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# Other People's Power: The Bad Man and English Positivism 1897-1997

William Twining

# OTHER PEOPLE'S POWER: THE BAD MAN AND ENGLISH POSITIVISM, 1897-1997*

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When we study Holmes, we are studying a mystery, a delphic oracle, an ambiguous icon. We are studying him not solely as a historical phenomenon, or as an intriguing character, but also for illumination about current concerns. Dead jurists have their uses. They can be treated not only as straw persons or as perpetrators of interesting errors, but also as sources of ideas that have a potential significance that transcends the particular context in which they were introduced. If a text is worth studying, it is usually fruitful to subject it to charitable interpretation, even to try to make it the best it can be. Holmes's critics have not always observed this precept. The object of our study is understanding, in particular, the use of a powerful idea to illuminate current concerns. The "bad man" is just such an idea.[1]

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[1] This paper builds on and develops some themes that have been explored in earlier writings by the author, in particular:
William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973) [hereinafter Twining, *The Bad Man*];
William Twining, *The Great Juristic Bazaar*, 14 J. SOC. PUB. TCHRS. LAW (1978) 185 [hereinafter Twining, *The Great Juristic Bazaar*];
William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329 (1985) [hereinafter Twining, *Talk About Realism*];
William Twining, *Reading Bentham*, Maccabean Lecture, 75 PROCEEDINGS OF THE BRITISH ACADEMY 97 (1989) [hereinafter Twining, *Reading Bentham*];
WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES (3d ed. 1991) [hereinafter TWINING & MIERS, HOW TO DO THINGS];
William Twining, RETHINKING EVIDENCE: EXPLORATORY ESSAYS, (1994) [hereinafter TWINING, RETHINKING EVIDENCE];
WILLIAM TWINING, BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL (1994) [hereinafter TWINING, BLACKSTONE'S TOWER];
William Twining, *General and Particular Jurisprudence: Three Chapters in a Story*, *in* STEPHEN GUEST, POSITIVISM TODAY 119 (Stephen Guest ed., 1996), *reprinted in* WILLIAM TWINING, LAW IN CONTEXT: ENLARGING A DISCIPLINE (1997) [hereinafter Twining, *General & Particular Jurisprudence*];

Before leaving England, in anticipation of this celebration I held an anachronistic conversation with another ambiguous icon—the auto-icon of Jeremy Bentham who sits in the South Cloister of University College London. Mr. Bentham asked me to convey his congratulations, but added a reminder that a more significant event, the 250th anniversary of his birth, is due to be celebrated in 1998. This rather grudging message could be taken as an example of Benthamic vanity and English arrogance; I hope to persuade you that it is symptomatic of a much deeper ambivalence on the part of my compatriots about Holmes as a person and what he can be made to stand for. This little episode can also serve to introduce some other themes: that conversations with and about Holmes are inevitably anachronistic; that, as with Bentham studies, the Holmes industry seems to be a rather clear example of the pursuit of the ambiguous by the ambivalent;[2] and that both Bentham and Holmes would probably be quite dismissive of some of the issues on today's agenda: such as positivism versus anti-positivism, the characterization or classification or pigeon-holing of thinkers, and antiquarian rather than forward-looking scholarly enquiries.

I have been asked to comment on Holmes's reception in the United Kingdom. In the spirit of anachronistic conversations, I interpret this as an invitation to dwell on how he has been or might be perceived and to explore the continuing significance of some of his central ideas as well as their historical provenance. I shall focus on one topic: the "bad man" as a symbol of tough-minded, "realistic" positivism.[3]

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WILLIAM TWINING, *Globalization and Legal Theory*, *in* CURRENT LEGAL PROBLEMS 1 (1996) [hereinafter Twining, *Globalization*];
WILLIAM TWINING, LAW IN CONTEXT: ENLARGING A DISCIPLINE (1997) [hereinafter LAW IN CONTEXT].

I am grateful to Terry Anderson, John Goldberg, Andrew Lewis, David Lyons, Jack Schlegel, Tony Sebok, and David Seipp for helpful comments on early drafts of this paper. I am particularly grateful to David Seipp for giving me access to materials that he has collected in his research on the historical background to *The Path of the Law*.

[2] On Benthamic ambiguity and anachronistic conversations, see Twining, *Reading Bentham*, *supra* note 1, at 110-11, 116-28.

[3] For criticism of recent use of the terms "weak" and "strong" in relation to positivism see *infra* note 37.

During the twentieth century Holmes has been fairly consistently treated in the United Kingdom as America's greatest jurist, but he has been regarded with almost as much ambivalence there as he has been in the United States. Today in my country only two of his works seem to have continuing resonance: *The Common Law*[4] and *The Path of the Law*.[5] The best selling student work on jurisprudence, Lloyd and Freeman, no longer quotes *Lochner* and extracts from one or two other cases.[6] A few aficionados may browse in the correspondence and puzzle over the unlikely friendship with Harold Laski; but much of what continues to engage American scholars—such as judicial restraint, pragmatism, Holmes's great dissents, his relationship to Realism or his private life—are treated as particular with American concerns. *The Common Law* is still discussed occasionally in relation to the objective theory of contract. For a brief moment it provided a partial justification for a much-criticized objective theory of criminal responsibility.[7] Otherwise, as Patrick Atiyah has shown, Holmes's direct impact on British legal theory and doctrine has been minimal.[8]

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[4] OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881).

[5] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L REV. 457 (1897).

[6] LORD LLOYD OF HEMPSTEAD & MICHAEL FREEMAN, INTRODUCTION TO JURISPRUDENCE (6th ed. 1994).

[7] Holmes was cited by the House of Lords in support of an objective interpretation of "the reasonable man" in Director of Public Prosecutions v. Smith [1961] A.C. 290. This produced a storm of criticism, in which Herbert Hart took a lead, and the decision of the House of Lords on this point was overruled by the Criminal Justice Act of 1967, § 8. For a summary of the debate, see Patrick Selim Atiyah, *The Legacy of Holmes Through English Eyes*, *in* BENJAMIN KAPLAN ET AL., HOLMES AND THE COMMON LAW: A CENTURY LATER: THREE LECTURES, 34-36 (1981).

[8] Atiyah sums up the impact of Holmes's theory of liability from the perspective of the English common lawyer as follows:

> The answer, I fear, is that not much can be said that is likely to add to Holmes' reputation. His theory of liability in criminal law may have been partially responsible for a near disaster, though in the end it proved short-lived. His theory of tort was more in tune with the times, and may have been influential on other writers, but precisely because it was in tune with the times, one cannot be sure how much of the credit truly belongs to Holmes. Others were at work along similar lines, and nothing of Holmes that was distinctly his own survived in the modern structure of tort theory. Moreover, modern law tends toward a recognition of the need for legal protection for those suffering personal injury, and this leads us even further away from the conduct-based classifications that

However, *The Path of the Law* is still treated as one of the great legal classics—the "Hamlet of Jurisprudence." I suspect that it may be still read in the original almost as much by British as by American law students—which may not be very much.[9] If this is so, it is not entirely surprising, because this is the classic text of legal positivism which also lives on as a sitting target for some powerful lines of criticism—it is at once a talisman and a target within the positivist tradition. This is especially true of the "bad man" as he is sometimes treated as a symbol of a radically impoverished view of law.[10] I shall argue that he is more fruitfully interpreted today as one device for enlarging and enriching our vision of our subject.

Twenty-five years ago I wrote an essay entitled *The Bad Man Revisited* which was later published in *The Cornell Law Review*.[11] My purpose was twofold: first, to explore the concept of standpoint as a tool of juristic analysis. Second, to rescue Holmes and the realists, especially Llewellyn, from the charge of advancing a vulnerable general theory of law based on ideas of prediction or official behavior or other "brute facts." British commentators, especially Hart, had a field day in first setting up and then demolishing "the prediction theory of law" and "rule scepticism" as soft targets. I set out to show that neither Holmes's dictum nor Llewellyn's famous sentence in *The Bramble Bush* were intended as general definitions of law; rather they were advanced as deliberately provocative statements in specific educational contexts. The main points made by the critics were valid, but the interpretations of the two

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Holmes found central in tort law.

On contract, Holmes is best remembered for his brilliant but generally rejected paradox that there is no duty to perform a contract, and for his bargain theory of consideration, which has left little mark on English law.

Patrick S. Atiyah, *supra* note 7, at 67.

[9] Holmes does not feature at all in the list of 41 jurists included in Hilaire Barnett's 1994 survey of taught jurisprudence in British, Canadia and Australian law schools. *See* Hilaire Barnett, *The Province of Jurisprudence Determined — Again!*, 15 LEGAL STUD. 88 (1995). However, *The Path of the Law* may be included in some courses under "realism." I regularly assign it and I know of at least two colleagues who also do so.

[10] Yosal Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 225 (1964); *cf.* RONALD DWORKIN, LAW'S EMPIRE 14 (1986) (calling "external theories," which he associated with Holmes, "perverse[,] . . . impoverished and defective.").

[11] Twining, *The Bad Man*, *supra* note 1.

texts were caricatures. I argued that *The Path of the Law* was more a contribution to legal education than to legal philosophy.[12] Holmes's purpose was to criticize several weaknesses in the approach to legal education that he felt had gained sway, especially at Harvard.[13] These weaknesses included the fallacy of the logical form (anti-formalism); the tendency of students to substitute their personal moral or other value predilections for rigorous legal analysis and thereby to confuse law and morality, and the distorted view of the reality of law which is promoted by viewing it from the elevated standpoint of appellate judges.[14] The three lines of argument, which are analytically separable, might be labelled the anti-formalist, the positivist, and the realist argument. The "bad man" is not directly relevant to the fallacy of the logical form. Holmes used the device to suggest that law students could be cured of the other two diseases by a simple switch of standpoint; substitute for the point of view of the appellate judge the lowly one of an ordinary citizen or his/her legal adviser make that citizen amoral, and one could see law from a perspective that is closer to everyday legal practice, and in this sense more "realistic."[15]

Today I would stick by the main points in that paper, especially in relation to standpoint, but would concede that I may have been rather kind to Holmes in regard to some aspects of his picturing law in terms of brute fact. There is, for example, a close connection between Holmes's objective theory

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[12] In addition to the text itself, which is explicitly about the study of law, there is extrinsic evidence in support of this interpretation, for example, in a letter from Holmes to Lady Castletown dated, Sept. 17, 1896. He wrote: "I ought to get to work on a discourse on legal education." However, in the same letter he also refers to it as a general discourse on the law. *See also* letter to Lady Castletown dated, Jan. 11, 1897. For further examples, see David Seipp, *Holmes's Path*, B.U. L. REV. 515 (1997).

[13] In *The Path of the Law* Holmes scattered his shot quite widely; by no means all of the targets of his criticism were attributable to legal education at Harvard. *See* Twining, *The Bad Man*, *supra* note 1, at 277 n.6.

[14] Holmes only explicitly attacks two fallacies, but the realist argument is implicit in much of the essay. However, this aspect of his position was never fully developed. *See infra* note 15.

[15] In his stimulating paper, Professor Grey suggests that the first part of *The Path of the Law* is analogous to Dante's *Divine Comedy*: Holmes may have had a rather jaundiced view of office practice; but it is doubtful that he intended to suggest to law students that entering the legal profession is akin to a descent into Hell. *See* Thomas C. Grey, *Plotting* The Path of the Law, 63 BROOK. L. REV. 19,27 (1997).

of liability, his concern to maintain a sharp distinction between law and morality, and his emphasis on force or power at the center of his conception of law.[16] Moreover, while legal education is overtly the central theme of the address, this was a vehicle for and was intended to convey some ideas of more general significance.[17] It is reasonable to interpret *The Path of the Law* as containing multiple messages for several different audiences.[18] If I was a bit kind to Holmes, I was much too kind to those commentators who have persisted in quoting passages from *The Path of the Law* out of context and then subjecting them to unscholarly or uncharitable readings.

Here I shall gloss my original thesis by suggesting that the significance of the "bad man" goes beyond these specific concerns to provide an enduring symbol of a positivist view of law seen as other people's power. In the context of addressing American law students, who were assumed to be intending private practitioners,[19] it was natural and appropriate that Holmes should choose a notional participant as his symbolic character; but for the purposes of general jurisprudence it may be more appropriate to view the "bad man" as a relatively detached spectator or observer. As we shall see, this transition from actor to spectator is not unproblematic.

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[16] Rogat, *supra* note 10, at 225.

[17] *See supra* note 12 and accompanying text.

[18] We need to distinguish between Holmes's intended audience and the actual audience on the day of the address. *The Boston Globe* for January 8th, 1897 lists as among those attending a substantial number of legal and academic dignitaries, including Dean Ames and Professors Thayer, Smith, Wambaugh, Gray, and Beale of the Harvard Law School. "Among the members of the Massachusetts bar were noticed . . . ." over 200 names. Apart from the Law School Glee Club (two quartets), which performed before Mr. Justice Holmes's address, there is no mention of students in the audience. This raised the question, which worried some of us at the Brooklyn Conference: how many students were actually in the room? Indeed, had Holmes mistaken his audience? However, the indefatigable David Seipp, after further investigation, has ascertained that the room, which was "packed to the doors," held 500 seats, that additional camp chairs were brought in, that the ushers were law students, and that others stood. Accordingly, at least half of the audience were current law students.

Even if Holmes was planning to make this the occasion for a summation of his more general views, *see supra* note 12; pace Tom Grey's fascinating rhetorical reconstruction of the structure of the address, it is hard to interpret this discursive piece as a systematic statement of a philosophy of law. Rather it illustrates the obvious point that Holmes was not by temperament or aspiration a systematic thinker.

[19] This is made clear in the opening words of the address.

## I. ENGLISH POSITIVISM[20]

It is commonplace that *ius positum* has been associated with a number of ideas that are not necessarily connected. Here I shall confine the term "positivism" to the separability thesis—in Hart's words, "the contention that there is no necessary connection between law and morals or law as it is and ought to be."[21] Insistence on a sharp distinction between is and ought has characterized the English analytical tradition from Bentham, through Austin, Holland, Pollock, Buckland, Hart and Raz. The connecting thread has been "clarity," but the predominating reasons behind this insistence have been quite varied. For example, Bentham distinguished the "is" and the "ought" for the sake of the "ought": in order to criticize and construct (universal censorial jurisprudence). Austin and Holland distinguished the "is" and the "ought" for the sake of the "is": as a foundation for an objective general science of positive law distinct from the science or art of legislation (general expository jurisprudence).[22] Pollock and Buckland were expositors who favored particular analytical jurisprudence for pragmatic pedagogical reasons.[23] Others, especially in the Nazi and Cold War periods, saw positivist legal science which emphasized objectivity and certainty as an essential part of the idea of the rule of law, conceived as a bulwark against tyranny and official administrative discretion.[24] Hart, following Austin, wished to revive a general descriptive jurisprudence about laws and legal systems in general, not just English or Anglo-

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[20] The switch from British to English in this context is deliberate because the histories of positivism in Scotland and Ireland, North and South, are to some extent different.

[21] H.L.A. HART, *Positivism and the Separation of Law and Morals*, *reprinted in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 57 n.25 (1983).

[22] Austin did not use the term "analytical jurisprudence"; for rather obscure reasons in American usage the term has acquired connotations that have little to do with the ideas of Bentham or Austin. For a useful critique of American interpretations that conflate positivism, formalism, and analytical jurisprudence, see Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054 (1995).

[23] On the history of the distinction between general and particular jurisprudence in the English tradition, see Twining, *General & Particular Jurisprudence*, *supra* note 1.

[24] On the complex historical roots of classical Continental "Rule of Law" positivism, see FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE ch. 23 (Tony Weir trans., 1995).

American or common law.[25] But, accommodating the "hermeneutic turn," Hart recognized that external description of social institutions and practices had to take account of the "internal point of view."[26]

English positivists have shared with Holmes the idea that distinguishing the "is" and the "ought" promotes clarity of thought. In *The Path of the Law* Holmes explicitly linked his distinction between law and morality to "clearness of thought" for the purpose of learning and understanding law. However, most English analytical jurists, including Bentham, Austin, Hart, and Raz, can be distinguished from Holmes in two key respects: first, most leading English positivists have been moralists. They were not moral skeptics or agnostics. Indeed, for most, the concern for clarity had a moral basis—for none more clearly so than Bentham.[27] Others were concerned with setting up an objective science of law as it is. Whether Holmes's concern for clarity had a moral basis is more debatable.[28]

Second, Holmes is also prototypically American in putting courts and adjudication at the center of his jurisprudence. One reason why Americans often misread English positivism is that they interpret it as being, or as being centrally concerned with, a theory of common law adjudication. The focus on adjudication as central to legal theory seems to many outsiders to be peculiarly American, and not just because of the special position of courts in the American polity.[29] Such a concern belongs

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[25] H.L.A. HART, THE CONCEPT OF LAW 239-41 (2d ed. 1994) [hereinafter HART, THE CONCEPT OF LAW].

[26] *Id.* at 88-91.

[27] STEPHEN GUEST, POSITIVISM TODAY, 29-31 (Stephen Guest ed., 1996); *cf.* NEIL MACCORMICK, H.L.A. HART 160 (1981). Attempts to establish the discipline of law as an autonomous science, exemplified by Austin and Holland, were not necessarily rooted in this kind of "moral" concern.

[28] A good discussion of this subject is found in Stephen Diamond, *Citizenship, Civilization, and Coercion: Justice Holmes on the Tax Power, in* ROBERT GORDON, THE LEGACY OF OLIVER WENDELL HOLMES, JR. 115 (Robert Gordon ed., 1992). Some of the hostility directed at *The Path of the Law* is probably attributable to negative interpretations of Holmes's moral views, which are notoriously problematic. *See, e.g.*, Mark De Wolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 544 (1951).

[29] *See, e.g.*, HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 123 (1983) [hereinafter HART, ESSAYS]. Earlier English theorists of the common law, such as Blackstone and Coke, naturally emphasized adjudication, but they were doing particular jurisprudence before the rise of modern legislation. Bentham and Austin put legislation at the center of their theories. The relative neglect of legislation by

more to particular than to general jurisprudence, because litigation, judges, and courts are institutionalized in ways that tend to be historically contingent and culture-specific. When doing general jurisprudence, Bentham and Hart, and to a lesser extent Austin, marginalized and hardly developed theories of adjudication—in my view, rightly so. It has been American commentators, for example, Fuller in *The Case of the Speluncean Explorers,*[30] Dworkin on Hart,[31] and Postema on Bentham,[32] who have tried to put adjudication at the center of legal theory, sometimes in a quite ethnocentric fashion. A few particularistic English common lawyers, like Pollock and Goodhart (an adopted American), have followed suit, but most modern English jurists from Bentham through Hart, Raz and Finnis have been mainly concerned with general jurisprudence. For that enterprise, questions about the structure and function of courts, styles of reasoning, the role of judges, the legitimacy of a given system, one's loyalty to it, even the concept of "judge," and the relationship between different kinds of functionary tend to be more or less historically context-specific.[33] They can best be dealt with in detail relative to a particular

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American academic lawyers and theorists cannot be explained solely or even mainly by the relative importance of courts in the United States. On issues surrounding the "centrality" of adjudication, see TWINING, RETHINKING EVIDENCE, *supra* note 1, at 112-16; *see also* Twining, *Talk About Realism*, *supra* note 1, at 350.

[30] Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949). Fuller's famous piece is an excellent introduction to some central issues in legal theory, but because it is centered on adjudication it hardly serves as a balanced overview of the whole field of legal theory. For example, one can reasonably ask students to write opinions in the case in the style of most American jurists, such as Holmes, Llewellyn, Posner, Dworkin, Kennedy, and Fuller himself. It works for utilitarians, such as Bentham, and for any jurist interested in reasoning about questions of law; but it just does not fit Maine or Hart or Weber or Raz or most feminist or Marxist or historical or sociological jurists, who generally have quite different agendas of issues. *See* LAW IN CONTEXT *supra* note 1, at 213-21.

[31] Dworkin's first criticisms of Hart centered mainly, but not exclusively, on judicial discretion: Ronald M. Dworkin, *Judicial Discretion*, 60 J. PHILOSOPHY 624 (1963); *cf.* RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY ch. 2 (1967). Hart dealt with adjudication quite briefly in HART, THE CONCEPT OF LAW, *supra* note 22, at 141-47. It is striking that a majority of references in the index to "adjudication" and "discretion of Courts" relate to the Postscript.

[32] G. J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986). Given Postema's focus on Bentham's attacks on common law ways of thought, the emphasis on judges is justified; but one wonders whether Bentham ever had quite as developed a theory of adjudication as Postema attributes to him.

[33] Twining, *Globalization*, *supra* note 1, at 24-25.

system or culture in a given phase of its history. In this view, one of the main tasks of general analytical jurisprudence is to develop a meta-language that transcends particular legal systems.[34] General descriptive analytical jurisprudence focuses on the form and structure of legal systems in general. It needs general concepts and patterns that transcend local differences in the content and institutionalization of laws. How far one can generalize about the content and function of laws and legal institutions may be an empirical question, as Buckland suggested, requiring both detailed research and relatively sophisticated comparative interpretation.[35]

Herbert Hart's treatment of Holmes exhibits an illuminating ambivalence. It can be treated as fairly representative of English reactions. Shortly after Neil MacCormick's book on Hart had been published,[36] I travelled with Hart on a train from Oxford to London. I asked him what he thought of MacCormick's book. He replied that he liked it, but he considered himself to be a more died-in-the-wool positivist than MacCormick made him out to be. I took this to mean that Hart, like Holmes, wished to emphasize the "is"/"ought" distinction, not just for the sake of abstract clarity, but also in order to bring out the close connection between law and power. I believe that Hart felt strongly that one needs to cast a cold eye on how such power has been exercised in the name of law. Accordingly, it is a mistake to present law as an inherently attractive phenomenon. For Hart, as well as Holmes, for the purpose of detached description, it is useful to conceive of law in terms of other people's power.[37]

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[34] Twining, *Globalization*, *supra* note 1, at 9-11. Boaventura de Sousa Santos usefully reminds us that Herman Kantorowicz used the concepts of a "judicial organ" and "justiciation" in a very broad sense to include "state judges, jurors, headmen, chieftains, human gods, magicians, priests, sages, doomsmen, councils of tribal elders, kinship tribunals, military societies, parliaments, international institutions, areopagi, sports umpires, arbitrators, church courts, *censores*, courts of love, Bierrichter, and eventually gang leaders." BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE 126-28 (1995) (citing HERMAN KANTOROWICZ, THE DEFINITION OF LAW 79-80 (1958)).

[35] Twining, *General & Particular Jurisprudence*, *supra* note 1, at 127-29.

[36] NEIL MACCORMICK, H.L.A. HART 158-62 (1981).

[37] The terms "weak" and "strong" positivism have recently crept into juristic discourse, but they do not seem to be used consistently or precisely. The terms have been used in different contexts, and "strength" sometimes seems to refer to tenacity, sometimes to degree of emphasis, and sometimes to the range of contexts

In this respect Hart was a positivist in the Holmesian mould; but he was also one Holmes's sharpest critics. His critique has four main themes.

First, in *The Concept of Law* Hart makes powerful criticisms of an alleged prediction theory as a general theory of law. In my view, the criticisms of such a theory are valid, but Hart indulged in decontextualized readings of the flimsiest of texts—a few passages in *The Path of the Law* and *The Bramble Bush*—in order to back the claim that anyone seriously advanced such a general theory.[38] As I have argued elsewhere, Hart's treatment of "rule scepticism" in *The Concept of Law* is an example of an unwarranted misreading of the nature and concerns of legal realism generally and of American Realism in particular.[39]

Second, as part of particular (English, Anglo-American, perhaps common law) jurisprudence, Hart made cogent criticisms of Holmes's "objective theory" of liability.[40]

Third, equally convincingly, Hart defended English analytical jurists from the charge that they subscribed to "the fallacy of the logical form."[41] He acknowledged that closed system reasoning is a chimera, but exempted the leading English positivists from the charge that they believed in it. Bentham

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in which the separability thesis is defended. Hart is surely both tenacious and emphatic in distinguishing the "is" and the "ought" for purposes of describing the form and structure of legal systems in general. He acknowledges being "a weak positivist" in respect of the content of the rule of recognition. HART, THE CONCEPT OF LAW *supra* note 25, at Postscript, 250-54. Holmes should have had no difficulty with that.

[38] HART, THE CONCEPT OF LAW, *supra* note 25, at ch. vii; *see also* Twining, *The Bad Man*, *supra* note 1, at 280-87. Hart later acknowledged that "the Nightmare view of law" that he had criticized was often embodied "in provocative slogans almost always meant to say something less extravagant than what the slogans seemed to say." HART, ESSAYS, *supra* note 29, at 128 (specifically referring to the key passages by Holmes and Llewellyn). However, as so often happens in jurisprudence, this partial retraction is almost always ignored.

[39] American Legal Realism refers to a specific historical movement; "legal realism" refers to ideas that have a less local provenance and more general significance. Neither Realism nor realism is solely or mainly concerned with judicial decisions on questions of law. *See* Twining, *Talk About Realism*, *supra* note 1, at 333 n.2, 359-71.

[40] HART, ESSAYS, *supra* note 29, at ch. 13.

[41] HART, ESSAYS, *supra* note 29, at ch. 12.

and Austin were not "formalists" in the Germanic sense that Holmes was attacking. To be fair to Holmes, he was probably not responsible for this attribution.

Finally, and more generally, Hart praised Holmes for his specific insights as an historian and as a lawyer, but dismissed him as a poor philosopher. The apercus and epigrams were diamonds, but they were held together by rather flimsy unphilosophical string.[42]

Thus, if one accepts that *The Path of the Law* did not launch a general theory or definition of law, Hart's arguments have little bearing on the main thesis of the address. On this interpretation, Hart's arguments are valid, but they do not damage the "bad man." Hart exonerates English analytical jurisprudence from "the fallacy of the logical form," ignores the realist argument, and endorses the positivist argument.

## II. THE "BAD MAN" IN 1897

### A. *Uncharitable readings*

Hart may have misread Holmes, but at least he produced illuminating criticisms of the idea of law as prediction or as brute fact. Few other misreadings have been so fruitful. Indeterminate attribution, crude ism-atizing, reading out of context, ignoring retractions and revisions, and both conflating and exaggerating difference and disagreement, are endemic bad practices in jurisprudence.[43] *The Path of the Law* has had more than its share of such unscholarly or uncharitable readings, most of which ignore the context of the relevant passages. One can clear away some unnecessary polemics by dealing peremptorily with four prime examples.

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[42] As Hart states:

> The diamonds are the marvelous insights into the genius of the common law and the detailed explorations of its growth . . . . The string is the sometimes obscure and hasty argument, the contemptuous dismissal of rival views, and the exaggerations with which Holmes sought to build up the tendencies which he found actually at work in the history of the law into a tough, collective philosophy of society.

HART, ESSAYS, *supra* note 29, at 278.

[43] Twining, *The Great Juristic Bazaar*, *supra* note 1.

(i) *The "bad man" is the basis for a general prediction theory of law.* There is little room for doubt that defining or conceptualizing "law" solely or mainly in terms of prediction is vulnerable to several strong lines of criticism, provided that the relevant passages are interpreted as launching a comprehensive general theory of law. Such an interpretation can only be sustained if one ignores the context, internal and extrinsic evidence of Holmes's intentions, and other more charitable interpretations. A better-grounded alternative interpretation is that Holmes intended to use a striking image to illustrate the point that prediction is a central concern of those subject to the law and their legal advisers. It is difficult to see how any careful reader can attribute to Holmes the view that legislators, judges or advocates are centrally concerned with prediction. A "top-down" perspective, such as a prescriptive theory of legislation or adjudication, is no less vulnerable to charges of partiality and can no more claim to be a "comprehensive" general theory of law than a "bottom up" subject perspective. A more charitable reading of Holmes is that he was recommending to law students that one can get a more realistic, down-to-earth idea of ordinary private practice by adopting a "bad man" standpoint rather than a more lofty one.

(ii) *Holmes was urging students to adopt a cynical or immoral attitude to law and legal practice.*[44] This uncharitable interpretation does violence to text and context. Holmes explicitly denied that he was speaking "the language of cynicism."[45] It is extremely unlikely that he intended to recommend that students should adopt such an attitude to law or its practice. It is

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[44] *E.g.*, Henry M. Hart, Jr., *Holmes' Positivism-An Addendum*, 64 HARV. L. REV. 929, 932-34 (1951); *see infra* note 50.

[45] Quite apart from the context and Holmes's other writings, this disclaimer is made explicitly in *The Path of the Law* before he uses the phrase "wash it with cynical acid":

> 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. For that purpose you must definitely master its specific marks, and it is for that I ask you for the moment to imagine yourselves indifferent to other and greater things.

Holmes, *Path*, *supra* note 5, at 459.

hardly more likely that he wished to equate entering private practice with a descent into Hell.[46] It can readily be conceded that the "bad man" could be, and has been, used as a model for a private practitioner who views his or her role as furthering her client's goals without regard to morality or the public interest.[47] It is reasonable to criticize this view. A more charitable reading is that the "bad man" perspective is a cognitive rather than an affective device; that it is a way of looking at things rather than as a model for action.

(iii) *The emphasis on law as involving the power of the state is indicative of an attitude that venerates or glorifies power. It suggests that might is right or that brute power is the basis of political obligation.* This is a standard caricature of "positivism," exemplified by the notorious article *Hobbes, Holmes, and Hitler*.[48] A more moderate version is the image of the state as "the gunman writ large," which was so effectively criticized by Herbert Hart, though not in relation to Holmes.[49] A more charitable interpretation is that the "bad man," far from venerating force, is confronted by institutions and laws that are threatening products of *other people's* power. These are as likely to be unattractive as attractive to him. Again, the linking of law to power is cognitive rather than affective.

(iv) *The "bad man" is a role model for those subject to law in respect of obedience/political obligation.* The "bad man" has been criticized as setting a bad example for ordinary citizens, taxpayers, civil servants, and the Chief Executive.[50] Again,

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[46] *See supra* note 12.

[47] On why it is inappropriate to treat the "bad man" as a role model, see *supra* text accompanying notes 47-50. Henry Hart is especially eloquent about the dangers of the "bad man" as a role model in respect of obedience, legal advice, judging, legislating, and scholarship: If we start with Holmes, where is the stopping place? Hart, *supra* note 44, at 932-35.

[48] Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A. J. 569 (1943). This was the culmination of a series of attacks, mainly from Catholics, in the nineteen-forties; *cf.* Father John C. Ford, *The Fundamentals of Holmes's Juristic Philosophy*, *in* PHASES OF AMERICAN CULTURE 51 (1942).

[49] HART, THE CONCEPT OF LAW, *supra* note 25, at ch. 2.

[50] The uses to which the "bad man" has been put in legal literature and cases will be detailed by David Seipp in a forthcoming article. *See supra* note 12. Here one example will suffice:

> The canons of ethics are not drawn for Holmes's bad man who wants to know just how many corners he can cut without running into trouble with the law. They are drawn rather for "the good man" or the ethical man as buoys to assist him in charting his professional conduct.

one can concede that the "bad man" is not an admirable role model in respect of political obligation and civil disobedience. A positivist is not committed by the separability thesis to taking an amoral or immoral stance on obedience. Jeremy Bentham, Herbert Hart, Joseph Raz and David Lyons are examples of positivists who treat political obligation as a normative question distinct from issues of the existence and validity of laws.[51] A standard positivist view is that there is no general moral obligation to obey or disobey the law just because it is law. From this perspective, one may have an obligation to obey some particular law or even a specific regime for many kinds of reasons; conversely one may sometimes have an obligation to disobey the law. For positivists of this kind, questions about the nature of law and questions about political obligation are quite separate; the former are descriptive, the latter prescriptive.

In *The Path of the Law* Holmes was not addressing directly the issue of political obligation. More importantly, there is a very good reason why the "bad man" cannot sensibly be treated as an example or role model for almost anyone: "role model" is a normative concept, usually, but not invariably, involving a substantial ethical element.[52] The good professional, the upright or just judge, the lawyer-statesman, and the enlightened lawmaker are examples of personifications which combine competence with ideals or standards that typically extend

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Irving Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV, 657, 660 (1957), *cited in* General Motors Corporation v. City of New York, 501 F.2d 639, 649 (1974).

[51] JOSEPH RAZ, THE AUTHORITY OF LAW at ch. 12 (1979) (arguing that there is no prima facie general obligation to obey the law, even in a good society whose legal system is just); Jeremy Bentham, A FRAGMENT ON GOVERNMENT 399 (James Henderson Burns & H.L.A. Hart eds., 1977) (stating that: "Under a government of Laws, what is the motto of a good citizen? To obey punctually; to censure freely."); David Lyons, *Political Responsibility and Resistance to Government*, 1995-96 PHIL. EXCHANGE 5.

[52] Some role models may exemplify qualities that do not involve an ethical element, for example, efficiency in a bureaucrat or skill in an athlete; but we generally expect our bureaucrats to have integrity and our athletes to be sporting. On moral constraints on partisanship within the adversary system, see LAW IN CONTEXT, *supra* note 1, at 322-25.

beyond what is formally required by disciplinary regulations or formal codes of ethics. The "bad man" is by definition amoral, so it is very odd to interpret, use, or criticize him as a role model.

### B. *The "Bad Man" in 1897: A Charitable Interpretation*

There is, of course, much scope for disagreement about what constitutes the best historical interpretation of a juristic text.[53] However, most would agree that attention needs to be paid to text and context. Both the text and the context of *The Path of the Law* support the view that the "bad man" was introduced for quite limited purposes. In the text, the device had two manifest functions: first, to dramatize a distinction between law and morals—the badness or amoral aspect, and second, to focus attention on a more realistic standpoint for law students than that of appellate judges—the predictive aspect. One can clear away some unnecessary controversy by a brisk restatement of a moderate positivist interpretation.

Insofar as the separability thesis is controversial, so is the "bad man." However, I sympathize with the view most recently expressed by several contributors to the volume on *The Autonomy of Law*, that much of the positivism versus anti-positivism debate is repetitious, trivial and almost entirely pointless.[54] Certainly, the debate tends to be trivialized if one discusses the so-called "separability thesis" outside of particular contexts.

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[53] On interpretation and use of juristic texts, see Twining, *Reading Bentham*, *supra* note 1, at 104-28 (arguing for a pluralist approach). On historical reading my views are similar to, but not identical with, those of Quentin Skinner. *E.g.*, Quentin Skinner, *A Reply to My Critics*, *in* JAMES TULLY, MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 231-88 (1988).

[54] THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM (Robert P. George ed., 1996) For example Klaus Fusser argues:

> Last but not least, it is by no means clear that the battles about the Separation Thesis are not entirely pointless. The question of necessary relations between morality and law hinges crucially on the presupposition that the very concept of law itself does not unravel into different sets of convenient stipulations from different epistemological angles, each of which renders the question of necessary relations trivial.

*Id.* at 120.

We can surely agree that there are some contexts in which distinctions between description and prescription, law and morals, and "is" and "ought" can be both viable and useful.[55] For example, in discussing law reform in a particular system, or trying to give a relatively detached account of someone else's legal system, or assessing the human rights record of a foreign regime. For some purposes, a vocabulary is needed that aids description of existing situations in order to assess, criticize or recommend change. Such descriptions may not be entirely value-free or neutral, but we still need the distinction. It is not a concern of Amnesty International or Human Rights Watch to make a system the best it can be; even if they went out of their way to be charitable in interpreting "the facts," they would need a language for giving an account of actual deviations from stated aspirations and international human rights norms. Proponents of the separability thesis maintain that rose-tinted spectacles filter out the seamy side of law and those elements that deserve criticism. What is done in the name of law can be pretty awful or quite admirable, and tools are needed for depicting both aspiration and reality—distinguishing what actually happens, from what is meant to happen.[56] The "bad man" provides one such lens.

We can also agree that in some contexts the separability thesis is difficult to maintain. For example, an expositor advancing a theory of contract or responsibility in a particular legal system (as in *The Common Law*) or a barrister advancing the best interpretation of a point of law on behalf of a client in court typically claims to be stating the law. The objective theory is advanced by Holmes as both descriptive and prescriptive; the theory goes far beyond the authoritative sources, but Holmes claims that this *is* the common law. Hart criticizes Holmes's theory because to impose liability on the basis of

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[55] Few anti-positivists maintain that it is never possible and useful to distinguish "is"-statements and "ought"-statements. Ronald Dworkin claims that his best theory of law describes legal practice as well as prescribing best practice: "Dworkin's idea of interpretation is not intended to dispense with these ideas of descriptivity and normativity. Rather, he wishes us to accept the idea that it is the nature of *some concepts* that they are not fully understood unless in an interpretive way." STEPHEN GUEST, RONALD DWORKIN 24 (1992) (emphasis added).

[56] On refining the crude common sense concept of "reality" in this kind of context, see TWINING, RETHINKING EVIDENCE, *supra* note 1, at 366-68.

objective standards in criminal or civil matters is unfair or unjust. He also denies that it represents either English or American law. Hart interprets Holmes as trying to construct a theory based on first principles.[57] He points out that, while Holmes claimed that he was merely recording the law's use of "objective standards," in fact "he devotes much of this chapter to showing that the law here is reasonable and even admirable."[58] Hart himself combines normative criticism of Holmes's theory with the claim that it has little support in American legal opinion. It seems that neither Holmes nor Hart strictly observes the "is"/"ought" distinction in this context. This is not surprising, because it is almost impossible to maintain the distinction when expounding the law. Even Kelsen recognized that, in stating or interpreting the substance of legal doctrine, ethical and other "impurities" inevitably enter in.[59]

We can agree that reasonable persons can differ about the validity or utility of such distinctions in some contexts; including in respect of a general theory of political obligation or about what constitutes a valid, cogent and appropriate argument on a question of law. There are genuine, sometimes profound disagreements and differences of concern underlying debates about positivism, but the range of disagreement is much narrower than decontextualized, repetitive discourse suggests.

The second function of the "bad man" is to focus attention on the standpoints of those subject to the law—including good citizens as well as bad men and the legal advisers of both—for whom predicting is often a central task or concern.[60] In the context of *The Path of the Law* the device of the "bad man" can be interpreted as a means of urging intending private practitioners to adopt a *realistic* standpoint. Surely we can agree with Holmes that: 1) there are some standpoints—both participant and observer—for which prediction is central or is one impor-

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[57] HART, ESSAYS, *supra* note 29, at 279.

[58] HART, ESSAYS, *supra* note 29, at 282.

[59] ESSAYS ON KELSEN 26-33 (Richard Tur & William Twining eds., 1986).

[60] In practice, prediction is usually part of some broader operation such as drafting, or giving legal advice. Predicting is part of, but not central to, some standard judicial operations, for example anticipating the likely reaction of higher courts or judging the likelihood that a defendant may offend again.

tant aspect of a wider task;[61] 2) that the standpoint of the office lawyer is at least as vocationally relevant for intending private practitioners as the standpoint of appellate judges; and 3) that the standpoint of those subject to the law is a significant and neglected one.

In respect of standard criticisms of Holmes, we can agree about a number of points independent of whether Holmes merited the criticism, including: 1) that there are many standpoints in which prediction is not central; 2) that predicting is only one of the tasks of actual office lawyers; and 3) that decisions of courts on points of law represent only one kind of a whole range of decisions and events that citizens, good or bad, and their legal advisers are concerned to predict.[62] To confine the Bad Man's concern to judicial decisions on questions of law is itself unrealistic—it smacks of "court-itis" and leaves out important decisions and events that a rational actor within a legal system needs to consider.[63]

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[61] Twining, *The Bad Man*, *supra* note 1, at 280-87.

[62] In criminal cases, for example, the "realistic" bad man contemplating a possibly unlawful act would be concerned with the likelihoods of observation, complaint, investigation, detection, decisions to prosecute, plea bargains and pleas, verdicts on questions of fact, procedural and jurisdictional issues, sanctions and so on. There have been other criticisms of the "realism" of the "bad man," *see supra* note 61, such as the assertion that "[i]n ongoing relations, Holmes's 'Bad Man' theory of law is quite removed from the realities of human conduct." Gidon Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567, 603 (1983).

[63] On one interpretation, Holmes focuses on interpretation and application of substantive law in particular cases and on sanctions and remedies, but not on pretrial issues or fact-determination. He explicitly excluded "the vaguer sanctions of conscience," and hence moral disapprobation, damage to continuing relationships, and other potential outcomes that would be the concern of prudent actors. This is because the focus is on understanding *law*. Fuller and others have made a different point: that in order to predict judicial decisions the Bad Man needs to take into account the motives and reasonings of "good men." LON FULLER, THE LAW IN QUEST OF ITSELF 94-95 (1940). This is no doubt true, but a comprehensive list of the factors that a prudent actor could usefully take into account as aids to prediction would be much longer and would vary according to context.

## III. THE "BAD MAN" IN 1997[64]

Since 1897 the "bad man" has to some extent become detached from the original text and has taken on a life of his own. We have seen that some decontextualized interpretations have treated him as a convenient target—what in England we would call an Aunt Sally. But what if we try to construct a more charitable interpretation, one which catches the positive part of his continuing appeal? I propose to argue that the "bad man" still has value both as an analytic device and as a metaphor, but within quite narrow parameters.

The "bad man" is a symbol, but what is the referent, and what is the context? In 1973 I wrote:

> 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. Nor is he a subscriber to 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."[65] Indeed, there appears to be no reason why the Bad

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[64] This section is similar in intent to that of William H. Wilcox's interesting article, *Taking a Good Look at the Bad Man's Point of View*, 66 CORNELL L. REV. 1058, 1059 (1981) (Wilcox states: "[M]y 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."). I agree with Wilcox that the most useful function of the "bad man" as an analytic device is to isolate prediction as a concern of all *prudent* actors, bad, amoral or good, and that prudence and prediction are central to understanding law. I also agree that the "bad man" is best interpreted as dramatizing rather than providing a basis for the separation thesis. However, I argue that the "bad man" is also symbolic of some, but not all, subjects of the law whose viewpoints are essential for "realistic" understandings of law, but are often neglected.

[65] Ralf 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* HAROLD LASSWELL & A. KAPLAN,

> 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.[65]

This passage bears repetition today, but it needs further elaboration.

First, in respect of context, it is important to distinguish between historical interpretation of the original text, and critical constructive evaluation of the "bad man" today. As an historical interpretation this passage reads rather a lot into the original text, where, as we have seen, it served quite limited purposes. The passage is better read as addressing the continuing significance and utility of the "bad man" almost a century later.

Second, it is useful to distinguish between two main ways in which the "bad man" can be interpreted and used today. He can be treated either as a precise analytical tool or as a more diffuse metaphor for "worms' eye views" or "bottom up" perspectives. Let us call these the analytical and the symbolic uses.

For some purposes, it is useful to treat the "bad man" as an artificial construct analogous to *homo sociologicus* and economic man. On this interpretation the "bad man" is an analytical device that isolates the prudential concerns of those subject to the law. As Wilcox says: "[t]he 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."[67] Predicting consequences is the core of prudence; detachment is a necessary, or at least an important, precondition for making good predictions. On this view, the "bad man" is amoral, rational and calculating. He is subject to the law, but he is different from *homo juridicus*. The latter is either just a legal person, whose existence according to one view is posited by law; or he is a personification of a purely legal perspective, i.e. depicting the lenses of the law from the point of view of legal science.[68] Both are creatures of law. The "bad man," on the other hand, is conceived to exist independently of

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POWER AND SOCIETY 78 (1950) (footnote in original).

[66] Twining, *The Bad Man*, *supra* note 1, at 280-81 (footnote omitted).

[67] Wilcox, *supra* note 64, at 1072.

[68] RAZ, *supra* note 51, at 140-43.

law. From his point of view the law is one of the facts of life that he has to cope with as an external force, to be avoided, evaded or perhaps used for his own purposes. *Homo juridicus* represents a top down view of legal persons or purely legal perspectives;[69] the "bad man" represents a detached view of legal subjects. His main function is to isolate, for purposes of analysis, the concern for prediction of those confronted by law.

Because the "bad man" is neither created nor defined by law, it does not follow that the idea needs to be restricted to individual human beings. Indeed, the treatment of corporations in the quoted passage is too cautious. Businesses, whether incorporated or not, trade unions, political pressure groups, teenage gangs, and many other kinds of collective actors and agents may well fit the ideal type quite closely.[70] For instance, is not the perspective of a large bureaucratic corporation whose sole or primary aim is maximization of profit very close to that of the "bad man"—amoral, rational, calculating, purposeful, pursuing its own agenda?[71] This may be especially significant for a realistic analysis of a given legal order in terms of the distribution of power.

A less precise interpretation treats the "bad man" as a diffuse metaphor for "bottom up" perspectives and "worms' eye views." The analytical interpretation focuses on the practical concerns of prudent actors; the symbolic interpretation emphasizes the position or vantage point of legal subjects, especially those subject to other people's power. The symbol is open to more than one interpretation. It could represent the viewpoint of all legal subjects; but insofar as it includes the main attributes of the analytic construct—rational, calculating,

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[69] On the problematic aspects of the perspectives and role of "legal scientists," see *supra* notes 22-24. The legal scientist as expositor is not a clear case of a top-down view: s/he is "above" and "outside" the law and is not in this sense a legal subject. How much power expositors or scientists actually exercise as participants within a particular system is a contingent matter, as Max Weber emphasized.

[70] *Cf.* Roger Cotterrell: "The most important legal persons in capitalist enterprise in contemporary Western societies are *not* human individuals but *corporations*." THE SOCIOLOGY OF LAW: AN INTRODUCTION 124 (2d ed. 1992).

[71] *Cf.* Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 512 (1995) (arguing that certainty in respect of regulation of corporate governance encourages directors and managers to behave like a "bad man" in tailoring their behavior to minimalist interpretations of fiduciary duties).

amoral—its scope is more restricted.[72] For example, a rational, calculating actor pursuing his own agenda is not an entirely appropriate symbol of the oppressed, the disempowered or the unempowered. In short there are many kinds of legal subjects, of which the "bad man" most appropriately represents only one species.

Let us illustrate this point in relation to two examples: gender and user perspectives on law.

*Gender.* Consider the "bad man" from a feminist perspective. What will result from a change of gender? Suppose a latter-day Holmes advised law students to look at law from the standpoint of a "bad woman"? Somehow the symbol loses its force. Why should this be? Several related reasons come immediately to mind. The stereotypical image of bad people is male: criminals, revolutionaries, naughty boys.[73] Even though we interpret "bad" to mean amoral rather than wicked, the image is still more male than female. Becky Sharp is generally amoral as she manipulates her way through *Vanity Fair*, but it seems inappropriate to characterize her as a or the "bad woman." On the other hand, a gender-neutral term such as the "bad person" or the "amoral person" sounds vapid, and there is nothing vapid about Sharp.[74] Rather, the "bad man" fits male stereotypes; if the gender is changed to meet feminist concerns, it does not work. One reason for this might be that insofar as

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[72] Twining, *The Bad Man*, *supra* note 1, at 288-89.

[73] *E.g.*, Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1091 (1986); Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1228 (1992).

[74] Sharp differs from the "bad man" in at least two other significant respects: First, her main ambition is to be accepted into the highest echelons of society, to become a respected part of the system. Second, while much of the time she is merely unscrupulous and amoral, she is prepared to lie and cheat when necessary:

> It was not the habit of the dear creature to tell falsehoods, except when necessity compelled, but in these great emergencies it was her practice to lie very freely; and in an instant she was ready with another neat, plausible, circumstantial story which she administered to her patron.

WILLIAM M. THACKERY, VANITY FAIR, 663-64 (World Classics 1983) (1847-48). Her patron Lord Steyne, himself a lecher and rogue, admired her artistry:

> What an accomplished little devil it is! thought he, What a splendid actress and manager! . . . . She beats all the women I have ever seen in the course of all my well-spent life. They are babies compared to her. I am a greenhorn myself and a fool in her hands-an old fool. She is unsurpassable in lies.

Holmes's "bad man" cannot compete.

Holmes's "bad man," like "economic man," is a rational, calculating, bloodless creature he fits male rather than female stereotypes. Furthermore, the "bad man" does not seem to be a good symbol of subordination or victimization. He does not share in and is detached from state power, but he is to some extent in control of his own destiny. Insofar as feminist critiques of patriarchy focus on the subordination, victimization, disempowerment, or silencing of women, neither the "bad man" nor the "bad woman" seems to be appropriate as a symbol. The "bad man" may symbolize alienation and detachment from, or even the dislike of law; but is he an apt representative of all legal subjects—of victims, the oppressed, silenced voices, for example?[75] The same is true for other subjects whose concerns or interests relate to empowerment, fair treatment or other kinds of participation. The "bad man" better symbolizes cool detachment rather than normative concerns about justice, oppression or power-sharing.

*Users.* The "bad man" suggests an image of someone steering their own path through the legal jungle rather than seeing it as an aid, resource, or habitat, to be used, manipulated or exploited for his own ends. A user perspective can also be a worm's eye view, in the sense that the user does not necessarily have an authoritative say in the design, development or administration of the system. Thus, a user may also see law as a product of other people's power. Users may include complainants, plaintiffs, constructors of tax avoidance schemes, welfare recipients, debt collectors, health and safety inspectors, or successful disputants enforcing arbitration awards. Legal rules may be used to threaten, harass, or coerce for purposes different from those intended;[76] and, insofar as law is facilitative, entering a contract, making a will, or setting up a company is using the law. A user perspective is quite close to that of the "bad man" in that it can be rational, calculating, and detached. However, there are some significant differences between the two concepts. First, the user may be amoral or even immoral,

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[75] It is, of course, important to distinguish between victims *of* a legal system and victims *in* the legal system. For example, someone wrongly accused or wrongly convicted of rape or murder is a victim of the legal system; someone who has been raped may be both a victim in it and a victim of it. The "bad man" is not an appropriate starting point for victimology.

[76] *E.g.*, large corporations using consumer courts as debt-collecting agencies.

but need not necessarily be so. Second, the user in this sense is an active and willing participant, the "bad man" is not. Third, those in control of the legal system may also be users, in which case the image of law as other people's power does not fit.[77] For these reasons the user is probably better treated as a close relative of the "bad man," but separate from him.

Thus the "bad man" today still has value: both as an analytical device, like "economic man," that isolates the prudential concerns of those subject to the law and as a more diffuse symbol of bottom-up perspectives. As we have seen, differentiating the "bad man" from victims, the oppressed, women, and users signals some limitations of the metaphor. He represents only one worm's eye view among many. The next section illustrates how the "bad man" can be used to explore and question some currently fashionable ideas within legal theory.

## IV. STANDPOINT: THREE DISTINCTIONS

The "bad man" usefully illustrates the elusiveness of three problematic, but useful, distinctions: general and particular jurisprudence; participants and observers; and internal and external points of view. All three play a significant role in contemporary legal theory, but they have not been subject to much sustained critical analysis.

### A. *General and Particular Jurisprudence*

Within the English analytical tradition a great deal of emphasis was placed on the distinction between general and particular jurisprudence by Bentham, Austin, Holland and

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[77] This last point is important in respect of Laura Nader's sketch for *A User Theory of Law*, which emphasizes the competition for power between different users:

> A user theory of law would embrace the view of law as being made and changed by the cumulative efforts of its users and would argue that law is being moved in a particular evolutionary direction by the dominant users. Such unconsciously generated cumulative movements may be considered as separate from yet equally important as any consciously created ones attributable to legal engineering.

Laura Nader, *A User Theory of Law*, 38 SW. L.J. 951, 952 (1984); *cf.* NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (Laura Nader ed., 1980).

Buckland.[78] Later, Anglo-American jurisprudence went through a strikingly particularist phase, and the distinction was all but forgotten. In his early work Hart tended to be rather dismissive of the distinction,[79] although he can be credited with reviving general analytical jurisprudence.[80] However, in his posthumous Postscript to *The Concept of Law*, Hart revived the distinction in order to try to narrow the range of disagreement between himself and Dworkin.[81] Another, more important reason for taking the idea of general jurisprudence seriously, is that some of the basic premises of particular jurisprudence, for example conceptions of municipal legal systems as discrete, self-contained orders, are under challenge in an increasingly interdependent world.[82]

Particular jurisprudence deals with one legal system or culture. General jurisprudence deals with more than one legal system or culture. Generality and particularity are relative. General jurisprudence may claim to be universal (as with Bentham's universal censorial jurisprudence), it may address all developed or "mature" legal systems (as with Austin's general expository jurisprudence), or it may deal with several legal systems or cultures. The geographical reach of much jurisprudential writing is strikingly indeterminate: is *Law's Empire* confined to American or Anglo-American law, does it apply to all common law systems, to the legal systems of liberal democracies, or more generally?[83] The referent of such commonly used phrases as "American jurisprudence" or "Anglo-American jurisprudence" is not always clear. Sometimes such terms refer to provenance, sometimes to audience, sometimes to data and sources. More often than not they are indeterminate. This is especially true of "common law"— do the phrases "common law adjudication," "common law reasoning," "common lawyers," and "the common law world" include Ireland and India and Sri Lanka and Mauritius? Similarly, talk of "legal culture" and

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[78] Twining, *General and Particular Jurisprudence*, *supra* note 1, at 120-29.

[79] *See, e.g.*, HART, ESSAYS, *supra* note 26, at 88.

[80] Twining, *General and Particular Jurisprudence*, *supra* note 1, at 129-33.

[81] HART, THE CONCEPT OF LAW, *supra* note 22, at postscript 239-44; *but see* Twining, *General and Particular Jurisprudence*, *supra* note 1, at 129-37; *cf.* Twining, *Globalization*, *supra* note 1, at 24-25.

[82] Twining, *Globalization*, *supra* note 1, at 7-11.

[83] Twining, *General & Particular Jurisprudence*, *supra* note 1, at 127-29.

"legal families" is also vague: Is there one American legal culture that encompasses Cripple Creek, Colorado, Boston and California? When is it meaningful to talk of "Western legal culture" and what does it exclude? Jurisprudence may be the general part of law as a discipline, but how general is the reach of any particular text is often very vague.

In order to introduce more precision into talk about the geographical reach of a text or group of texts, it is useful to distinguish between provenance, audience, focus, sources, perspectives and significance. It may also be illuminating to substitute for "particular" such words as "local" or "parochial," which have somewhat different connotations.

The *provenance* of a text may refer to the nationality or locale of its author. For example, Holmes was an American jurist, Hart was an English positivist. It may also locate the origins of a school or movement: the Frankfurt School, the Chicago School of Law and Economics, American Legal Realism. More generally, it may associate a jurist or group with a nation or region—American or Icelandic or Scandinavian jurisprudence. Such labels, though imprecise, may give an indication of the intellectual tradition or cultural context from which a jurist or a particular text or school or movement emerged.

The intended *audience* of a text may be local (as in a public lecture), specialized (as in a law review article which may have a modest circulation internationally) or it may be more general; the actual audience or readership may be wider or narrower than anticipated by the author. *The Path of the Law* was seemingly addressed to Boston University law students; part of the sub-text may have been aimed at a professional audience—American practitioners and teachers of law. Holmes could hardly have anticipated that a century later it would continue to be frequently cited and occasionally read internationally in a variety of quite different contexts.

More important is *focus:* particular jurisprudence, in Austin's sense, refers to theorizing about a single legal system. For example, English analytical jurisprudence is concerned with the basic concepts and principles of English law. General jurisprudence, in Austin's usage, focuses on laws in general or at least in "maturer systems." A focus is strongly parochial if it is limited to local parish pump issues.

Juristic writing may be local or parochial in respect of *sources*. For example, much American writing cites only, mainly or almost exclusively American sources even when dealing with issues that are not merely local. Conversely, Pollock and Buckland were widely read in Roman and German literature, but explicitly argued that the focus of taught jurisprudence should be local or particular.[84]

Jurisprudence may be local or parochial in respect of *perspectives*. There are sometimes peculiarly English, or German, or French ways of looking at things. The pejorative term "ethnocentric" is used when a writer allows the peculiar concepts, assumptions or "blinders" of their own culture to cloud or distort their perception or interpretation of phenomena or ideas of another legal system or culture. This is quite commonly exemplified by foreign "experts" who fly in to advise on legal development assuming that "lawyers," "courts," "trials" or "constitutions" have the same connotations and functions as in their own country.[85]

Finally, jurisprudence which is more or less local or particular in respect of provenance, audience, focus, sources and perspectives may be of much more general or even universal *significance*. In jurisprudence, as elsewhere, one may see a world in a grain of sand.

Locating a juristic text is not an exact science. *The Path of the Law* illustrates the limitations of such characterizations: one might say that it is American, even Bostonian, in respect of both provenance and audience. Its sources are mainly Anglo-American, but it is informed by a sprinkling of Roman and Continental European ideas. It is arguably mid-Atlantic in respect of style. Its focus ranges from the highly local to the universal. It is a classic of the common law and of jurisprudence generally, just because in important ways it transcends its peculiar roots in time and space to provide insights of general significance. The provenance of the "bad man" was Boston

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[84] Twining, *General and Particular Jurisprudence*, *supra* note 1, at 127-29.

[85] On ethnocentrism and constitution-making, see William Twining, *Constitutions, Constitutionalism, and Constitution-mongering*, *in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 383 (Irwin Stotzky ed., 1993).

in 1897, but in 1997 he can sensibly be interpreted as a citizen of the world—for example, as a personification of positivism or realism or of some worms' eye views of law anywhere.

B. *Participants, Observers, and Participant-observers.*

Law, I have argued elsewhere, tends to be a participant-oriented discipline.[86] By this I mean that the culture of much legal scholarship, legal education and legal discourse generally is imbricated with practical insider attitudes. This is hardly surprising in what is, for the most part, an applied discipline closely associated with the world of affairs. What is surprising is how often one participant standpoint is equated with a whole view. The "bad man" and his critics illustrate the variety of participant standpoints in law. Prediction fits bad men, good citizens, their advisers, decisions to prosecute, and some external observers (e.g. intelligence analysts), but not others. Prediction is not *central* to the role of legislators, judges, advocates, mediators, or negotiators, but it plays a part in performing their tasks.[87] Holmes has been criticized for ignoring other standpoints; accusations of confusing the part with some notional whole can at least as well be the basis for criticizing theories of adjudication or legislation which claim to be comprehensive theories of law.[88]

It is a mistake to treat the distinctions between general and particular jurisprudence and between observers and participants as co-extensive. A stance of strong detachment fits the standpoints of some kinds of observers of other people's legal systems. However, one can observe a particular legal system, including one's own, and one can participate in foreign, regional, transnational and global operations. And general jurisprudence can be normative as well as interpretive or descriptive.

More important is the point that there are many kinds of observers, with different vantage-points, roles, resources, perspectives and purposes.[89] Some people are observers by hap-

[86] TWINING, BLACKSTONE'S TOWER, *supra* note 1, at 128-30; TWINING LAW IN CONTEXT, *supra* note 1, at 126-28.

[87] On prediction by lower court judges of potential decisions by higher courts, see RICHARD POSNER, THE PROBLEMS OF JURISPRUDENCE 223-28 (1990).

[88] On the alleged centrality of judges, see *supra* note 29.

[89] The variety of types of observer and observing is illustrated by Rogat's

penstance (a bystander, casual onlooker, or chance witness), but observing, describing, explaining and interpreting are *activities* undertaken for a variety of purposes from a variety of standpoints. Accordingly, some observers of legal systems are participants in some broader enterprise. For example, the CIA agent, the foreign correspondent, Amnesty International, the comparative lawyer, and "the legal scientist" have different goals, roles, resources and situations. What lenses are appropriate depend on factors such as vantage point, purpose and role.

Most such observers are not direct participants in the legal systems they are observing. There is, however, the social science concept of the participant-observer, who—leanly interpreted—participates in order to observe. The concept is itself notoriously fuzzy; in order to avoid the Hawthorn effect, the observer of a rain making ceremony must be restrained about innovating or suggesting improvements in a subsequent debriefing session. The main point of participant-observation is to gain a better vantage-point and some first-hand experience of being part of the action. But a Moscow-watcher, whether journalist, diplomat, travel writer or spy, usually needs to visit or live in Moscow, during which time, like the "bad man," she too is subject to the Russian legal system and other local legal orderings.

The "bad man" illustrates the fluidity of such categories. Unlike the participant-observer, he does not participate in order to observe. But neither does he observe in order to par-

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splendid article. In discussing, mainly from a psychological perspective, the attitudes and postures of Holmes, Henry James and Henry Adams, Rogat uses *inter alios*: spectator, Rogat, *supra* note 10, at 213, *passim*; "Brahman," Rogat, *supra* note 10, at 230; "observer," Rogat, *supra* note 10, at 230, 237, 239-40; "outsider," Rogat, *supra* note 10, at 230, 243; "onlooker," Rogat, *supra* note 10, at 240; "bystander," Rogat, *supra* note 10, at 241, 242; "Olympian," Rogat, *supra* note 10, at 245; "audience," Rogat, *supra* note 10, at 241; "astronomer," Rogat, *supra* note 10, at 243 (Holmes Sr.'s image of his son); "expatriate," Rogat, *supra* note 10, at 243; and "disinterested technician," Rogat, *supra* note 10, at 249. These nuanced characterizations are reflected in other nouns and adjectives: attachment, detachment, alienation, estrangement, withdrawal, indifference, disinterestedness, and fatalism. Rogat skillfully deploys these concepts, but he does not differentiate clearly enough between vantage point, role, perspective and purpose.

ticipate; he is an actor rather than a participant, for participation in the legal system is only incidental to his purposes as actor.

Yosal Rogat, in his seminal article, *The Judge as Spectator*, pointed out a seeming paradox in *The Path of the Law*: Holmes advocates a standpoint of strong detachment for participants—not just for the "bad man," but also for law students as intending practitioners, for citizens, and even for the judge.[90] However, the paradox is only apparent. The concerned insiders who are critics or reformers also need a language for describing existing institutions, rules and practices, etc., that they wish to evaluate, criticize or change. In some contexts one describes in order to criticize. In many other participant roles, relative detachment is widely considered to be a desirable trait. Llewellyn's "temporary divorce of the is and the ought for purposes of study"[91] and Holmes's "dual lenses" seem sensible rather than paradoxical.[92] But Holmes, as a person, sometimes carried his detachment rather far.

Strong detachment does not fit so easily with the standpoints of most participants within their own legal system, such as legislators, judges, officials, advocates, good citizens, reformers, and expositors.[93] The image better fits one's academic colleague who throws away all administration circulars and directives without reading them; or the well-dressed woman who walks calmly through the Green channel at Heathrow knowing that she is unlikely to be stopped; or the tax consultant who constructs wealth-maximizing schemes for clients by calculating risks without too fine a regard for distinctions between evasion, avoidance and grey areas; or the African National Congress activist in the apartheid era who worked out when and how to use the South African legal system and when to operate outside the law in furthering the political

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[90] Rogat, *supra* note 10, at 243.

[91] KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 56-57 (1962).

[92] The phrase "double vision" is taken from Thomas Nagel's THE VIEW FROM NOWHERE ch. 6 (1986). The relationship between Nagel's interpretation of points of view and my conception of "standpoint" is too complex to pursue here.

[93] On expositors as participants in their legal system see TWINING, BLACKSTONE'S TOWER, *supra* note 1, at 130-41.

goals of the movement.[94] Whether the image fits the standpoint of the "bad man's" counsellor or a revolutionary or a spy or Saint Genêt is debatable.[95]

The "bad man" is an actor, but he symbolizes detachment from the system. *He disowns it.* For him there is no question of loyalty or fidelity or legitimacy or validity or correct interpretation or making it the best it can be. He is in the system, but not of it. It is a fact of life that has been created, imposed, implemented (or not) by others—one can navigate, play or benefit from the system as one can a jungle or other external environment.

### C. *External and Internal Points of View.*

Much has been made of distinctions between "internal" and "external" points of view in modern jurisprudence. Hart made this a cornerstone of his hermeneutic interpretation of the concept of law. Dworkin claims for *Law's Empire* that "this book takes up the *internal*, participants' point of view."[96] Some sociologists of law, as different as Roger Cotterrell[97] and Donald Black,[98] claim that they are outside observers of legal systems. Even critical legal scholars frequently say that they are analyzing law from the outside.[99]

It is a mistake to equate the distinction between observers and participants with the distinction between internal and external points of view. There are many types of observers and participants: some observe as part of participating, some par-

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[94] *See generally* NELSON MANDELA, LONG WALK TO FREEDOM (1994)

[95] Twining, *The Bad Man*, *supra* note 1, at 280, 288.

[96] DWORKIN, supra note 10, at 14.

[97] Roger Cotterrell, *The Sociological Concept of Law*, 10 J.L. AND SOC'Y 241, 242; *cf.* COTTERRELL, THE POLITICS OF JURISPRUDENCE (1989).

[98] DONALD BLACK, THE BEHAVIOR OF LAW (1976); SOCIOLOGICAL JUSTICE (1989), discussed by Roger Cotterrell, in THE SOCIOLOGY OF LAW: AN INTRODUCTION 13 (2d ed. 1992).

[99] For a perceptive critique of some examples, see Tamanaha, *infra* note 97, at 188-91. It is natural for critical scholars to distance or dissociate themselves from authority, but a high proportion of critical literature is activist and hence participatory, for example from England, THE CRITICAL LAWYERS' HANDBOOK (Ian Grigg-Spall & Paddy Ireland eds., 1992); *cf.* from an earlier generation in the United States, KATHY BOUDIN ET AL., THE BUST BOOK: WHAT TO DO UNTIL THE LAWYER COMES (1970), discussed in relation to Holmes in Twining, *The Bad Man*, *supra* note 1, at 275-76, 299-303.

ticipate in order to observe. The "bad man" is detached from the law and disowns it; but he is in the legal system as an actor, sometimes as a participant. At the very least, talk of internal and external needs to give a specific answer to such questions as: "internal/external to what?"

Brian Tamanaha has convincingly shown that the internal /external distinction has arisen in a variety of contexts and "remains obscure and largely unanalyzed."[100] I agree with most of his argument[101] and will not repeat it here. I would go further in differentiating vantage point, role, resources, purpose, and perspectives in relation to "standpoint," but this must be reserved for another occasion. Suffice to say here that once again the "bad man" does not fit decontextualized distinctions between "internal" and "external" points of view and in the process illustrates why, in jurisprudence, it is essential to take clarification of standpoint seriously.[102]

Neither the distinction between general and particular jurisprudence nor distinctions between observer and participant standpoints or internal and external points of view can bear much weight. This does not mean that they are meaningless or useless. Holmes's "bad man" is local, participatory, and relatively detached. In 1896-97 he was introduced for quite narrow purposes. He has since become a symbol of wider significance. This standpoint usefully emphasizes the power dimension of law. It fits quite comfortably with much of English legal culture. But, of course, the "bad man" represents only one juristic standpoint among many.

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[100] BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 153-54 (1997).

[101] *Id.* at 153-95

[102] It is not a coincidence that Holmes was sensitive to the significance of standpoint; his friend Henry James was one of the first figures to develop self-consciously the idea of "point of view" in fiction. *See* PERCY LUBBOCK, THE CRAFT OF FICTION 156-87 (Jonathan Cape 1955) (1921): "The whole intricate question of method, in the craft of fiction, I take to be governed by the question of the point of view—the question of the relation in which the narrator stands to the story." *Id.* at 251. Earlier Lubbock states: "Henry James was the first writer of fiction, I judge, to use all the possibilities of the method with intention and thoroughness, and the full extent of the opportunity which is thus revealed is very great." *Id.* at 172. A similar claim can be made for the significance of standpoint in legal theory.

## CONCLUSION

First, it is useful to distinguish between historical interpretations of Holmes's text and the potential uses of the "bad man" device today. An end to unscholarly interpretations of Holmes's text and uncharitable interpretations of the "bad man" as a symbolic figure would be welcome. There never was a general prediction theory of law, except perhaps in the minds of some slapdash critics. The "bad man" was never intended to be nor should he be used or criticized as a role model; rather he represents one limited, but useful and neglected, perspective.

Second, Holmes's original intention was to use the "bad man" as a device to introduce a positivist and a realist perspective. It is a vivid way of illustrating the separability thesis, which was, and to this day remains, controversial. It was less successful as a realist move because real bad men, good citizens and their advisers are not solely concerned with prediction and they need to predict many kinds of decisions and events, not just judicial decisions on questions of law (and sanctions). Furthermore, real subjects of the law, whether good, bad, or amoral are not always rational, calculating or purposive. As an analytical construct, the "bad man" is no more realistic than "economic" man. Rather, like *homo economicus*, it can be used as an analytic device for isolating the concerns of a prudent subject who is detached from both law and morality.

Third, the "bad man" is a good example of the significance of switching standpoint. In particular, he reminds us of the significance of bottom up perspectives. Even if broadly interpreted as a metaphor, he cannot be taken as fully representative of all legal subjects, such as victims, users, women and the oppressed. But he does draw attention to the idea of law as other people's power and in the process to much that tends to be omitted from theories that are exclusively top down analyses. How law is perceived and used by subjects is as significant for the purpose of understanding as the motives, aims and decisions of those who control the legal system. It also reminds us of the potential awfulness of much that is done in the name of

law. Like *The Bonfire of the Vanities*,[103] the "bad man" draws attention to the seamy underside of law that is generally papered over or ignored by legal scholarship.

Fourth, distinctions between "internal" and "external" points of view, between participants and observers, between general and particular jurisprudence are recognized as important in contemporary legal theory. The "bad man" cuts across these distinctions: an outsider with an insider's vantage-point, an unwilling participant who is a relatively detached observer, a worm from Massachusetts who has become a citizen of the world. In transcending these dichotomies he shows up their fragility and their crudity. Here, legal theory needs a more nuanced vocabulary.

Finally, there are some genuine issues worth debating between positivism and its critics, but these tend be obscured by unnecessary, often unscholarly, polemics. I personally believe that both positions are largely complementary and that jurisprudence is impoverished by obsessive preoccupation with the rather narrow range of issues that are the focus of such debates. For if the purpose of legal theory is understanding, how can anyone claim to have a balanced theory of law who only looks at one side of the admittedly rough distinctions between the local and the universal, between the law in books and the law in action, and between aspiration and reality? Any legal theory that focuses solely on aspiration or solely on the often brutal facts of the realities of law is radically incomplete. Understanding law involves taking account of the "realities" of those with power over it, those who are subject to it and many others besides. Understanding law requires multiple lenses. The "bad man," constructively interpreted, still provides one useful set.

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[103] TOM WOLFE, THE BONFIRE OF THE VANITIES (1987). While works of this genre may be poor sociology, as Judge Posner has suggested, they can vividly illuminate problems and practices that deserve serious attention. In RICHARD A. POSNER, OVERCOMING LAW (1995) Posner partially retracted his original opinion that one learns almost nothing about law from Tom Wolfe's novel. However, he concludes that "*The Bonfire of the Vanities* is a fine novel with limited relevance to the deep issues of jurisprudence." *Id.* at 489. I respectfully disagree; like the "bad man," it focuses on some neglected points of view, not least the experiences of people who become enmeshed in the criminal process as suspects.