⁵ The standard criticisms reveal some of the inadequacies of Holmes's dictum thus viewed, but it is stretching

as citizen and not *qua* solicitor. Alternatively, he may claim that by virtue of his experiences as a solicitor he is particularly well qualified to participate in law reform. One starting point for analyzing such claims is to clarify underlying assumptions about standpoint and role.

³⁴ See notes 18-19 and accompanying text *supra*.

³⁵ See notes 26-34 and accompanying text *supra*.

the term to treat this statement as encapsulating a theory of law.³⁶ A second possible meaning of the Bad Man theory, or the prediction theory, relates to standpoint in the third sense insofar as these theories attempt to provide a working theory for predictors. Taken this way the phrases represent a general account of what the Bad Man needs to know and to understand in order to make reliable predictions (including perhaps some general advice by way of guidelines or rules of thumb on how to go about the task of predicting). This is a perfectly plausible usage. Holmes, however, certainly did not produce such an account (nor drop more than the slightest of hints as to what it might contain), nor, as far as I know, has anyone else attempted to do so in a systematic fashion.³⁷

A third possible meaning of the Bad Man theory (but less plausibly of the prediction theory) is a descriptive account of what law in general (or within a particular legal system) looks like from the standpoint of a Bad Man. Here, since standpoint is being used in the observational sense, it does not seem appropriate to define the Bad Man in terms of prediction;³⁸ indeed, there is considerable doubt as to who the Bad Man might be in this context and as to what exactly would be his vantage point. A work by Genêt or a professional burglar or a member of the I.R.A. might qualify under this heading, as might a descriptive work by the authors of *The Bust Book* or by a trained observer occupying a similar vantage point. Such worms' eye views are potentially of great interest since they represent perspectives which have been largely neglected by jurists. It is dangerous to generalize about such views, however, for there are many species of worms with different observational capacities who may be viewing for a variety of

³⁶ One source of confusion relating to the prediction theory is attributable to the obscurity of the term "theory of law." Sometimes that term is restricted to attempts to elucidate the concepts of "law" and "legal system"; sometimes it is used vaguely to refer to the corpus of a jurist's more general ideas; sometimes it may be loosely equated with theorizing about law, or legal theory, and may be applied indiscriminately to any inquiry of a general nature about or related to law. Failure to distinguish between the restricted sense of a "theory of law"—or "theory of legal system" (see J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 1-4 (1970))—and legal theory (or theorizing about law) in general can be a potent source of confusion, not least because it easily leads to the error of assuming that all jurists have been addressing themselves to identical questions and that all legal theories are comparable. It is far from clear in what sense the prediction theory could be said to be a "theory of law," even if it were developed more fully than Holmes ever attempted to develop it.

³⁷ Karl Llewellyn's *The Common Law Tradition* can be viewed as a handbook for predicting appellate court decisions, but not for predicting the outcome of legal processes in general. See generally K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960); W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (forthcoming).

³⁸ See text following note 19 *supra*.

purposes or who may, under the guise of viewing, be doing something else such as calling for help or advocating a cause. Thus, the Bad Man theory in the descriptive sense is an intriguing, if somewhat open-ended, category.

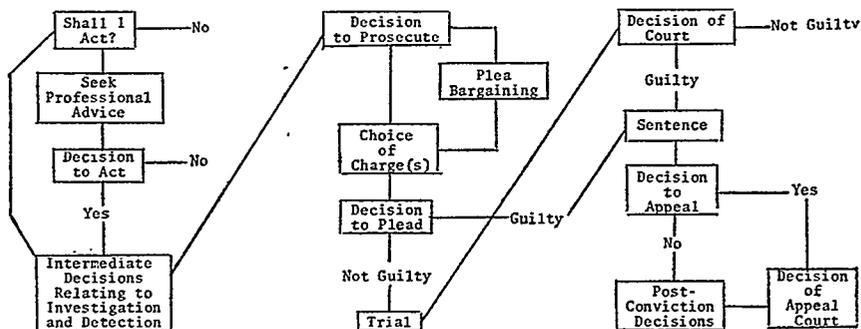
Finally, the Bad Man theory may be used in an ideological sense, corresponding to the second usage of standpoint. Again it is necessary to ask who exactly the Bad Man is in this context. He might be an ethical nihilist or a disciple of Nietzsche or de Sade or some kind of revolutionary or anarchist, labelled "Bad" because he is seen as an enemy of the established order. Certainly there is ample scope for theorizing from this type of standpoint, but such theorizing, perhaps not surprisingly, is not currently accorded much attention in orthodox Anglo-American jurisprudence. Thus, although this may be a plausible meaning of the Bad Man theory, it is not an adequate interpretation of Holmes.

We return, at last, to the criticism that the prediction theory is inadequate not because it is wrong, but because it is incomplete.³⁹ The argument is that while the Bad Man's desire is to predict, other participants have additional tasks, such as to persuade, to decide, to advise, to justify, to regulate behavior, and to channel expectations. What would a complete theory dealing with these points include? Without attempting a definitive answer, I would suggest that were we to take the idea of completeness literally, then the standpoints of all participants in legal process would need to be accommodated and the relationships among them indicated. In addition, we might wish to add the standpoints of people outside the process, as, for example, the observer who is not also a participant (*i.e.*, the scientist?), and ultimately (raising questions which here I deliberately bypass) the standpoint of God.⁴⁰

³⁹ See text following note 27 *supra*.

⁴⁰ Another aspect of the argument about completeness assumes that a "complete" theory must accommodate a number of working theories. Presumably in this context an adequate theory for the Bad Man is one which provides him with the means to understand the nature of his situation, and furnishes him with an indication of the kind of information on which to base his predictions, and of the kind of skills requisite to making effective calculations. Terms such as "theory," "understanding," "information," and "skills" require further analysis, but in the present context it may suffice to define a working theory as a set of operative ideas which can give a participant at least general guidance on how he can most effectively perform his tasks or pursue his objectives. Without developing the point here, I think that the idea of a complete theory as one which accommodates not only the non-participant theories of observers and scientists (whoever they may be), but also the working theories of participants in legal process, is one which is worth developing in jurisprudence. Among other things, it may provide a basis for establishing a healthier relationship between theory and practice.

Developing such a model need not be as ambitious an undertaking as might at first sight appear.⁴¹ It would be a very ambitious undertaking to attempt to provide a "complete" description of a legal system along these lines, let alone to provide a complete description of all legal systems. But to set up a model for describing and analyzing legal process in terms of the flow of decisions and of the varying tasks and roles of participants at each stage in the process is a more straightforward enterprise. Indeed, when we talk of "the legislator," "the judge," "the advocate," "the prosecutor," and "the citizen" (Good or Bad) and his advisers, we are assuming a crude version of such a model. This flow-chart of the main decisions relating to the Bad Man's escapade in Boston⁴² is an elementary example of a way of analyzing one type of legal process along these lines:



This is, of course, a very simple example of a model of one type of legal process. An adequate model for depicting and analyzing the totality of legal processes in the United States would obviously be much more complicated. I do not propose to develop such a model here, but it is worth making certain points about this kind of analysis. First, it is important in constructing such models and charts to bear in mind the distinction between general and particular jurisprudence. A chart may take certain things for granted which are not necessary or characteristic features of all legal systems. For example, it may assume that there are advisers and prosecutors, as well as the possibility of pleading guilty or not guilty, and provision for appeal. These are neither necessary nor universal features of legal process in all systems, although such features would be appropriate in most kinds of criminal process models in England and the United States. If a chart were to be expanded it

⁴¹ See generally H. LASSWELL & M. McDOUGAL, *supra* note 30; Twining, *Pericles and the Plumber*, 83 L.Q. REV. 396, 412-15 (1967).

⁴² See generally text accompanying note 23 *supra*.

would tend to become more particularized and thereby more closely linked to one actual system. Indeed, the building up of more and more detailed charts of this kind would be a revealing way of comparing and contrasting criminal processes in two or more legal systems.

Analysis of legal process in terms of decisions, tasks, and roles is not an alternative to a model of legal system as a system of rules (or rules and principles).⁴³ It is not strictly speaking a theory of law, but rather presupposes such a theory; the concept of "legal process" assumes some concept of "law" and "legal system." Thus a "complete theory," as that term is used in criticizing the Bad Man theory, is best treated not as a theory of law, but as a model or ideal type of process within a legal system. As such it is a tool of analysis to be evaluated in terms of its utility.⁴⁴

A model of legal system as a system of rules and a model of legal process as a system of roles need not be viewed as inconsistent or competing models. Each may be useful for certain purposes, although a particular model may, of course, be over-used or have an "overspill" effect which may be open to criticism. For example, much of the unease of American jurists with the rule model may be based on the feeling that it has exerted undue and unsalutary influence on the consideration of matters which are marginally related to basic questions about the nature of law, and that it has been used to provide criteria of relevance which are too narrow for particular purposes. A simple example of this overspill effect is found, once again, in legal education; the study of law has too often been equated with the study of legal doctrine. To suggest that it is important to study the role conceptions of lawyers and judges or the effects of laws is even today sometimes met with the reaction: "That's not law, that's sociology."⁴⁵ The identification of law solely with legal doctrine has led to literature, teaching, and talk that have repeatedly been characterized as "narrow," "sterile," or "unrealistic." Insofar as participants in legal processes and other affected people complain that too many of their concerns have been left unexplored, and that too many of their questions have been left unanswered by academic lawyers, their complaints are justified. The gist of their complaint is that for their purposes different criteria of rele-

⁴³ See Dworkin, *Is Law a System of Rules?*, in *ESSAYS IN LEGAL PHILOSOPHY* 25 (R. Summers ed. 1968). The differences between Hart and Dworkin on this question are not at issue here.

⁴⁴ See R. BENDIX, *MAX WEBER: AN INTELLECTUAL PORTRAIT* 274-75 (1962); cf. M. BLACK, *MODELS AND METAPHORS* 219-43 (1962).

⁴⁵ Such statements may be more common in the United Kingdom than in the United States.

vance are required. A model of legal process developed around the concept of standpoint, it is suggested, is likely to provide a more satisfactory theoretical basis for such criteria than that provided by models of legal system as a system of rules (or rules and principles).⁴⁶ This is not to reject such theories. It is only to put them in their place.⁴⁷

E. Summary

The "Path of the Law" is often treated as the *locus classicus* of the prediction theory of law. This theory, despite its ambiguity, is embryonic in character, and its vulnerability to elementary criticism seems to continue to attract at least two classes of persons: those who feel that the traditional approaches to law exhibited in juristic writing, legal literature, legal research, and legal education tend to be too academic or unrealistic or divorced from the realities of the law in action; and those who find that much of the theorizing of analytical jurists from Austin to Hart is narrow or sterile, or, again, remote from reality. Although demands for greater practicality and demands for a broader approach to law are by no means identical, they reflect a felt need for a theoretical framework which accords to such notions as process, role, function, official, institution, decision, and technique an important place in juristic analysis alongside traditional notions such as sovereignty, sanction, authority, rule, and duty.

A crucial reason for the continued attractiveness of "The Path of the Law" as a contribution to legal theory is that Holmes made an effective, although elementary, switch of standpoint; its main weakness as a contribution to legal theory is that his analysis was not developed in a systematic fashion. A key to finding a satisfactory theoretical basis for demands for more realistic or for broader approaches to law is to develop models of legal system and legal process which accommodate at least the principal standpoints of participants in legal processes. These standpoints can be defined either in terms of specific tasks (*e.g.*, rule-making, rule-interpreting, fact-finding, persuading, and predicting) or in terms of typical functionaries who in practice often have overlapping and imprecisely defined roles (*e.g.*, judges, legislators,

⁴⁶ See Dworkin, *supra* note 43.

⁴⁷ What is suggested here is not that attempts to elucidate the concept of law in terms of systems of rules—or rules-and-principles (*see id.*)—have been misconceived or mistaken, but rather that such theories of law have sometimes been used to provide or to justify inappropriately narrow criteria of relevance in other contexts. To conceive of law as a system of rules does not involve commitment to a narrow approach to legal literature or legal education as a matter of logical necessity, but it may in fact encourage such an approach.

and advocates). Such models of legal process are not an alternative to, but rather presuppose, a model of legal system as a system of rules (or rules and principles).

III

THE BAD MAN AND LEGAL EDUCATION

In the United States concern with legal education has often been both a stimulus to and a testing ground for general theorizing about law. "The Path of the Law" exemplifies this tendency. Two major themes have dominated American discussions of legal education since Holmes: the search for ways of developing a more efficient and realistic system of preparation for legal practice, and the desire for a closer integration of law and the social sciences.⁴⁸ A close connection between these objectives is often taken for granted, although the exact nature of this connection is not always made clear. Both themes are recognizable in "The Path of the Law," where their compatibility is assumed rather than demonstrated. I propose to argue that in advocating a switch of standpoint, Holmes pinpointed a crucial weakness in Langdell's educational theory, but that largely because he failed to pursue the implications of such a switch, his own prescriptions for legal education did not provide the basis for a viable alternative. In particular, by failing to identify precisely what standpoint(s) might be suitable as the basis for a working theory of legal education, Holmes was able to beg some crucial questions, including questions about the relationship between these two themes.

Demands for a more efficient and realistic system of preparation for practice typically emanate from legal practitioners, who have not always been their own best advocates in this cause. Poor diagnosis, naive prescription, a lack of appreciation of educational problems—pedagogical, financial, and administrative—and more than a hint of anti-intellectualism have often spoiled the presentation of a potentially strong case. The American legal profession has been distinctive in having had over the years a number of men of stature, such as Holmes and Frank, who have performed the function of spokesmen for the profession in a manner which exempts them from charges of crude anti-intellectualism. From one perspective "The Path of the Law" is a powerful statement of the practicing lawyer's complaint against academic

⁴⁸ See generally W. TWINING, *supra* note 37; Stevens, *Two Cheers for 1870: The American Law School*, in 5 PERSPECTIVES IN AMERICAN HISTORY 405 (D. Fleming & B. Bailyn eds. 1971).

law in general and against Langdellism in particular. The essence of the complaint is that Langdell and his disciples adopted inappropriate criteria of relevance in their approach to teaching, research, and writing. In such an interpretation the Bad Man serves as a device for dramatizing a plea for the adoption of a more realistic standpoint.

What was the standpoint assumed by Langdellism? In his most famous formulation Langdell identified it with "the true lawyer," who has a mastery of legal principles and an ability "to apply them with constant facility and certainty to the ever-tangled skein of human affairs."⁴⁹ As has often been pointed out, Langdell's "true lawyer" is a far from realistic stereotype of actual private practitioners. His assumed criteria of relevance are almost identical with those adopted by appellate court judges in their task of expounding, interpreting, and applying the law to given sets of facts.⁵⁰ These criteria are different from, and generally much more restricted than, those of office or trial lawyers. In this context the charge of narrowness is apposite.⁵¹

⁴⁹ C. LANGDELL, *supra* note 6, at vi (Preface).

⁵⁰ See Megarry, *Law as Taught and Law as Practised*, 9 J. Soc'y Pub. Teachers L. 176, 176-78 (1966).

⁵¹ Of course, Langdell was not a lone offender in this respect. Indeed, his reforms at Harvard represent an important stride away from what might be termed the textbook tradition of legal education. As a product of a system which was in certain respects pre-Langdellian, I can give examples from personal experience of the consequences of adopting a standpoint which is closer to appellate court adjudication than to "Bad Mansmanship." For example, my only exposure as a student to the important subject of compensation for personal injuries occurred in a course called "Torts." We were encouraged to buy one of the leading textbooks on the subject, and to read a large number of reports of decisions of appellate courts as well as a few learned articles, almost all of which adopted similar criteria of relevance. The main textbook which I used was *Salmond*. See J. SALMOND, *THE LAW OF TORTS* (11th ed. R. Heuston ed. 1953). It still flourishes and it is in many respects an admirable work. *Salmond's* treatise was quite informative and lucid about the ingredients of liability in the tort of negligence and about the various defenses, but it was silent on a great many matters that an English solicitor would want to know when handling a personal injury claim. There was, for example, no mention of the fact that in England only about 2% of such claims are determined by a judgment of a court and that the vast majority of the remainder (approximately 80% according to a recent survey) are settled or abandoned even before the issuance of a writ. See P. ATIYAH, *ACCIDENTS, COMPENSATION AND THE LAW* 281-304 (1970); T. ISON, *THE FORENSIC LOTTERY* 115, 155 (1967). There was no indication of the factors which make the pursuit of such claims what has been aptly called "a forensic lottery" (T. ISON, *supra*); there was almost no discussion of the relationship of the common law action for negligence to other compensation processes or to the social security system; and, most surprising of all, there was no discussion of the insurance factor. The latest editions of *Salmond* (the most recent edition is the fifteenth) make some concession on the last point (see J. SALMOND, *THE LAW OF TORTS* 31-39 (15th ed. R. Heuston ed. 1969)), but the criteria of relevance remain essentially the same as before, with the result that most of the things which the injured citizen or his adviser or other participants in compensation processes need to know are treated as irrelevant. Thus, *Salmond* has limited value as a tool of prediction for participants in pro-

Up to this point there appears to be common ground between demands for more efficient professional training and the desire for a closer integration of law and the social sciences. Both involve the rejection of Langdellism as too narrow; both call for a broader approach; both evidence a concern with the law in action. But these seductive phrases all too easily conceal widely divergent standpoints and concerns. Broader in what respect(s)? Interest in the law in action from what standpoint(s)? The Wall Street lawyer, the gadfly reformer, the would-be pioneer of an Empirical Science of Law, and the representative of any one of the species of emerging legal worms might all give different answers to these questions.

Failure to recognize this point has probably helped to sustain the comfortable myth, central to the American Realist Movement, that the protagonists of improved professional training and the leaders of the integration movement were natural allies. The existence of a common enemy and some overlap between their concerns is not disputed. But the extent to which their criteria of relevance were shared and how far they diverged has never been adequately explored. Analysis along these lines may contribute something to explaining such phenomena as the split between the Scientists and the Prudents at Columbia in 1928, the disillusion and malaise that quickly succeeded the rise of the Realist Movement, and the continuing confusion and sense of dissatisfaction surrounding many contemporary debates about legal education, legal research, and legal literature.⁵²

Recent developments in academic treatment of the law of torts

cesses involving claims for compensation for personal injuries. It is also questionable whether, without considerable supplementation, it is adequate as an educational work for intending participants in those processes or for those who wish to understand the way the system works in practice. Nor does it provide an adequate basis for evaluating the system. From a wide variety of standpoints its basic limitation is that its criteria of relevance are too narrow.

The authors (or editors) of such works may defend themselves by saying that they do not hold themselves out as doing more than expounding the law as it is in a particular field at a given moment in time. For example, in the preface to the first edition of Salmond's work, the author stated: "I have endeavoured in this book to set forth the principles of the law of Torts with as much precision, coherence and system as the subject admits of, and with as much detailed consideration as is necessary to make the work one of practical utility." *Id.* at v (1st ed. 1907) (Preface).

What is at issue is not whether such books achieve their objectives (although Salmond's assumptions about practical utility are debatable), but how dominant a place in a nation's legal literature and legal education should be accorded to works with such limited objectives, and whether it is a healthy situation for a high proportion of the energies of outstanding legal scholars to be devoted to the production of such works. See generally W. Twining, *Is Your Textbook Really Necessary?*, 11 J. Soc'y Pub. Teachers L. 81 (1970).

⁵² See generally works cited in note 48 *supra*.

and accidents provide a concrete example of the unsystematic nature of the post-Langdellian reaction. Most torts books and courses even today provide striking examples of what Pound termed the divorce between law in books and law in action.⁵³ Yet the works and the courses survive and many of the responses to criticism of them look more like palliatives than cures. There has, however, recently been a spate of books on accident compensation which depart significantly from the traditional model. Many are of excellent intellectual quality.⁵⁴ These works are largely, but not exclusively, concerned with reform; thus, they represent a move away from the standpoint of the judge towards that of the legislator. Their criteria of relevance are closer to those of the Bad Man, although they are by no means identical. These works have generally been well received, but two contrasting lines of criticism have been leveled at some of them. On the one hand it has been pointed out that proponents of accident compensation schemes have not paid sufficient attention to the vested interests and political obstacles likely to prevent or delay the movement for reform.⁵⁵ On the other hand it has been suggested that they fail to provide sufficient guidance to those who wish to know how to operate within the existing system.⁵⁶ It is even arguable that traditional expository works are of more value to the intending practitioner than this new genre which claims, *inter alia*, to be more concerned with the law in action than were its predecessors. Thus, ironically, these ostensibly more realistic works are charged with lack of political realism from the standpoint of the legislator, and with neglect of immediate practical realities from the point of view of the practitioner. It is unnecessary here to treat the merits of these criticisms. The relevant point is that the movement away from the standpoint of the appellate judge or the expositor of legal doctrine has not involved a simple switch to the standpoint of the Bad Man or to any other single standpoint.

⁵³ There has been too much abstract reasoning from attractive analogies of the past and not enough testing of those analogies in the light of how they meet or fail to meet the exigencies of reasonable expectations of men in the time and place. Abstract ethics and abstract politics must be supplemented by comparative study of the social and economic conditions from which their abstract theories are derived and of those to which they are to be applied.

R. POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON* 47-48 (1960).

⁵⁴ See, e.g., P. ATIYAH, *supra* note 51; G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970); T. ISON, *supra* note 51; R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965).

⁵⁵ See, e.g., Greer, Book Review, 22 N. IR. L.Q. 554, 559 (1971) (review of P. ATIYAH, *supra* note 51).

⁵⁶ See, e.g., Walker, Book Review, *JURID. REV.* 278 (1970) (review of P. ATIYAH, *supra* note 51). See also Smith, *Authors and Authority*, 12 J. SOC'Y PUB. TEACHERS L. 3 (1972).

A brief glance at existing literature, such as practical manuals on accident claims and defamation suits, which appears to be designed specifically for the Bad Man's legal adviser, conveys the impression that such literature is generally intellectually inferior to both the reform-minded books and traditional textbooks. For this reason, if for no other, this type of work is generally regarded as unsuitable for pedagogical purposes. Thus, even in an area in which significant intellectual advances have been made, the needs of the Bad Man's adviser have been catered to only incidentally.

What the Bad Man, the Good Citizen, and their legal advisers need to know in order to act out their roles as participants in legal processes is not coextensive with what other participants, such as judges and advocates, need to know. And much of legal theory and legal writing, as well as legal education, ignores their standpoints and their needs. Attempts to make adjustments in the light of such complaints have often been halfhearted and have tended to proceed on an inadequate theoretical basis. Nine pages on insurance in a recent edition of *Salmond on Torts*⁵⁷ represent little more than a placatory gesture. Holmes's Bad Man concept contained the germ of a theoretical basis for some practitioners' complaints. More fully developed, it could provide the basis for a systematic evaluation of and response to their demands. It represents a striking example of the influence of assumptions about standpoint on ways of approaching and thinking about law.

Holmes never developed a systematic theory for educating future practitioners. One may confidently infer from "The Path of the Law" and his other pronouncements that such an approach to legal education would have had little appeal to him. It seems likely that he would have rejected what might be termed "the rationalist model of formal legal education."⁵⁸ A mode of legal education which sets out methodically and single-mindedly to prepare students within the academy for tasks which they would be likely to perform in real life would almost inevitably have to contain a large element of the banal. Even with the support of a romantic and inflated view of the role of lawyers in society (and backed by arguments that formal education should be seen as a long term investment in highly transferable skills), we cannot evade the fact that effective participation in legal processes almost always involves mastery of much that is specific, trivial, routine, dull, or any combination of these. Holmes, on the other hand, shared the prevailing high-minded and comfortable vision of the elite law school:

⁵⁷ See J. SALMOND, *THE LAW OF TORTS* 31-39 (15th ed. R. Heuston ed. 1969).

⁵⁸ See generally *WHAT'S WRONG WITH THE LAW?* 124-26 (M. Zander ed. 1970).

"I say the business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner, and to make great lawyers."⁵⁹

Furthermore, it is doubtful whether Holmes would have agreed with those who believe that many of the lessons traditionally left to be picked up in practice can be learned more efficiently and more quickly within the academy. If any precise meaning can be attached to his cryptic aphorisms on the life of the law and the role of formal education, it is that the academy cannot and should not hold itself out as providing more than a start to a lifelong process of self-education. He believed that law schools should perform a role which is at once elevated, limited in scope, and not subject to precise analysis. A rationalist Bad Man theory of legal education would probably not have appealed to him.

Holmes never worked out in detail the implications of his pronouncements on legal education. His diagnosis was at best incomplete. His prescriptions were scattered and vague, and he dropped only a few very general hints about his views on educational priorities. He was correct in his perception that the main weakness of Langdellism was that it was too closely wedded to a single, and for many purposes inappropriate, standpoint. But he did not seriously attempt to identify what standpoint or standpoints would provide the basis for a more satisfactory theory of legal education. He probably sensed that an approach to legal education based exclusively on the standpoint of the Bad Man would be at least as defective as Langdellism. But he declined to provide a coherent alternative theory, perhaps because he was skeptical of theorizing about education. This omission enabled him to beg two of the most persistent questions facing American law schools: first, to what extent and by what means formal legal education should be wholeheartedly vocational in its orientation; and second, to what extent preparation for legal practice and the development of law as a social science are compatible objectives for a single institution. Much

⁵⁹ O.W. HOLMES, *The Use of Law Schools*, in COLLECTED LEGAL PAPERS 37 (1920). No result is easy which is worth having. Your education begins when what is called your education is over—when you no longer are stringing together the pregnant thoughts, the "jewels five-words-long," which great men have given their lives to cut from the raw material, but have begun yourselves to work upon the raw material for results which you do not see, cannot predict, and which may be long in coming,—when you take the fact which life offers you for your appointed task.

O.W. HOLMES, *Profession of the Law*, in *id.* at 31.

Speaking before the Harvard Law School Association in 1886, Holmes remarked: "The main part of intellectual education is not the acquisition of facts, but learning how to make facts live." O.W. HOLMES, *The Use of Law Schools*, *supra* at 36-37.

of the history of the American law school since Holmes's day could be written in terms of a recurring failure to face, let alone to resolve, these issues. "The Path of the Law" brings to the surface the two main ingredients of this central dilemma of American legal education: the Bad Man model of vocational training and the idea of law as a social science. Although Holmes identified the ingredients of the dilemma, he failed to resolve it.

IV

THE BAD MAN AND THE BUST BOOK

A pillar of the New England intellectual elite addressing potential members of the legal profession in 1897 and four young radicals giving practical advice to members of the underground in 1971 seem to belong to different worlds. The expressed aspiration of the former was to "catch an echo of the infinite";⁶⁰ that of the latter is to smash the system.⁶¹ One function of Holmes's cynical acid is to strip value judgments from legal analysis; the acid of *The Bust Book* is directed at the whole structure of the legal system, not only at its claims to neutrality and impartiality. Holmes tended to dismiss radical socialism as empty humbug;⁶² no doubt members of "the Movement" would use stronger language to characterize the social order and the attitudes represented by Holmes. To Frank, Holmes symbolized "the completely adult jurist";⁶³ the new radical jurisprudence is still in its infancy.⁶⁴ Despite these contrasts, I propose to argue that "The Path of the Law" may provide a starting point for a dialogue between the emergent jurisprudence of the radical left in the United States and the

⁶⁰ 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.

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⁶¹ The judicial system in the United States is not a neutral institution. Although the courts hide behind a cloak of judicial impartiality, they are an apparatus for the preservation of the status quo—a society based on race, sex, and class exploitation. The cop and the judge wear different uniforms, but they both serve the same System we seek to destroy. Both the cop on the beat and the judge on the bench will attempt to crush our Movement; we must understand the function of each—and fight against both.

K. BOUDIN, B. GLICK, E. RASKIN & G. REICHBACH, *supra* note 1, at 14.

⁶² Holmes's political views have been the subject of much debate. See S. KONEFSKY, *THE LEGACY OF HOLMES AND BRANDEIS* 64-66 (1956).

⁶³ J. FRANK, *LAW AND THE MODERN MIND* 270-77 (1930).

⁶⁴ It has, however, a formidable intellectual pedigree.

bourgeois jurisprudence (as radicals might categorize it) which has dominated American legal thought since Holmes.

It should not be necessary to labor the point that such a dialogue is worth encouraging. The genre of literature represented by *The Bust Book* presages the arrival of a new brand of radical jurisprudence which deserves the serious attention of jurists, whether radical, reformist, or reactionary.⁶⁵ Of course, manuals like *The Bust Book* tend to take for granted rather than to expound upon underlying ideological assumptions; even the more theoretical writings of radical lawyers presently tend toward exaggeration, crude simplification, and heavy use of emotive terms which obfuscate rather than assist rational discourse. But it would be foolish to make stylistic puerility an excuse for not taking seriously the challenging ideas that are emerging, or re-emerging, from this quarter: that judicial impartiality is a myth which cloaks the essential function of the courts as apparatus for maintaining an unjust social order; that the function of bourgeois jurisprudence has been to legitimize the existing order and to contribute to the mystification rather than the demystification of law; that all trials are political and that all prisoners are political prisoners; that talk of "civil liberties" is a species of the Big Lie; and that civil libertarian groups such as the American Civil Liberties Union function as para-governmental organizations.⁶⁶ Such assertions deserve careful analysis, if only because they are gaining increasing currency among law students and lawyers. The challenge they present to traditional juristic discourse deserves, at the very least, a reasoned response. In the United States this response needs to be set in the context of American legal thought in general. The dominant historical position of Holmes in the American tradition makes him one, but not the only, suitable starting point for comparing and contrasting radical and bourgeois juristic ideas.⁶⁷

It must be admitted that there are some important limitations to using "The Path of the Law" for this purpose. In many respects Holmes's essay and *The Bust Book* are hardly comparable;⁶⁸ the dates, the circumstances, the objectives, and the style of each work, their re-

⁶⁵ The terminology adopted here is that of the radical left, who would probably characterize Jeremy Bentham (and the author of this essay) as "reformist" and Holmes as "reactionary."

⁶⁶ See generally *LAW AGAINST THE PEOPLE: ESSAYS TO DEMYSTIFY LAW AND ORDER AND THE COURTS* (R. Lefcourt ed. 1971). This work also illustrates the tendency to rely heavily on emotive terms.

⁶⁷ Jeremy Bentham has recently begun to provide a similar starting point in the United Kingdom. Lecture by Professor H.L.A. Hart, "Bentham and the Demystification of the Law," London School of Economics, June 28, 1972.

⁶⁸ See notes 60-64 and accompanying text *supra*.

spective audiences, and the only semi-articulate major premises of their authors *prima facie* provide little basis for comparison. But on at least two points there are significant links between the Bad Man and the addressees of *The Bust Book*.

First, the criteria of relevance of the works are similar, although not identical. Both works are concerned with the practical realities of confronting the law as it is. There is a shared concern with predicting events at various stages in certain kinds of legal processes which mandates a realistic picture of how the legal system in fact operates. But there is an important difference between the works:

The non-conformist challenges the legitimacy of the social norms he rejects while the criminal accepts the norms he violates. The non-conformist aims to change the norms and the criminal is primarily concerned with escaping the sanctioning force of existing norms without proposing substitutes. . . . The criminal and the revolutionary are linked by the inequities of society, the one reflecting and the other challenging them; the one deviant, the other defiant.⁶⁹

At several points *The Bust Book* illustrates the dilemma of those who are obliged to participate in a system they seek to change. Conformance to the rules of the system may be seen as acceptance or even reinforcement of it, but refusal to conform may be counter-productive. This dilemma, although not shared by Holmes's Bad Man, is openly recognized in *The Bust Book*.⁷⁰

A second point of contact between the Bad Man and *The Bust Book* relates to the Bad Man's amorality. As we have seen, one function of the Bad Man in Holmes's argument was to dramatize the distinction between law and morals. This distinction provides one basis for claims

⁶⁹ Unpublished student essay by Timothy Chapman, University of Warwick, Coventry, England (quoted with permission of the author).

⁷⁰ A conventional legal defense means using the facts and the law—technicalities, rules of evidence, Constitutional rights—to win a case. It can be used alone, or combined with a political defense.

This approach is useful when a good plea bargain has not been offered or when you think you have a very good chance of winning.

Legal technicalities have also been used to delay final judgment on a case until the political situation changed to the defendant's benefit. After the Columbia University busts, the defense lawyers stalled until the new University administration was appointed, which dropped the complaints against five hundred of the students.

Using existing laws does tend to legitimate a legal system which we oppose. Asking the judge to enforce those laws on our behalf reinforces the myth that courts are neutral, and compliance with conventional courtroom procedures may add to the sanctity of the law.

Nevertheless, at the present time, conventional legal defense does keep activists out of jail and free to organize.

to neutrality in analysis and description of the law as it is. At first sight there appears to be a clash between this brand of legal positivism⁷¹ and the ideas of radicals who pour scorn not only on claims that existing legal orders are in fact neutral or impartial, but also on the idea that legal analysis can ever be neutral or value-free. This raises extremely complex issues which have been much debated. Here I shall content myself with making two points. First, the positions of Holmes and the authors of *The Bust Book* are both more complex and closer to each other on this issue than might at first appear. Holmes's insistence on divorcing law and morals for the purposes of legal analysis did not preclude his acceptance of the point that judgments of value and considerations of policy have an important place in judicial reasoning. Indeed, he was one of the first to stress this theme.⁷² Conversely, much of the information in *The Bust Book* could be said to be neutral in the sense that it is capable of verification by empirical means and that it could be useful to a variety of people with different values pursuing different objectives. These examples at least serve to make the elementary point that sweeping claims to, or denials of, neutrality need to be treated with caution.

Insistence on the distinction between prescription and description is indicative of a concern with demystification of law by jurists in the Anglo-American tradition of jurisprudence.⁷³ The main reason for this insistence has been a concern with clarity of thought as a precondition for describing, analyzing, and criticizing legal systems as they really are. In different ways demystification of law has been a prominent theme in the writings of jurists as varied as Bentham, Holmes, Frank, Llewellyn, and Hart. Here there is, *prima facie*, common ground between radical and orthodox jurisprudence. Ironically, the leading contemporary proponents of the demystification of the law (itself a eulogistic phrase) tend to be among the worst offenders in their mystifying use of question-begging epithets and other eulogistic and dyslogistic terms. Like Blackstone, their cardinal error is to confuse propaganda with analysis. If radical lawyers are to enter into meaningful dialogue

⁷¹ On the various meanings of "positivism," see Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 601-02 (1958).

⁷² I take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism. The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men. 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.
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⁷³ See Lecture, *supra* note 67.

with bourgeois jurists they could well add Bentham's *Book of Fallacies* to their shelf of handbooks, and could do very much worse than move on from that to "The Path of the Law" as part of their progress to a more mature radical jurisprudence.

ENVOI

Invulnerability to criticism is not a necessary quality of a classic. Significant error is more characteristic of the genus. Does it contain important insights? Do its errors and exaggerations suggest further insights? Does it have something fresh to say to successive generations, or is it as ephemeral as most legal writing? Judged by these criteria, "The Path of the Law" easily passes the test. In arguing that legal education and legal theory could benefit from a change of standpoint, Holmes identified a persistent source of dissatisfaction and perplexity in American legal thought. He also provided a striking illustration of the potential of standpoint as a tool of juristic analysis. By exaggerating the importance of the task of prediction, he invited criticism which has itself been revealing. The protean qualities of the Bad Man in his subsequent existence serve to remind us of some neglected perspectives on law. *Floreat vir amoralis.*