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FINDING THE GOOD IN HOLMES'S BAD MAN

Marco Jimenez*

This Article critically examines Oliver Wendell Holmes's widely influential but controversial "bad man" theory of law from its inception during a speech Holmes gave for the dedication of a new hall of the Boston University School of Law in 1897, through its development over the next century, to its current influence over legal fields as diverse as contract law, tort law, and modern punitive damages jurisprudence. This Article argues that Holmes's theory, despite its extraordinary influence, has been widely misunderstood and can be more profitably understood—by both supporters and critics alike—not as supporting the bad man but the good, by providing an effective counterpart to the traditional positivist theory of law for which Holmes's bad man theory has so often been associated. Indeed, Holmes's theory, which has been portrayed by some as supporting the argument for the strict separation of law and morality, has been attacked by its critics both descriptively (as providing an incomplete picture of the law) and normatively (as providing an immoral or, at best, amoral theory of law) and has been accused of artificially driving a wedge between law on the one hand, and justice or morality on the other. Far from overlooking this relationship, however, a careful reading of Holmes suggests that he was himself well aware of the intimate relationship between law and morality, and seems to have recognized, somewhat surprisingly, that only by engaging in an analytical separation of these two concepts can they then be normatively reunited in an intellectually consistent and satisfying manner. In short, Holmes's theory supports the idea that only by recognizing the differences between the concepts of law and justice, rather than by stressing their similarities, can the two be brought together and integrated into the social fabric upon which law must necessarily rest.

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INTRODUCTION

In one of the most cited¹ and important² law review articles ever written,³ Oliver Wendell Holmes articulated his path-breaking and widely influential⁴ theory of law,⁵ in which he sought to help lawyers, judges, and

1. See, e.g., David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. REV. 1547, 1548 (1997) ("Path has been republished and cited so many times that few of us remember that it began as a speech, rather than an essay on jurisprudence.").

2. See, e.g., Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1228 (1991) (book review) (describing *The Path of the Law* as "the single most important essay ever written by an American on the law").

3. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

4. See, e.g., PHILLIP E. JOHNSON, REASON IN THE BALANCE: THE CASE AGAINST NATURALISM IN SCIENCE, LAW & EDUCATION 140 (1995) ("This lecture has been so influential in shaping the thinking of American lawyers that it might be described as almost part of the Constitution.").

academicians understand the law by viewing it not from the internal perspective of a good man, “who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience,”⁶ but from the external perspective of the “bad man,”⁷ who “cares only for the material consequences which such knowledge enables him to predict.”⁸ Since its creation in 1897, Holmes’s “bad man” theory of law has been accused (among other things) of advocating a legal system devoid of morality,⁹ one that not only leaves the law itself impoverished,¹⁰ but promotes immoral behavior by encouraging the bad man (or his lawyer)¹¹ to choose a course of conduct not according to generally accepted standards of community behavior,¹² but according to a cost-benefit analysis¹³ in

5. Holmes once defined law as “a statement of the circumstances, in which the public force will be brought to bear upon men through the courts. . . . [T]he word commonly is confined to such prophecies or threats . . . addressed to persons living within the power of the courts.” *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356–57 (1909) (Holmes, J.).

6. Holmes, *supra* note 3, at 459.

7. Although this author would have preferred to use the non-sexist terms “good person” and “bad person,” I have retained the terms “good man” and “bad man” in this Article because they are ubiquitous in Holmes’s own writings and are used by judges and scholars discussing Holmes’s work.

8. Holmes, *supra* note 3, at 459. Here, Holmes acknowledges both the “internal” and “external” ways of viewing the law, about which I shall have a lot more to say in Part III. For a general statement of the internal and external points of view, see H.L.A. HART, *THE CONCEPT OF LAW* 89 (2d ed. 1994) (“[F]or it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the ‘external’ and the ‘internal points of view.’”).

9. See Robert W. Gordon, *The Path of the Lawyer*, 110 HARV. L. REV. 1013, 1014 (1997) (“Probably the most common reading of the speech is that it sets forth a purely positivist theory of law—a deflated, de-moralized, ‘disenchanted’ view . . . of the legal system.”).

10. See, e.g., William Twining, *Other People’s Power: The Bad Man and English Positivism, 1897–1997*, 63 BROOK. L. REV. 189, 192 (1997) (“[*The Path of the Law*] 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.”); see also RONALD DWORKIN, *LAW’S EMPIRE* 14 (1986) (calling “external theories,” which he associated with Holmes, “perverse,” “impoverished[,] and defective”).

11. See Nelson P. Miller, *The Nobility of the American Lawyer: The Ennobling History, Philosophy, and Morality of a Maligned Profession*, 22 T.M. COOLEY L. REV. 209, 231 (2005) (“Justice Holmes desired most of all that lawyers disconnect themselves from morality—to destroy their morality and faith.”).

12. See Gordon, *supra* note 9, at 1014 (“To less approving eyes, Holmes recommends that the lawyer regard the legal system in a wholly alienated and instrumental fashion—not as a set of norms established for common membership in a political community, nor an attempt to realize (however imperfectly) ideals of justice or social integration, but simply as random and arbitrary outputs of state force, which are opportunities for or obstacles to realizing his client’s self-interested projects.”).

13. This, of course, is the way that many law and economics scholars understand Holmes today, and their view is not without support in Holmes himself. See Holmes, *supra* note 3, at 474 (“[W]e are called on to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.”). As I discuss in Part III, this view, while part of

which the bad man chooses to engage in a given activity whenever the benefit of doing so exceeds the activity's legal cost.¹⁴

In this Article, I argue that this commonly accepted view of Holmes's legal theory is not only wrong, but dangerous. In short, I will show how scholars and judges have erected around Holmes's mighty reputation a jurisprudential edifice built upon the shifting sands of misunderstanding, and how this misunderstanding has led some judges, including most recently our own Supreme Court, to base some of their most important decisions on a misinterpretation of Holmes.

If, however, Holmes's theory, even as misunderstood and misapplied, had an independent normative and descriptive force, then one could still defend this corrupted version of Holmes's theory as logically coherent, and its influence on our law, although not in accord with Holmes's original intent, could still be justified. As I will show, however, no such justification is possible. This does not mean, of course, that Holmes's bad man theory of law, especially as understood by Holmes, is not valuable.

Indeed, as this Article shows, Holmes himself had a much narrower understanding of the bad man's role in jurisprudence than is commonly supposed. In fact, Holmes's bad man, when coupled with other important insights provided throughout Holmes's writings, not only sows the seeds for the bad man's demise (at least to the extent that the bad man theory of law is commonly understood today), but provides a much fuller and more satisfactory theory of law than has been previously acknowledged—one capable of speaking to us in a meaningful way today.

This Article therefore revisits Holmes's bad man theory of law as it was originally conceived. It then shows how the bad man theory has come to be misunderstood and misapplied in several important areas of law, including contract law, tort law, and punitive damages jurisprudence. Finally, this Article suggests ways in which a fuller understanding of Holmes's theory can shed light on important questions of law and legal policy today.

This Article proceeds in three principle parts. Part I paints, in broad strokes, Holmes's bad man theory of law, as it has been commonly understood. Part II discusses how this misunderstood version of the theory has been misapplied in the areas of contract law, tort law, and, most recently, the law governing punitive damages. Part II then demonstrates how these developments have infected our law by pitting Holmes's corrupted version of the bad man against the more noble "good man" view of law, in which morality and ethics exist within, and alongside, the black-letter law. Part III revisits Holmes's bad man theory of law in order to

Holmes's philosophy, is incomplete and only tells part of the story Holmes wished to convey.

14. Gordon, *supra* note 9, at 1014 ("To those who like this view, the 'bad man' is just the rational man—*Homo law-and-economicus*—who treats all legal rules as prices on conduct."); see also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1773 (1976) ("The certainty of individualism is perfectly embodied in the calculations of Holmes' 'bad man,' who is concerned with law only as a means or an obstacle to the accomplishment of his antisocial ends.").

reinterpret it in light of Aristotle, an interpretation for which there is strong textual support. Part III then suggests a new way of understanding Holmes's theory that is fundamentally at odds with, but more intellectually and morally satisfying than, most modern interpretations. More specifically, Part III argues that this mixed Aristotelian/Holmesian theory may help provide judges, academicians, and policymakers with a useful tool for making and examining important decisions for the benefit of the good man. Part III then briefly sketches the usefulness of such a theory in the areas of contract law, tort law, and punitive damages.

It is important to note that, throughout this Article, I will not be calling for the bad man's death or overthrow. Rather, I ask, as Holmes did, that we endeavor to understand the bad man, learn from him what he will teach us and, ultimately, see the world—if only for a moment—through his eyes. But we must do this not to placate the bad man, but to better fashion, from deep within our laboratories of justice, a more suitable rival. This rival, when he is ready to rule, will not displace the bad man from his throne of law, but will take his place alongside him, on the throne of justice.

I. THE BIRTH OF A THEORY: HOLMES INTRODUCES THE BAD MAN

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

— *Oliver Wendell Holmes*¹⁵

With these immortal words, Holmes, who was perhaps the greatest jurist this country ever produced,¹⁶ breathed life into what was arguably his most enduring contribution to jurisprudence: the “bad man.”

According to the most common reading of Holmes's theory, law should be approached and understood as the bad man himself would approach and understand it: that is, not as an historically minded rational man concerned with the reasons for the existence of a particular law, nor as a morally driven good man “who finds his reasons for conduct, whether inside the law

15. Holmes, *supra* note 3, at 459.

16. See Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 677, 684 (1931) (“He is today for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence, and one of the greatest of the ages.”); Felix Frankfurter, *The Early Writings of O.W. Holmes, Jr.*, 44 HARV. L. REV. 717, 723 (1931) (“[Holmes], above all others, has given the directions of contemporary jurisprudence. He wields such a powerful influence upon today, because his deep knowledge of yesterday enables him to extricate the present from meaningless entanglements with the past and yet to see events in the perspective of history.”); Roscoe Pound, *Judge Holmes's Contributions to the Science of Law*, 34 HARV. L. REV. 449, 449 (1921) (“[Holmes] has done more than lead American juristic thought of the present generation. Above all others he has shaped the methods and ideas that are characteristic of the present as distinguished from the immediate past.”).

or outside of it, in the vaguer sanctions of conscience,”¹⁷ but rather as a calculating and amoral (or perhaps, immoral) bad man who, in Holmes’s own words, “cares only for the material consequences”¹⁸ of his actions, which can be thought of as the difference between the advantages to be gained and the penalty to be suffered by violating this or that provision of the law, breaching this or that contract, or committing this or that tort.¹⁹

If Holmes’s views constituted the mere ramblings of an obscure scholar writing more than a century ago, then all could be forgiven, as much would be forgotten. But Holmes’s bad man, like Dr. Frankenstein’s own creation,²⁰ soon took on a life of his own, and has been terrorizing the Anglo-American legal landscape ever since, spreading his unsavory influence to fields as disparate as contract law,²¹ tort law,²² and the law governing punitive damages.²³ And, more than a century after his birth, the bad man is alive and well today and has recently made his presence felt in state²⁴ and federal²⁵ judicial decisions, books,²⁶ law review articles,²⁷ and,

17. Holmes, *supra* note 3, at 459.

18. *Id.*

19. See, e.g., Claire Finkelstein, *Hobbes and the Internal Point of View*, 75 FORDHAM L. REV. 1211, 1213 (2006) (“Law for the bad man is a yoke around his neck that restrains him from various liberties he might otherwise wish to enjoy. It also constrains his ability to benefit himself and to further his various ends; including ends of survival and physical well-being. He has no sense of legal duty and would think nothing of violating the law if he could do so with impunity. The only restraint on illegality is the possibility of detection, which he would constantly weigh against the potential for gain.”).

20. See MARY WOLLSTONECRAFT SHELLEY, *FRANKENSTEIN; OR THE MODERN PROMETHEUS* (James Rieger ed., Univ. of Chi. Press 1982) (1818).

21. See *infra* Part II.A.

22. See *infra* Part II.B.

23. See *infra* Part II.C.

24. See *State v. Creekpaum*, 732 P.2d 557, 569 n.2 (Alaska Ct. App. 1987) (citing Holmes, *supra* note 3, at 459) (finding that the Ex Post Facto Clause was intended to protect the bad man from unknown punishment), *rev'd*, 753 P.2d 1139 (Alaska 1988); *Neufeld v. Balboa Ins. Co.*, 101 Cal. Rptr. 2d 151, 155 (Cal. Ct. App. 2000) (finding the bad man insurance company could not act as the “bad insurer” and seek to use its own wrong, including the flouting of time limit disclosure regulations, as an affirmative defense in later litigation); *Bridgeport Harbor Place I, LLC v. Ganim*, No. X06CV040184523S, 2008 WL 4926925, at *12 (Conn. Super. Ct. Oct. 31, 2008) (quoting *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2631–32 (2008)); *In re W.D.P.*, 91 P.3d 1078, 1089–92 (Haw. 2004) (finding that for attorneys and future bar applicants, “bad man”-like behavior may be legal but may also cause failure of admission requirement of good moral character); *Sorci v. Iowa Dist. Court for Polk Cnty.*, 671 N.W.2d 482, 494 (Iowa 2003) (finding the Iowa Code of Professional Responsibility for Lawyers is not designed for Holmes’s bad man); *State v. Paul*, 548 N.W.2d 260, 267–68 (Minn. 1996) (declining to rule that warrantless entry into a suspect’s home can only be predicated on a felony, used in the DUI context as against public policy to incentivize evasions from the police for minor stops); *Estate of Murrell v. Quin*, 454 So. 2d 437, 440–41 (Miss. 1984) (Robertson, J., concurring in part, dissenting in part) (citing Holmes’s bad man and the contrasting purposes of equity and contract law); *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 466 & n.4 (Miss. 1983) (finding a Mississippi Chancery court is allowed to grant punitive damages and that the “bad man” could foresee the possibility of paying such damages); *Reardon v. Marlayne, Inc.*, 416 A.2d 852, 857 (N.J. 1980) (“[T]he Code of Professional Responsibility is not designed for Holmes’s proverbial ‘bad man’ who wants to know just how many corners he may cut” (quoting *Gen. Motors Corp. v. City of N.Y.*, 501 F.2d 639, 649 (2d Cir. 1974))); *Havana Cent. NY2 LLC v. Lunney’s Pub, Inc.*, 852 N.Y.S.2d 32, 37 & n.1 (N.Y. App. Div. 2007) (McGuire, J.,

concurring in part, dissenting in part) (finding a contract provision relieving a landlord of liability for failure to give possession on commencement date is equivalent to term stating landlord is not required to give possession of the premises if unable to do so); Terrazas v. Ramirez, 829 S.W.2d 712, 732 n.2 (Tex. 1991) (Cormyn, J., concurring) (noting that “the constraints of law are not primarily designed for persons with good intentions”).

25. Castro-Cortez v. I.N.S., 239 F.3d 1037, 1054 (9th Cir. 2001) (finding that even the bad man has a right to know what the penalty will be); Gray-Bey v. United States, 201 F.3d 866, 872 (7th Cir. 2000); United States v. Holmquist, 36 F.3d 154, 160 (1st Cir. 1994); United States v. Bruchhausen, 977 F.2d 464, 469 (9th Cir. 1992) (Fernandez, J., concurring) (writing against bad man action in property contracts); Eugene D. v. Olivia D. v. Karman, 889 F.2d 701, 714 & n.1 (6th Cir. 1989); Kurowski v. Krajewski, 848 F.2d 767, 774 (7th Cir. 1988) (finding, contrary to Holmes’s view in *The Path of the Law* that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law,” Holmes, *supra* note 3, at 461, “there may be ‘law’ without a judicial remedy”); *Gen. Motors*, 501 F.2d at 649 (finding the Code of Professional Responsibility is not designed for the bad man); Delso v. Trs. for Ret. Plan For Hourly Emps. of Merck & Co., Inc., No. 04-3009 (AET), 2007 WL 766349, at *5 (D.N.J. Mar. 6, 2007) (finding the Code of Professional Responsibility is not designed for the bad man); Norcia v. Equitable Life Assurance Soc’y of the U.S., 80 F. Supp. 2d 1047, 1047–48 (D. Ariz. 2000) (finding that when a bad man breaches a contract the only punishment is to pay damages and nothing else); Essex Cnty. Jail Annex Inmates v. Treffinger, 18 F. Supp. 2d 418, 437 (D.N.J. 1998) (citing *General Motors*, 501 F.2d at 649); Fun-Damental Too, Ltd. v. Gemmy Indus. Corp., No. 96 Civ. 1103 (MBM), 1996 WL 125641, at *1 (S.D.N.Y. Mar. 21, 1996) (quoting Holmes, *supra* note 3, at 459); Secs. Indus. Ass’n v. Connolly, 703 F. Supp. 146, 156 (D. Mass. 1988); Redgrave v. Boston Symphony Orchestra, Inc., 602 F. Supp. 1189, 1194 (D. Mass. 1985) (citing Holmes’s bad man theory and Holmes’s maxim that a breach of contract requires payment of damages and nothing more), *aff’d in part, vacated in part*, 855 F.2d 888 (1st Cir. 1988); Rochez Bros., Inc. v. Rhoades, 353 F. Supp. 795, 802 (W.D. Pa. 1973) (citing bad man in the conflict between equity and contract maxims), *vacated*, 491 F.2d 402 (3d Cir. 1974).

26. See, e.g., ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES (2000) (providing a generally negative account of Holmes’s provocatively amoral approach to understanding the law and the influence of his thought in American jurisprudence); THE LEGACY OF OLIVER WENDELL HOLMES, JR. (Robert W. Gordon ed., 1992); *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* (Steven J. Burton ed., Cambridge Univ. Press 2000) (a collection of essays by American and Canadian scholars on the legacy of Holmes’s famous essay, with particular discussion of the bad man by several contributors). References to the bad man theory of law are made in too numerous a quantity to list exhaustively, but a representative example includes David O. Brink, *Legal Interpretation, Objectivity, and Morality*, in OBJECTIVITY IN LAW AND MORALS 12, 14–15 (Brian Leiter ed., 2001); STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 108 (2000); NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING 80–81 (2005); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 126–27, 146 (1993).

27. See, e.g., Albert W. Alschuler, *The Descending Trail: Holmes’ Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353 (1997) (reviewing *The Path of the Law*); David Campbell, *The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract*, 11 TEX. WESLEYAN L. REV. 455, 461–62 (2005) (writing on the bad man and efficient breach); Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593 (2006) (writing on corporations acting as the bad man); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) [hereinafter Grey, *Legal Pragmatism*] (writing that good lawyers must themselves be bad men); Thomas C. Grey, *Plotting The Path of the Law*, 63 BROOK. L. REV. 19, 21 (1997) (noting that *The Path of the Law* was born of a speech and Holmes’s words were written to be memorable more than making their interrelations clear); David Howarth, *Many Duties of Care—or a Duty of Care? Notes from*

most recently, the Supreme Court of the United States itself,²⁸ where he has asserted himself in a particularly pernicious manner.²⁹ That such an ominous theory has made its way to the highest levels of our judiciary should give us pause to reflect on this theory that now informs much of our law.³⁰

the Underground, 26 OXFORD J. LEGAL STUD. 449, 449–50 (2006) (discussing the bad man and Holmes’s breach of contract theory in light of tort law); Irving R. Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657 (1957) (writing on the professional canons of ethics and the role of the bad man in legal ethics); Yoram Keinan, *Playing the Audit Lottery: The Role of Penalties in the U.S. Tax Law in the Aftermath of Long Term Capital Holdings v. United States*, 3 BERKELEY BUS. L.J. 382 (2006) (noting corporations and individuals act as the bad man with respect to the Tax Code); Sanford Levinson & J.M. Balkin, *The “Bad Man,” the Good, and the Self-Reliant*, 78 B.U. L. REV. 885 (1998) (arguing that Holmes’s bad man is a bad metaphor and is more profitably replaced by the Emersonian self-reliant individual); Luban, *supra* note 1 (discussing Holmes’s prediction theory, morality in the law, and the relationship between punitive damages and the bad man); Vicki Lawrence MacDougall, *The Supremes’ “Reflections” on Punitive Damages: The Constitutional Dimension of Tort Reform*, 61 CONSUMER FIN. L.Q. REP. 864, 878–79 (2007) (mentioning the Supreme Court’s use of the bad man in discussing punitive damages in *Exxon Shipping Co. v. Baker*); Miller, *supra* note 11 (discussing the role of morals in the legal profession and the place of the bad man in law); Liam Murphy, *Better To See the Law This Way*, 83 N.Y.U. L. REV. 1088 (2008) (supporting lawyers who take the bad man view to better represent clients); Richard A. Posner, *The Path Away from the Law*, 110 HARV. L. REV. 1039 (1997) (analyzing the importance of Holmes and *The Path of the Law* 100 years after its publication); David J. Seipp, *Holmes’s Path*, 77 B.U. L. REV. 515 (1997) (reviewing *The Path of the Law* 100 years after publication); David Simon & Gerald A. Novack, *Limiting the Buyer’s Market Damages to Lost Profits: A Challenge to the Enforceability of Market Contracts*, 92 HARV. L. REV. 1395, 1433 (1979) (“Perhaps the best way to appraise the court’s foreseeability theory is to see how it would operate in the hands of Justice Holmes’ classic ‘bad man.’” (citing Holmes, *supra* note 3)); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 9–10 (2005) (finding the bad man in the context of marriage and divorce); William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973) (exploring the bad man as one standpoint providing a useful tool of juristic analysis); Twining, *supra* note 10 (decrying unscholarly and inaccurate characterizations of the bad man and arguing he was not meant as a role model but as a device to speak about the difference between law and morality, a discussion which remains controversial); Louise Weinberg, *Holmes’ Failure*, 96 MICH. L. REV. 691 (1997) (commenting on Holmes’s legacy and work, including *The Path of the Law*); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005) (discussing the bad man and the role of lawyers in the Enron, Global Crossing, WorldCom and other corporate financial scandals); T. Patrick Gumkowski, Comment, *Protecting the Integrity of the Rhode Island Judicial System and Assuring an Adequate Remedy for Victims of Spoliation: Why an Independent Cause of Action for the Spoliation of Evidence is the Solution*, 10 ROGER WILLIAMS U. L. REV. 795, 815–16 (2005) (discussing the present state of Rhode Island spoliation law and how it encourages a bad man reading of the statute); Jay E. Rivlin, Note, *Recognizing an Independent Tort Action Will Spoil a Spoliator’s Splendor*, 26 HOFSTRA L. REV. 1003 (1998) (offering a solution to the issue of insufficient punishment of the spoliation of evidence and to prevent bad man behavior); Matthew T. Sanderson, Note, *Voodoo Economics: A Look Abroad for a Supply-Side Solution to America’s Campaign-Finance Riddle*, 41 VAND. J. TRANSNAT’L L. 937, 943 (2008) (finding the bad man in campaign-finance).

28. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008) (finding that punitive damages should not be so high as to prevent an agent—like the bad man himself—from being able to predict the cost of violating the law).

29. See *infra* Part II.C.

30. It should be noted that, while the bad man is typically viewed in a negative light, there are times in which he has been used by courts in what many would agree is a positive

So who, exactly, is the bad man, and what, if anything, can he offer to the study of law?

Many commentators have viewed the bad man as a basic extension of Holmes himself;³¹ that is to say, as a gruff character indifferent to matters of justice, and either apathetic or downright opposed to the establishment of any connection between law and morality.³² And, although Holmes's own views on the matter were much more nuanced,³³ Holmes himself was at least partly to blame for these depictions. For instance, Holmes encouraged his audience to understand law as the bad man himself would understand it, and that meant, first and foremost, to "dispel a confusion between morality and law"³⁴ by purging the legal vernacular of all words of moral significance. In Holmes's words: "For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law."³⁵

way. For instance, some courts have cited this theory for the proposition that individuals in our society are not allowed to act as the bad man would. *See Holmquist*, 36 F.3d at 160 (using statutory construction to avoid promoting a bad man reading of the statute); *Bruchhausen*, 977 F.2d at 469 (Fernandez, J., concurring) (warning against allowing bad man to take property, regardless of bad man's willingness to pay market value for the property); *Eugene*, 889 F.2d at 711–15 (Merritt, J., dissenting) (arguing against the bad man and the positivist position); *Gen. Motors*, 501 F.2d at 649 (holding the Rules of Professional Conduct are not meant to be read from the perspective of the bad man); *Delso*, 2007 WL 766349, at *5 ("[T]he Code of Professional Responsibility is not designed for Holmes proverbial 'bad man'" (quoting *Gen. Motors*, 501 F.2d at 649)); *People v. Peevy*, 953 P.2d 1212, 1214 (Cal. 1998) (holding law enforcement agents are not allowed to act as the bad man and choose when to obey the rules with regard to an accused's rights); *id.* at 1230 (Mosk, J., concurring) (finding police officers and agencies are not free to act as the bad man would and cannot choose whether to give *Miranda* rights and thus make defendant statements admissible, or not give *Miranda* and make defendant statements inadmissible); *Cuevas v. Royal D'Iberville Hotel*, 498 So. 2d 346, 356–57 (Miss. 1986) (Robertson, J., dissenting) (arguing that when conduct is proscribed by law, the state should never act as the bad man).

31. Seipp, *supra* note 27, at 552 ("Holmes was 'the bad man.'").

32. *See, e.g.*, Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929, 932 (1951).

33. *See, e.g.*, ALAN CALNAN, A REVISIONIST HISTORY OF TORT LAW: FROM HOLMESIAN REALISM TO NEOCLASSICAL RATIONALISM 22 (2005) (arguing that Holmes's theory "depicted a system that was both principled and policy-driven, faulty and fault-free and moral and amoral, all at the same time"). For a more in-depth discussion of Holmes's views, see Part III, *infra*.

34. Holmes, *supra* note 3, at 459; *see also id.* at 458 ("One of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward."); *id.* at 464.

35. *Id.* at 464. Indeed, while discussing the "confusion between legal and moral ideas," particularly in the area of contract law, Holmes famously remarked that

[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. . . . But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.

Id. at 462. As I discuss in Part III, however, Holmes was not against morality informing law, and understood too well that the legitimacy of law itself rested on public morality. Holmes's

But requiring one to leave morality at justice's door probably seemed as inauspicious then as it does now, and it is but one short step from such a statement to the now widely accepted view that Holmes's bad man theory of law stands for the principle that lawyers, judges, and lawmakers should not concern themselves at all with matters of morality when advising clients, interpreting a statute, or enacting new legislation.³⁶

To see why, let us examine how a bad man might understand a concept such as "duty," a term laden with both moral and legal significance. In the words of Holmes: "[W]hat does [a legal duty] mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money."³⁷

Holmes continues:

What significance is there in calling one taking right and another wrong from the point of view of the law? It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it. If it matters at all, still speaking from the bad man's point of view, it must be because in one case and not in the other some further disadvantages, or at least some further consequences, are attached to the act by the law.³⁸

In short,

[t]o a Holmesian bad man, law is a system of prices, and only material prices matter. The law's price may include damages, an injunction, a

point in making this comment is that legal ideas could be better *understood* if legal and ethical concepts, especially those concepts unfortunate enough to be identified with the same linguistic marking (e.g., the word "duty"), were disentangled.

36. See, e.g., Alschuler, *supra* note 27, at 420; Hart, *supra* note 32, at 932 (replying to Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529 (1951), Professor Henry M. Hart, Jr. states: "The conclusion . . . is that law is something entirely separate from morals, and that to see law truly we must look at it the way a bad man does. Why that helps, unless to make us more effective counselors of evil, I have never understood."). Professor Albert W. Alschuler is deeply critical of what he perceives as Holmes's project to separate morals from the law:

At the conclusion of a tour of Holmes' dark, elegant, engaging, and destructive essay, however, the praise seems flawed. Morton Horwitz's judgment appears more appropriate: "With 'The Path of the Law' Holmes pushed American legal thought into the twentieth century." The only flaw in this pronouncement is that Horwitz apparently meant it as a compliment to Holmes, to the century, and to American law.

Alschuler, *supra* note 27, at 420 (quoting MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 142 (1992)).

37. Holmes, *supra* note 3, at 461; see also 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, at 212-13 (Mark DeWolfe Howe ed., 1942) ("So we get up the empty substratum, a *right*, to pretend to account for the fact that the courts will act in a certain way. . . . I think our morally tinted words have caused a great deal of confused thinking."); Holmes, *supra* note 3, at 458 ("[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right.").

38. Holmes, *supra* note 3, at 461.

contempt citation, a fine, a prison term, or even death by hanging. Nevertheless, a man tough enough to pay the price always has the option of noncompliance with the law's directives.³⁹

Indeed, juxtaposing Holmes's bad man view of law with an alternative "good man" view of law may help bring into sharper focus what many believe to be at stake in adopting Holmes's judicial philosophy. A good man, as Holmes stated, will rely on his "conscience" to guide his behavior and will presumably do the right thing—not because it is illegal to do otherwise—but simply because it is the right thing to do. When deciding whether to obey a particular law, for example, the good man will not look to the penalty that may be imposed in the case of violation. Rather, the good man will look to the rightness or wrongness of the action at issue and will undertake just actions even where it is unprofitable to do so (e.g., performing a losing contract) while violating unjust laws without regard to the penalty imposed (e.g., Jim Crow laws).

Because the bad man is motivated by external sanctions, while the good man is motivated by internal conscience, a lawyer, judge, or legislator advising a client, interpreting a statute, or making a new law may behave quite differently depending on whether he or she has the good man or bad man in mind. For instance, a lawmaker with the good man before his mind would likely attempt to "establish wholesome laws in a state" in order to make "his citizens virtuous,"⁴⁰ whereas a legislator with the bad man before his mind would not worry much about appealing to his constituent's hearts by enacting laws to make his citizens more virtuous, but would likely appeal to their minds by attaching sufficiently large penalties to laws deemed important enough to enforce.

Putting aside Holmes's own intentions for the moment,⁴¹ one may have a hard time seeing what the "bad man" theory of law, at least as it is commonly understood today, has to offer at all to legal analysis, especially when juxtaposed with the more benign and noble "good man" theory of law. One commentator, for example, described Holmes's bad man theory of law as one that would, if widely adopted, "breed disrespect for law by encouraging the public to act like Holmes' bad man," whereas a "good man" view would encourage individuals to uphold "an obligation to conform to a norm."⁴² And, in helping their clients behave in this manner,

39. Alschuler, *supra* note 27, at 412.

40. See, e.g., ARISTOTLE, *THE POLITICS* bk. III, ch. IX, 1280b, at 82 (Ernest Rhys ed., William Ellis trans., E.P. Dutton & Co. 1912) (c. 384 B.C.E.) ("[W]hosoever endeavours to establish wholesome laws in a state, attends to the virtues and the vices of each individual who composes it; from whence it is evident, that the first care of him who would found a city . . . must be to have his citizens virtuous; for otherwise it is merely an alliance for self-defence; differing from those of the same cast which are made between different people only in place: for law is an agreement and a pledge . . . between the citizens of their intending to do justice to each other . . .").

41. I discuss Holmes's intentions in greater detail in Part III.

42. Michael C. Dorf, *Prediction and the Rule of Law*, 42 *UCLA L. REV.* 651, 687 (1995) ("The prediction model, if widely accepted, would breed disrespect for law by encouraging the public to act like Holmes' bad man, understanding the law as imposing an obligation not to get caught, rather than an obligation to conform to a norm.").

lawyers advising the bad man, unlike those advising the good man, would in time become “more effective counsellors of evil,”⁴³ and with enough practice, would help bring about Holmes’s sinister desire to “destroy their morality and faith.”⁴⁴ So again, what benefits can the bad man view of law offer to legal analysis?

Quite a few, as it turns out. To examine more closely the bad man’s contribution to modern jurisprudence, this Article examines the bad man theory’s influence in three important legal fields: contract law, tort law, and punitive damages jurisprudence. In each of these fields, this Article draws heavily on the work done by law and economics scholars, who have probably made the most use of Holmes’s bad man.⁴⁵ By doing so, we will see the strong influence the bad man has had not only on academicians, but on judges deciding actual disputes, making it even more important that they get the theory right.

II. FROM HOLMES’S THEORY OF THE BAD MAN TO THE BAD MAN’S THEORY OF LAW

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

—*Oliver Wendell Holmes*⁴⁶

This part of the Article traces the influence of Holmes’s bad man theory in three important areas of our law. Section A traces the development of Holmes’s bad man theory of contracts from its inception in Holmes’s article

43. See, e.g., Hart, *supra* note 32, at 932 (replying to Howe, *supra* note 36: “The conclusion . . . is that law is something entirely separate from morals, and that to see law truly we must look at it the way a bad man does. Why that helps, unless to make us more effective counsellors of evil, I have never understood.”).

44. See Miller, *supra* note 11, at 231 (claiming “Justice Holmes desired most of all that lawyers disconnect themselves from morality—to destroy their morality and faith”).

45. In fact, Holmes’s bad man approach to law was probably carried to its highest level of abstraction in the writings of Ronald Coase. See, e.g., R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19–28 (1960); see also Nancy A. Weston, *The Metaphysics of Modern Tort Theory*, 28 VAL. U.L. REV. 919, 931 n.15 (1994) (arguing that Coase’s seminal article “presents an essentially Holmesian understanding of law as without fundamental obligatoriness: Holmes’s famous proposal to understand law from the position of the ‘bad man’ follows this reasoning, as does his treatment of contract as presenting an option to perform or to breach and pay”). Through Coase, the bad man theory of law has spread to the four-corners of the law in large part through the law and economics movement. See, e.g., *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J.L. & ECON. 163, 226 (1983) (“[Coase’s] social cost article, as everybody knows—it’s silly to dwell on it—is basic to the whole economic analysis of law.” (statement of Richard Posner)).

46. Holmes, *supra* note 3, at 460–61.

The Path of the Law to its modern development and use by judges and law and economics scholars alike. Section A also considers some of the main objections asserted against this theory by its critics, paying particular attention to the manner in which Holmes's theory is understood today. Section B follows the same procedure set forth in section A with respect to tort law, and section C focuses on the most recent application of Holmes's theory, in the realm of punitive damages, where the Supreme Court of the United States has embraced (a corrupted version of) Holmes's bad man theory of law. It is important to note that this part of the Article is primarily focused on how Holmes's bad man theory of law has been understood and developed by scholars and applied by judges. I reserve for Part III a deeper exploration of Holmes's own thoughts on the issue, which have not only been inadequately developed, but which provide a much deeper and more insightful theory of law capable of helping us better understand how our law actually operates and how our law ought to be better structured in the future.

A. *The Bad Man's Theory of Contracts: From Pacta Sunt Servanda and the Sanctity of Contracts to Efficient Breach*

The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.

—*Oliver Wendell Holmes*⁴⁷

Although Holmes's bad man theory of law has come to permeate Anglo-American legal thought,⁴⁸ perhaps nowhere has the bad man had more influence than in the realm of contracts, where scholars and judges alike have spilled so much ink fleshing out and giving shape to Holmes's vision that it is difficult to think or write about contract law without the bad man standing over one's shoulders, monitoring one's action, and attempting to influence one's thought.⁴⁹ But how, exactly, does Holmes's bad man

47. *Id.* at 462. Holmes was remarkably consistent in his thinking, and had begun to develop this view some sixteen years previously in his groundbreaking work, *The Common Law*. See, e.g., OLIVER WENDELL HOLMES, *THE COMMON LAW* 236 (Mark DeWolfe Howe ed., 1963) (1881) ("It is true that in some instances equity does what is called compelling specific performance. But . . . [t]his remedy is an exceptional one. The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses."); see also *id.* at 247–48 ("If we look at the law as it would be regarded by one who had no scruples against doing anything which he could do without incurring legal consequences, it is obvious that the main consequence attached by the law to a contract is a greater or less possibility of having to pay money. The only question from the purely legal point of view is whether the promisor will be compelled to pay.").

48. See *supra* Part I.

49. See *Norcia v. Equitable Life Assurance Soc'y of the U.S.*, 80 F. Supp. 2d 1047, 1048 (D. Ariz. 2000) (noting that the "'bad man' theory of contracts permeates American common law").

approach contract law, and what, if anything, can his views tell us about the way Holmes thinks we are to understand contract law?

Perhaps the best way of understanding the bad man's view of contract law is to contrast it with the way his counterpart, the good man, understands the subject. Unlike the bad man, the good man performs his promise not because of the benefits he might receive, nor because of the costs he might incur, but because, quite simply, performing one's promise is the right thing to do.⁵⁰ And because the good man is guided by the moral law emanating from within, rather than the positive law imposed from without, he believes that moral principles governing the institution of promise-keeping (e.g., the idea that "there is something inherently despicable" about not keeping one's promises) should guide, or at the very least inform, the legal principles governing contract law (e.g., "a properly organized society should not tolerate this").⁵¹

The bad man, in contrast, sees matters quite differently. Holmes, in his monumental speech,⁵² famously dismissed this type of moralistic thinking as unhelpful and confusing, and invited his audience to understand contract law as the bad man himself would understand it. In language now immortalized in the contract law canon, Holmes wrote:

Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else. . . . But such a mode of looking at the matter stinks in the nostrils of those who think it advantageous to get as much ethics into the law as they can.⁵³

All of the bad men in attendance must have nodded with wild enthusiasm at Holmes's words. Holmes is undoubtedly right that the bad man, if he is true to his name, would not understand the notion of "duty" in the same moral sense that a good man would understand such a concept and would probably look at the matter in much the same way as Holmes suggests. But the last sentence of Holmes's quoted speech is more problematic, for it

50. Professor Charles Fried refers to this as the "promise principle," which constitutes "the moral basis of contract law" by imposing on individuals "obligations where none existed before." CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1, 8 (1981) ("By promising we transform a choice that was morally neutral into one that is morally compelled."). This same idea was discussed by Professor Morris R. Cohen in his seminal piece, *The Basis of Contract*, and dubbed the "sanctity of promises" approach. See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 571–75 (1933).

51. Cohen, *supra* note 50, at 571; see also FRIED, *supra* note 50, at 16 ("An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance."); Peter Linzer, *On the Amoralism of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 111 (1981) ("[I]t should be wrong to break a contract.").

52. See Holmes, *supra* note 3.

53. *Id.* at 462; see *supra* note 47.

appears to cast its net beyond the bad man himself, and seems to suggest that all of us, and especially those among us who view contract law from the good man's perspective, are wrong about our views. But in what way might we be wrong? Is Holmes's argument that the good man does not behave according to moral precepts? This seems unlikely. Or, was Holmes arguing that the good man may understand law in this manner, but that others do not? This might be closer to the truth, but still says nothing about how contract law ought to be understood by everyone else. Or, was Holmes's point that others may also understand contract law as the good man does, but that courts do not? This would seem to be relevant as a descriptive matter, but would be inadequate to those who would seek to reform contract law for the better. Perhaps this was Holmes's point—that contract law was better off without these moral infusions.

What Holmes meant by these words, and whether he was speaking normatively or descriptively, is a matter of much debate,⁵⁴ which I take up in greater detail in Part III. What is not in debate, however, is the enormous influence these words, as interpreted by generations of contracts scholars and judges, have had on the subsequent history of contract law,⁵⁵ and it is

54. See, e.g., Joseph M. Perillo, *Misreading Oliver Wendell Holmes on Efficient Breach and Tortious Interference*, 68 *FORDHAM L. REV.* 1085, 1090 (2000) (arguing that others have misunderstood Holmes's bad man theory of contract law by linking it to the "towering legal authority of Holmes," whereas, in fact, Holmes "is incorrectly cast as articulating the idea of a right to breach a contract"); see also Willard T. Barbour, *The "Right" to Break a Contract*, 16 *MICH. L. REV.* 106, 109 (1917) ("[N]either the history of the common law nor logic sustains the proposition that there is no legal obligation to perform a contract or, conversely, that there is a right to break a contract."); Richard Hyland, *Life, Death, and Contract*, 90 *Nw. U. L. REV.* 204, 207 (1995) ("[S]o much nonsense has been written about [Holmes's] thought, including the especially idiotic notion that Holmes adhered to a 'bad man's' view of the law, according to which our only obligations derive from a calculated prediction of whether, in a particular situation, a court would impose a sanction. Posner, citing Holmes, developed this idea with stubborn narrow-mindedness into the theory of efficient breach.").

55. See, e.g., Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 *BUFF. L. REV.* 645, 647 (1999) ("The law has come to regard the obligation to perform a contract as being generally equivalent to an option to perform or pay damages. Holmes saw the matter this way more than one hundred years ago.").

Some examples of judges invoking Holmes's bad man view of contract law include *United States v. Bruchhausen*, 977 F.2d 464, 469 (9th Cir. 1992) (Fernandez, J., concurring) (acknowledging that although "Holmes's 'bad man' theory of the law . . . [is] realistic in some sense," it should not apply to support the idea of efficient theft in property law (citing Holmes, *supra* note 3, at 459–62)); *Norcia v. Equitable Life Assurance Society of the United States*, 80 F. Supp. 2d 1047, 1047–48 (D. Ariz. 2000) (acknowledging that the "'bad man' theory of contracts permeates American common law. That is, a contracting party usually cannot demand performance of a valid contract; rather, the defaulting party must either perform or pay damages equivalent to the value of the promised performance. Under this approach to contract theory, it follows that when performance becomes uneconomic, a contracting party will not infrequently break a contract, preferring instead to pay damages," and finding that when a bad man breaches a contract, the only punishment is to pay damages, and nothing else (citing Holmes, *supra* note 3, at 462)); *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1194 (D. Mass. 1985) (recognizing that "[t]he suggested freedom to break a contract and suffer liability only for the legally recognized damages is within the scope of the idea often referred to as Holmes' bad man theory of contract law—that one who is willing to pay the penalty of such damages as the law assesses is free to

this effect I am most concerned with here. According to the standard interpretation, Holmes meant to suggest that a promisor, upon entering into a contract, is not obligated to uphold his promissory commitment,⁵⁶ but rather has a *choice* between performing, on the one hand, and breaching while paying money damages, on the other.⁵⁷ The truth is that the bad man,

break the contract and pay” (citing Holmes, *supra* note 3, at 461–62)), *aff’d in part, vacated in part*, 855 F.2d 888 (1st Cir. 1988); *Rochez Bros. Inc. v. Rhoades*, 353 F. Supp. 795, 802 (W.D. Pa. 1973) (recognizing the conflict between “the rule that equity regards as done that which ought to be done” and “the ‘bad man’ theory of Justice Holmes that would regard the obligation of a contract as merely the liability to pay damages for its breach, which might well be less than the profitability of non-performance” (citing OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 173–75 (1920))), *vacated*, 491 F.2d 402 (3d Cir. 1973); *Estate of Murrell v. Quin*, 454 So. 2d 437, 440 (Miss. 1984) (Robertson, J., concurring in part, dissenting in part) (examining the contrasting purposes of equity and contract law and noting that “[f]uzzy moral notions of right and wrong, good and bad are irrelevant. That persons not parties to the contract may suffer loss is of no concern of the law. . . . Persons potentially affected who have failed to act to protect their interests sit idle at their peril. The law is wholly indifferent to non-legal consequences. It would allow one to think and behave as the proverbial Holmesian bad man to his heart’s content” (citing Holmes, *supra* note 3, at 459)); *Havana Central NY2 LLC v. Lunney’s Pub, Inc.*, 852 N.Y.S.2d 32, 37 & n.1 (N.Y. App. Div. 2007) (McGuire, J., concurring in part, dissenting in part) (lamenting the fact that, “[a]fter a perhaps too brief struggle, I have succumbed to the temptation to invoke Holmes’ ‘bad man’ theory of law” in finding that a contract provision relieving a landlord of liability for failure to give possession on commencement date is equivalent to term stating landlord is not required to give possession of the premises if unable to do so (citing Holmes, *supra* note 3, at 462)).

56. Alternatively, many scholars understand Holmes to be stating that a promisor may or may not be morally obligated to perform his promise, but dismiss such considerations as *legally* irrelevant. This, for instance, was the view of Judge Isaac Parker, who famously wrote well before Holmes that although some “disgraceful” promisors (“men of a different character,” he calls them) may refuse to perform promises “they are bound in *foro conscientioe* to perform,” the law will nevertheless not get involved, but leave the enforcement of such promises to that “*interior* forum, as the tribunal of conscience has been aptly called.” *Mills v. Wyman*, 20 Mass. (3 Pick.) 207, 209–10 (1825). The court went on to note:

What a man ought to do, generally he ought to be made to do, whether he promise or refuse. . . . Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

Id. at 210–11; *see also Estate of Murrell*, 454 So. 2d at 440 (Robertson, J., concurring in part, dissenting in part).

57. *See, e.g.,* Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 (1977) (“The modern law of contract damages is based on the premise that a contractual obligation is not necessarily an obligation to perform, but rather an obligation to choose between performance and compensatory damages.”); *see also* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 118 (4th ed. 1992) [hereinafter POSNER, *ECONOMIC ANALYSIS OF LAW*] (arguing that a “voluntary but . . . efficient” breach “give[s] point to Holmes’s dictum that it is not the policy of the law to compel adherence to contracts but only to require each party to choose between performing in accordance with the contract and compensating the other party for any injury resulting from a failure to perform”); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 58 (2003) (“Holmes pointed out that in a regime in which the sanction for breach of contract is merely an award of compensatory damages to the victim, the entire practical effect of signing a contract is that by doing so one obtains an option to break it.”); Clayton P. Gillette,

of course, does see matters this way, and will probably, as a descriptive matter, choose his course of conduct based not on moral considerations, but by performing a cost-benefit analysis.⁵⁸

Although some scholars lament the fact that morality does not play a larger role in Holmes's theory,⁵⁹ most scholars (even if only reluctantly) concede that modern contract law is essentially Holmesian⁶⁰ and ultimately does "exclude[] considerations of morality"⁶¹ in order to "advance the objective of economic efficiency."⁶² Today, the most ardent supporters of Holmes's theory are those working within the law and economics paradigm,⁶³ who have applied Holmes's bad man view of contracts with particular force to the modern theory of efficient breach,⁶⁴ which acts as the

Limitations on the Obligation of Good Faith, 1981 DUKE L.J. 619, 658–59 ("Professor Posner suggests that the modern theory of contract damages . . . views a contract as an undertaking to perform or pay damages for nonperformance . . ."); Remington, *supra* note 55, at 647; Robert E. Scott & George G. Triantis, *Embedded Options and the Case Against Compensation in Contract Law*, 104 COLUM. L. REV. 1428, 1429 n.1 (2004) ("It is well known that contract damages effectively give the promisor an option between performing the promise or breaching and paying damages.").

58. See, e.g., *Norcia*, 80 F. Supp. 2d at 1048.

59. See, e.g., Linzer, *supra* note 51, at 138 n.189 (noting that Holmes's rebellion against the will theory of contract law may explain his "deprecation of ethics in the law," but "does not justify it").

60. See, e.g., Remington, *supra* note 55, at 647.

61. Linzer, *supra* note 51, at 111; see, e.g., *Estate of Murrell*, 454 So. 2d at 440 (Robertson, J., concurring in part, dissenting in part) ("Fuzzy moral notions of right and wrong, good and bad are irrelevant. . . . The law is wholly indifferent to non-legal consequences. It would allow one to think and behave as the proverbial Holmesian bad man to his heart's content.").

62. Linzer, *supra* note 51, at 111 (arguing that although "it should be wrong to break a contract," contract law "has emphasized an approach that excludes considerations of morality and is said to advance the objective of economic efficiency"); see also *Patton v. Mid-Continent Sys.*, 841 F.2d 742, 750 (7th Cir. 1988) (Posner, J.) ("Even if the breach is deliberate, it is not necessarily blameworthy. The promisor may simply have discovered that his performance is worth more to someone else. If so, efficiency is promoted by allowing him to break his promise, provided he makes good the promisee's actual losses."). But see Cynthia A. Williams, *A Tale of Two Trajectories*, 75 FORDHAM L. REV. 1629, 1659 (2006) (commenting that "much of society and many religious and philosophical traditions would disagree with Judge Posner's view, arguing that breaking a promise simply because one has later realized it is to one's personal advantage to do so is morally blameworthy in most instances").

63. Here, again, Holmes's views have proved to be remarkably prescient. In the same speech in which he created the bad man, Holmes acknowledged that although "the black-letter man may be the man of the present" with respect to the "rational study of law," "the man of the future is the man of statistics and the master of economics." Holmes, *supra* note 3, at 469.

64. See Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 633 (2008) (arguing that Holmes's statement "has since been developed into the 'efficient breach' theory of contractual remedies, which is based on the argument that in situations where a promisor's profits from a potential breach are in excess of the promisee's loss from such breach, the breach should be encouraged (or at the very least, not deterred)—with no restraints whatsoever imposed by morality"); see also Campbell, *supra* note 27, at 461–62 ("[T]he idea of an efficient breach which allows the defendant to maximise his utilities is traceable to Holmes' famous observation that: '[T]he only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised

bad man's shibboleth⁶⁵ in distinguishing those who would invoke morality⁶⁶ when determining one's contractual obligations from those who would not.⁶⁷

For instance, the strongest proponents of efficient breach theory not only acknowledge, as a descriptive point, the promisor's *right* to breach a contract where doing so is efficient,⁶⁸ but even go so far as to claim that the law should *encourage*, as a normative matter, such breaches.⁶⁹ Putting aside for the moment Holmes's own views on the matter, it is in large part due to such statements that many scholars have opposed this theory as

event does not come to pass. [The law of contract] leaves [the promisor] free to break his contract if he chooses.' This observation smacks of the cynicism of Holmes's 'bad man' . . ." (quoting HOLMES, *supra* note 47, at 236) (citing Holmes, *supra* note 3, at 459)); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 1–2 (1989) ("The modern theory of 'efficient breach' is a variation and systematic extension of Holmes's outlook on contractual remedy."); Grey, *Legal Pragmatism*, *supra* note 27, at 832 ("[Holmes's] formulations represented a breakthrough, the implications of which would not be fully absorbed for several generations. At the outset of his career as a legal theorist, he planted the germ of the whole modern analysis of tort and contract in terms of risk allocation, later embodied in such notions as loss spreading, cost internalization, and efficient breach."); Avery Wiener Katz, *The Option Element in Contracting*, 90 VA. L. REV. 2187, 2202 (2004) ("[T]he modern-day economic elaboration of Holmes's theory [is] the so-called theory of efficient breach."); Perillo, *supra* note 54, at 1090 ("[I]t has become commonplace to tie the economists' notion of efficient breach to the towering legal authority of Holmes . . .").

65. The term itself seems to have been first coined in 1977 by Professors Charles J. Goetz and Robert E. Scott. See Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 384 n.11 (2005) ("It appears that the term 'efficient breach' may have been coined, at least in print, by Charles J. Goetz and Robert E. Scott." (citing Goetz & Scott, *supra* note 57)).

66. See, e.g., FRIED, *supra* note 50, at 16 ("An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance.").

67. See, e.g., Craig S. Warkol, Note, *Resolving The Paradox Between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach*, 20 CARDOZO L. REV. 321, 345 (1998) ("The theory of efficient breach encourages the parties to the contract and the reviewing judge to look at the contract without moral considerations.").

68. *Patton v. Mid-Continent Sys.*, 841 F.2d 742, 750 (7th Cir. 1988) (Posner, J.). *But see* Williams, *supra* note 62, at 1659.

69. See, e.g., POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 57, at 119 ("[I]n some cases a party [to a contract] is tempted to break his contract simply because his profit from breach would exceed his [expected] profit from completion of the contract. If [his profit from breach] would also exceed the expected profit to the other party from completion of the contract, and if damages are limited to the loss of [expected] profit, there will be an incentive to commit a breach. But there should be."); Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 284 (1970) ("Repudiation of obligations should be encouraged where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered."); Remington, *supra* note 55 (arguing that the law encourages efficient breaches, except where those breaches are or should be wrongful). *But see* Friedmann, *supra* note 64, at 18 (arguing that the law of contract has evolved away from recognizing efficient breach); Perillo, *supra* note 54, at 1093–98.

morally wanting⁷⁰ and, worse yet, damaging to the institution of promise-keeping.⁷¹

The previous analysis seems to suggest that one can either accept Holmes's bad man view of contract law and hold that morality is and ought to be irrelevant to a proper understanding of this subject, or can find, along with the good man, that one cannot properly understand contract law without acknowledging its moral underpinnings. What seems clear, however, is that one cannot simultaneously hold the views of both the good man and the bad man. Either morality is relevant to contract law, or it is not. If it is relevant, it would seem that the good man's approach is better, and Holmes's bad man may have little to offer to the institution of contract law, except perhaps the need for better enforcement. If the bad man is right, however, it raises a number of questions regarding what, if anything, we the people should do about it. If, contrary to what was stated earlier,

70. See, e.g., Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 942 (1985) (describing a society "in which people can confidently rely on each other" as "morally superior to the state of constrained avarice depicted by 'bad man' theories of legal obligation"); Friedmann, *supra* note 64, at 3–4 (noting that even Posner by 1986 had begun to distinguish and decry "opportunistic breach" from efficient breach, and pointing out that "[i]t is not explained why opportunistic breaches should be discouraged even if they are efficient. Is it because they are morally reprehensible?" (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 79 et seq., 105–06 (3d ed. 1986))); Linzer, *supra* note 51; Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 963–65 (1982) (likening efficient breach of contract to efficient theft of property, and rejecting both on moral grounds). I should note that the theory of efficient breach has also been attacked on non-moral grounds. For an examination of some of these grounds, see generally Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59 (2008).

71. See, e.g., Dorf, *supra* note 42, at 687 ("The prediction model, if widely accepted, would breed disrespect for law by encouraging the public to act like Holmes' bad man, understanding the law as imposing an obligation not to get caught, rather than an obligation to conform to a norm. To be sure, contract law includes a doctrine of efficient breach, under which a contract to do *X* is understood as imposing an obligation to do *X* or pay the resulting damages from not doing *X*."); Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1201 (2009) ("[T]he growth of economism as an academic mode of thinking about law devalues any conception of law as expressing norms or public purposes. Lawyers influenced by the 'efficient breach' theories of legal economics theorize Holmes's hypothetical 'bad man' as Everyman . . . [which allows parties to violate the law] 'when violations are profitable.'" (quoting Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982); Holmes, *supra* note 3, at 459)). There is even some concern that this bad man view of contracts, through the doctrine of efficient breach, may be spreading to the realm of public law. See, e.g., Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1327–28 (1998) ("The efficient breach concept of statutory and regulatory law, which is based on an understanding of law as a series of prices established for the 'right' to violate the law, has evolved as a direct extension of the efficient breach of contract theory. . . . [Although] 'Holmes' "bad man" understanding of contract law has become so descriptively accurate that few would contest the notion of a "right" to breach a contract,' this insight about private law, even if it were true, says nothing about whether one also has a 'right' to breach public, statutory law simply by assuming a similar Holmesian equivalence between performance and paying damages." (quoting Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1559 (1995))).

both views are correct, then it seems that a reworking or reinterpretation of Holmes's views are in order.⁷² For the time being, however, let us turn our attention to the bad man's view of tort law to see how scholars and courts have developed Holmes's theory in this area of our law.

B. The Bad Man's Theory of Torts: From the Duty of a Reasonable Person to the Cost-Benefit Analysis of Homo Economicus

The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. . . . I think that commonly malice, intent, and negligence mean only that the danger was manifest to a greater or less degree, under the circumstances known to the actor

— *Oliver Wendell Holmes*⁷³

Just as Holmes's bad man paved the way towards a new understanding of contract law, he likewise paved the way in tort law, where Holmes's invocation of the bad man, along with his focus on external sanctions rather than internal motivations, and his insistence on separating the legal and moral spheres, revolutionized this area of law.⁷⁴ In the same speech in which Holmes sought to dispel the "mystic significance" attached to the morality-based "primary rights and duties" of contract law,⁷⁵ Holmes urged

72. This is the approach I take in Part III of this Article.

73. Holmes, *supra* note 3, at 460, 471. Holmes articulated a similar view in another monumental work nearly two decades earlier. See HOLMES, *supra* note 47, at 115 ("Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms."). Interpreting the first passage, one commentator wrote, "Oliver Wendell Holmes articulated the theory that as law matures, liability—civil and criminal—becomes more external and less reliant on mental state." Adam Candeub, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2077 (1994).

74. John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L. REV. 1563, 1571 (2006) ("Holmes, by linking a radical jurisprudential argument to a radical reconceptualization of tort law, changed the landscape of tort theory."); see also DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY 1* (1995) ("From the beginning, th[e] debate [governing the legitimacy of tort law] has been shaped by the ideas of Oliver Wendell Holmes, the most illustrious jurist in American law."); Grey, *Legal Pragmatism*, *supra* note 27, at 832 ("[Holmes's] formulations represented a breakthrough, the implications of which would not be fully absorbed for several generations. At the outset of his career as a legal theorist, he planted the germ of the whole modern analysis of tort and contract in terms of risk allocation, later embodied in such notions as loss spreading, cost internalization, and efficient breach."); Sheldon M. Novick, *Holmes's Path, Holmes's Goal*, 110 HARV. L. REV. 1028, 1030 (1997) ("The starting point of this transformation is the central insight of *The Common Law*, an imaginative leap that changed all legal thinking afterward: the organizing principle of the common law was liability, not duty.").

75. Holmes, *supra* note 3, at 462 ("Nowhere is the confusion between legal and moral ideas more manifest than in the law of contract. Among other things, here again the so called primary rights and duties are invested with a mystic significance beyond what can be

us to do the same for tort law by understanding the so-called “duties” imposed on us from the perspective of the bad man. According to this view, we ought to abandon the internal perspective that would require us to consult our “vaguer sanctions of conscience” in order to understand the “duties” we owe to one another, in both tort law and contract law, in purely external terms: in both torts and contracts, the only “duty” imposed on us by the law is to “pay a compensatory sum” if we breach our duties toward our fellow citizens.⁷⁶

Although, once again, Holmes’s bad man view of tort law was probably misunderstood,⁷⁷ the influence of these views (even as misunderstood) cannot be overemphasized.⁷⁸ Holmes was not merely tinkering at the margins with the writ of trespass, or attempting to reform the law of negligence by reconceptualizing the way we view causation; rather, he was promulgating “the blueprint for [tort law’s] organization and development”⁷⁹ by erecting an entire jurisprudential edifice from the

assigned and explained. The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else.”)

76. *Id.* at 459, 462 (analogizing contract- and tort-based “duties” by describing the “duty” imposed on a person who “commit[s] a contract” as one in which they are “liable to pay a compensatory sum unless the promised event comes to pass,” and the “duty” imposed on a person who “commit[s] a tort,” as one in which they are also “liable to pay a compensatory sum”). Elsewhere in his speech, Holmes listed “as other examples of the use by the law of words drawn from morals” the terms “malice, intent, and negligence,” and sought “to show that [these terms] mean[] something different in law from what [they] mean[] in morals, and also to show how the difference has been obscured by giving to principles which have little or nothing to do with each other the same name.” *Id.* at 463. It is remarkable to note how consistent Holmes’s views were over time. In *The Common Law*, an equally famous work written nearly two decades before *Path of the Law*, Holmes offered the following view of torts:

The law of torts abounds in moral phraseology. It has much to say of wrongs, of malice, fraud, intent, and negligence. Hence it may naturally be supposed that the risk of a man’s conduct is thrown upon him as the result of some moral shortcoming. But while this notion has been entertained, the extreme opposite will be found to have been a far more popular opinion;—I mean the notion that a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter.

HOLMES, *supra* note 47, at 65.

77. *See, e.g.*, ALSCHULER, *supra* note 26, at 1 (“[P]ost-Holmes visions of law are the product of a revolt against objective concepts of right and wrong rather than a revolt against formalism . . .”). Holmes’s actual views are discussed in Part III, *infra*.

78. *See, e.g.*, CALNAN, *supra* note 33, at 5 (describing Holmes’s “influence on tort law” as “both enormous and undeniable”).

79. *See, e.g., id.* Professor Calnan goes on to say about Holmes’s monumental work:

The impact of *The Common Law* was profound and immediate. In an 1881 review, noted English legal historian Frederick Pollock remarked that “Mr. Holmes’ book will be a most valuable—we should say almost an indispensable—companion to the scientific study of legal history.” Frederic Maitland, another giant of English legal history, gushed that *The Common Law* “[f]or a long time to come will leave its mark wide and deep on all the best thoughts of Americans and Englishmen about the history of their common law.”

Id. (quoting Frederic Maitland, *The Materials for English Legal History*, in 2 COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 8 (H.A.L. Fisher ed., 1911); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 189 (1993)).

ground up where “there simply was no law of torts.”⁸⁰ And the blueprint Holmes used to build this monumental intellectual cathedral could best be appreciated, according to Holmes, by looking at it through the eyes of the bad man.⁸¹

But what is at stake, exactly, in adopting the bad man’s perspective with regard to tort law? Once again, it may be helpful to contrast the bad man perspective with its counterpart, the “good man.” According to this perspective, a good man understands the notion of obligation *not* in terms of an external penalty a court may impose whenever he engages in a dangerous activity or fails to take the proper level of care, but in terms of internal norms governing the rights and duties that members of civil society owe each other.⁸² Accordingly, courts adopting such a view do not impose liability on an actor simply because the danger of his activities are “manifest to a greater or less degree,”⁸³ but because the actor has acted wrongly in that he has violated the rights of another. Viewed in such a way, the morally laden language of tort law is not something to be ignored or explained away, but can be pointed to as evidence supporting the idea that what the law *really* requires is for one party to conform his behavior to commonly accepted notions of morality, and not to simply choose between performing one’s duty or paying a sanction.

Conforming one’s behavior to the internal standards of morality has other benefits as well. If, following Aristotle, we hold that “[m]oral goodness . . . is the result of habit,”⁸⁴ and that “it is from the repeated performance of just and temperate acts that we acquire virtues,”⁸⁵ then a good man view of law that requires individuals to internalize the law’s norms would, with continual practice, help individuals become more virtuous citizens themselves.⁸⁶ Allowing citizens to behave as Holmes’s bad man, on the other hand, would not only fail to carry out the Aristotelian idea, but would

80. See, e.g., *id.* at 4; see also 1 EDWIN A. JAGGARD, *HAND-BOOK OF THE LAW OF TORTS*, at vi (1895) (“The theory of Torts was essentially terra incognita until the contributions of Oliver Wendell Holmes, Jr., appeared on the subject.”).

81. CALNAN, *supra* note 33, at 8 (“Holmes believed that law is not a principle of justice, but merely ‘[t]he prophe[cies] of what the courts will do in fact, and nothing more pretentious.’ In other words, the law is a material sanction that will motivate a ‘bad man’ to refrain from bad acts, not an ethical rule which depends for its enforcement on ‘vaguer sanctions of conscience.’” (quoting Holmes, *supra* note 3, at 460–61)).

82. See generally JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2003); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

83. Holmes, *supra* note 3, at 471.

84. ARISTOTLE, *NICOMACHEAN ETHICS* bk. II, at 31 (J.A.K. Thomson trans., Penguin Books 2004) (c. 384 B.C.E.).

85. *Id.* at 37–38.

86. See, e.g., ARISTOTLE, *supra* note 40, bk. III, ch. ix, at 82 (“[W]hosoever endeavours to establish wholesome laws in a state, attends to the virtues and the vices of each individual who composes it; from whence it is evident, that the first care of him who would found a city . . . must be to have his citizens virtuous; for otherwise it is merely an alliance for self-defence; differing from those of the same cast which are made between different people only in place: for law is an agreement and a pledge . . . between the citizens of their intending to do justice to each other.”).

make a mockery of the law itself by allowing individuals to inflict harm on others whenever they could pay the legal cost of doing so.

Holmes, however, seemed to explicitly reject this internal point of view. In a famous series of lectures given nearly two decades before *The Path of the Law*, Holmes acknowledged the morally laden language of tort law but seemed to reject the notion that it was there “for the purpose of improving men’s hearts.”⁸⁷ Rather:

The true explanation of the reference of liability to a moral standard . . . is to give a man a fair chance to avoid doing the harm before he is held responsible for it. It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.⁸⁸

Holmes’s bad man perspective has had a tremendous impact on tort law in this country⁸⁹ and has radically changed the way we view even the most basic of torts. Consider, for example, the tort of negligence with its reliance on the “reasonable man” standard as that standard was understood before Holmes.

When is conduct negligent? According to the famous test set forth by Baron Edward Hall Alderson⁹⁰ in the 1856 case of *Blyth v. Birmingham Waterworks Co.*,⁹¹ which not only established the “reasonable man”

87. HOLMES, *supra* note 47, at 115.

88. *Id.* Holmes recognized that his theory cut against the grain. In *The Path of the Law*, Holmes reports a recent conversation he had with a famous English judge to whom he had conveyed his views: “[W]hen I stated my view to a very eminent English judge the other day, he said: ‘You are discussing what the law ought to be; as the law is, you must show a right. A man is not liable for negligence unless he is subject to a duty.’” Holmes, *supra* note 3, at 471–72. Although Holmes thought that the English judge’s view was decidedly “wrong,” he acknowledged that “it is familiar, and I dare say generally is accepted in England.” *Id.* at 472.

89. ROSENBERG, *supra* note 74, at 1 (“From the beginning, th[e] debate [governing the legitimacy of tort law] has been shaped by the ideas of Oliver Wendell Holmes, the most illustrious jurist in American law.”); Goldberg & Zipursky, *supra* note 74, at 1571 (“Holmes, by linking a radical jurisprudential argument to a radical reconceptualization of tort law, changed the landscape of tort theory.”); Grey, *Legal Pragmatism*, *supra* note 27, at 832 (“[Holmes’s] formulations represented a breakthrough, the implications of which would not be fully absorbed for several generations. At the outset of his career as a legal theorist, he planted the germ of the whole modern analysis of tort and contract in terms of risk allocation, later embodied in such notions as loss spreading, cost internalization, and efficient breach.”); Novick, *supra* note 74, at 1030 (“The starting point of this transformation is the central insight of *The Common Law*, an imaginative leap that changed all legal thinking afterward: the organizing principle of the common law was liability, not duty.”).

90. Baron Alderson has another claim to fame as well: he was the judge who established the basic rule, familiar to every Contracts student in the Anglo-American legal world, that consequential damages, to be recoverable, must be foreseeable by the promisor at the time of entering into a contract. *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145 (Ex.) 151; 9 Ex. 341, 354 (“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”).

91. (1856) 156 Eng. Rep. 1047 (Ex.); 11 Ex. 781.

standard,⁹² but serves as the basis for pattern jury instructions to this day.⁹³ negligence is defined as “the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”⁹⁴ Such a standard, it seems, would not be very hospitable to Holmes’s bad man, who could no longer rely on an external cost-benefit analysis to guide his behavior, but must presumably adopt the internal perspective of other “reasonable men” of his community, who will no doubt be guided by their own “vaguer sanctions of conscience,”⁹⁵ if he is to avoid acting negligently.

The bad man’s prospects take on a decidedly different flavor, however, and fare much better in the hands of law and economics scholars, who have done for Holmes’s theory of tort law (through the Learned Hand Formula) what other scholars have done for his theory of contract law (through efficient breach theory). In fact, perhaps nowhere is Holmes’s bad man theory of law more perfectly encapsulated than in the famous Learned Hand Formula,⁹⁶ which remains the starting point for the economic analysis of negligence to this day.⁹⁷ First formally articulated in *United States v. Carroll Towing Co.*,⁹⁸ Judge Learned Hand also rejected the “reasonable

92. Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769, 769 n.2 (2001).

93. See Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 AM. J. JURIS. 143, 144 n.2 (2002).

94. *Blyth*, 156 Eng. Rep. at 1049.

95. Holmes, *supra* note 3, at 459.

96. See Patrick J. Kelley, *The Carroll Towing Company Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731, 742–48 (2001) (arguing that the Hand Formula was influenced by the definition of negligence adopted by the Restatement (First) of Torts, which can itself be traced to the seminal article by Henry Taylor Terry, *Negligence*, 29 HARV. L. REV. 40 (1915), who was in turn influenced by the theory of negligence articulated by Oliver Wendell Holmes in his famous book, *The Common Law*). Incidentally, Holmes himself was likely influenced by Auguste Comte and John Stuart Mill. *Id.* at 748.

97. COLEMAN, *supra* note 82, at 14 (“[E]conomic analysis explicates negligence in terms of the Learned Hand formula Negligence is the imposition of unreasonable risks, and the criteria for the proper application of the concept of a reasonable risk are given by the Learned Hand test. The Learned Hand test is itself simply an expression of the economic goal of tort law, namely, the optimal reduction of accident costs.”); Samuel J. Levine, *Richard Posner Meets Reb Chaim of Brisk: A Comparative Study in the Founding of Intellectual Legal Movements*, 8 SAN DIEGO INT’L L.J. 95, 108 (2006) (stating that the Hand Formula served as the “basis for the economic analysis of negligence” since the case was first decided in 1947); Daniel Q. Posin, *The Error of the Coase Theorem: Of Judges Hand and Posner and Carroll Towing*, 74 TUL. L. REV. 629, 644 & n.48 (1999) (“In effect, the Posner-Hand analysis uses the Coase Theorem” which is “basic to the whole economic analysis of law” (quoting *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, *supra* note 45, at 226 (statement of Richard Posner))); Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2001 (2007) (“Professor Posner used the case to energize his entire economic theory of tort law, which, in my view, remains the most celebrated within the legal academy.”).

98. 159 F.2d 169, 173 (2d Cir. 1947); see also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 9, 85–86 (1987) (stating that although “most lawyers and law professors still believe . . . that the actual as well as the ideal function of tort law is to achieve fairness rather than efficiency,” in fact “something like the Hand

man” standard that seemed to require a potential wrongdoer to view the law of negligence from the good man’s internal point of view,⁹⁹ and provided the following external standard by which courts should determine whether or not a defendant had acted negligently:

[An] owner’s duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability [of harm]; (2) the gravity of the resulting injury [if the harm comes about]; [and] (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether $B < PL$.¹⁰⁰

formula has long been used to decide negligence cases,” and “Hand was purporting only to make explicit what had long been the implicit meaning of negligence”).

99. See, e.g., Kelley, *supra* note 96, at 749–50 (stating that just as “[t]he critical question for Holmes . . . was not simple foreseeability by the ordinary reasonable man, but the specific laws of antecedence and consequence that enable us to foresee harm from certain conduct under certain circumstances,” so too for Judge Hand, who, as a “friend and admirer of Holmes,” “refus[ed] to include foreseeability in his simplified reformulation of the unreasonable foreseeable risk test”). The result was a test that was “more scientific: you do not need to use that weaselly creature, the ordinary reasonable man, with his penchant for sentiment and outmoded custom, who may upset the purely objective calculation of costs and benefits.” *Id.* But see Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 817 (2001) (noting that, although the reasonable person test and the Hand Formula can be thought of “as independent and alternative techniques for determining negligence,” the two can also be combined “by characterizing the Hand Formula as the test a reasonable person would use in deciding which precautions to take to avoid accident risks to others”).

100. *Carroll Towing Co.*, 159 F.2d at 173 (Hand, J.). As pointed out by Professor Kelley, “Judge Hand had expressed this same understanding of the appropriate test of negligence, without the algebraic notation, over six years before in *Conway v. O’Brien*.” Kelley, *supra* note 96, at 743 (citing *Conway v. O’Brien*, 111 F.2d 611, 612 (2d Cir. 1940) (Hand, J.) (“The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.”)); see *id.* at 754 (“Judge Posner recognized the *Carroll Towing Co.* negligence formula as ‘a valuable aid to clear thinking about the factors that are relevant to a judgment of negligence and about the relationship among those factors’ even though ‘the formula does not yield mathematically precise results in practice, [since the burden of precautions, the probability and potential gravity of harm have never all been quantified] in an actual lawsuit.”) (alteration in original) (quoting *U.S. Fidelity & Guar. Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022 (7th Cir. 1982) (Posner, J.)); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972) (“Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. The cost of prevention is what Hand meant by the burden of taking precautions against the accident If the cost of safety measures or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention. A rule making the enterprise liable for the accidents that occur in such cases cannot be justified on the ground that it will induce the enterprise to increase the safety of its operations. When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability.”).

Under this approach, codified in our law¹⁰¹ and reflected in the *Restatement (Third) of Torts*,¹⁰² a court need “merely calculate[] the costs and the benefits of an activity to decide whether an injurer [is] negligent,”¹⁰³ and need not be concerned with determining what a virtuous¹⁰⁴ or reasonable¹⁰⁵ person in the defendant’s position would have

101. See, e.g., Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013, 1037–38 (1991) (“[T]he process of balancing the magnitude of the risk against the cost of risk prevention has been embedded in negligence law since the nineteenth century, and was rendered official by the *First Restatement of Torts* and Learned Hand’s opinion in *United States v. Carroll Towing Co.*”). But see Gilles, *supra* note 99, at 861 (arguing that although the *Restatement (Third)* has explicitly adopted the Hand Formula, the cost-benefit of risk-utility balancing has been an implicit aspect of the reasonable person standard for seventy years); Kelley, *supra* note 96, at 752–53 (“Stephen Gilles has confirmed what this author had earlier suggested: judges ordinarily instruct juries on the negligence issue to determine whether the actor behaved as a ‘reasonably prudent person’ or an ‘ordinary reasonable person.’ Judges do not ordinarily instruct juries on the negligence issue to balance the costs and benefits of greater care.” (citing Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1016 (1994))); Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171, 1183 (2008) (“To be sure, there is much controversy about the descriptive claim that the Hand test reflects Anglo-American tort law. Jury instructions (except in some products liability cases) rarely refer to Hand balancing, and appellate decisions refer to such balancing only intermittently. Rather, ‘reasonable care under the circumstances’ appears to be the (remarkably vague and opaque) ‘standard’ that many jurisdictions require juries to apply in determining negligence.” (footnotes omitted)).

102. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 3 (2005) (“A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person’s conduct lacks reasonable care are the foreseeable likelihood that the person’s conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.”). It may have been the case, however, that Judge Learned Hand was himself influenced by the American Law Institute’s (ALI) Restatement project, rather than the other way around. See Kelley, *supra* note 96, at 743–44 (“Where, then, did Judge Hand get his formula? We know from his biographers that Learned Hand was an intellectually ambitious and progressive judge, alive to the latest currents of thought in the legal community. This found expression in many ways, including Judge Hand’s early membership in the ALI and his vigorous support for its project of restating the common law. This suggests that a likely source for Hand’s description of the negligence standard would be the Restatement of the Division of the Law Relating to Negligence, approved by the ALI at its annual meeting in 1934. Sure enough, when we turn to that Restatement we find negligence explained as conduct posing an unreasonable foreseeable risk of harm to another. The Restatement defined an unreasonable risk as ‘one of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.’ The Restatement went on to list factors to be considered in determining the utility of the actor’s conduct, as well as factors considered in determining the magnitude of the risk.” (quoting RESTATEMENT OF TORTS: NEGLIGENCE § 291 (1934)) (citing GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 190–415 (1994))); see also Randy Lee, *A Look at God, Feminism, and Tort Law*, 75 MARQ. L. REV. 369, 387 (1992) (“The Restatement approach differs from the Hand test only in that it measures the burden and loss, factors in terms of social burden and loss rather than in terms of the burden and loss to the parties.” (citing RESTATEMENT (SECOND) OF TORTS §§ 291–93 (1977))).

103. Frank J. Vandall, *Judge Posner’s Negligence-Efficiency Theory: A Critique*, 35 EMORY L.J. 383, 383 (1986).

104. Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries About Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 592 (2002) (citing Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431 (2000)).

foreseen, or whether a tortfeasor's actions were intrinsically right or wrong.¹⁰⁶ Rather, under this modern-day iteration of the "bad man" theory of negligence, a court need only determine which party is the "cheapest cost avoider"¹⁰⁷ (i.e., "the actor who could most easily discover and inexpensively remediate the hazard"),¹⁰⁸ and then place the cost of accident prevention on this person to encourage them to take only those precautions that are economically feasible.¹⁰⁹

If we recall Holmes's definition of the bad man as one "who cares only for the material consequences which such knowledge enables him to predict,"¹¹⁰ one can immediately see how useful such a theory would be to him. When followed,¹¹¹ such a theory allows the bad man to predict, with a fair degree of accuracy, how a court would rule, and thereby provides him with external guidance (via the threat of possible sanctions) regarding the appropriate precautions to take.

105. *Id.* at 591 (citing HOLMES, *supra* note 47, at 87–88). *But see* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 169 (6th ed. 2003) (characterizing *Blyth v. Birmingham Waterworks Co.* as a case illustrating Baron Alderson's economic understanding of the law of negligence, and remarking that although the injury was "of unprecedented severity," the court did not find negligence because "[t]he damage was not so great as to make the expected cost of the accident greater than the cost of prevention" because "the probability of the loss had been low").

106. Kelley & Wendt, *supra* note 104, at 591–92 (citing Catharine Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2402–13 (1990)).

107. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1096–97, 1119 (1972).

108. M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lens of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1047 (1998).

109. *See, e.g.*, Gilles, *supra* note 99, at 818 ("The Hand Norm tells us that it is negligent to omit a precaution if the reduction in expected accident costs would have been greater than the costs of the precaution," or, stated algebraically, "it is negligent to omit a precaution if $PL > B$ "); Kelley & Wendt, *supra* note 104, at 591 ("[A]dvocates of the *Carroll Towing Co.* test have suggested that the ordinary reasonable person standard asks a cost-benefit question: whether the burden of taking precautions against a foreseeable risk is less than the foreseeable probability times the foreseeable gravity of threatened harm to others if the precautions are not taken.").

110. Holmes, *supra* note 3, at 459; *see also id.* at 457 ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.").

111. Compare LANDES & POSNER, *supra* note 98, at 9, 85–86 (stating that although "most lawyers and law professors still believe . . . that the actual as well as the ideal function of tort law is to achieve fairness rather than efficiency," in fact "something like the Hand formula has long been used to decide negligence cases," and "Hand was purporting only to make explicit what had long been the implicit meaning of negligence"), and Robert L. Rabin, *Law for Law's Sake*, 105 YALE L.J. 2261, 2275 (1996) ("Long before *Carroll Towing* was decided, common law judges were speaking the prose version of the Learned Hand formula without knowing it . . ."), with Richard W. Wright, *Hand, Posner, and the Myth of the "Hand" Formula*, 4 THEORETICAL INQUIRIES IN L. 145, 273 (2003) ("If one turns from the academic discussions of negligence law to the actual cases, it immediately becomes clear that the aggregate-risk-utility test of negligence that is set forth in Learned Hand's formula, in the various editions of the Restatement, and in Richard Posner's academic writings is almost never referred to in jury instructions, is seldom referred to in judicial opinions, and is inconsistent with the actual criteria applied by the courts in various types of situations.").

And what sorts of precautions will a bad man likely take under such a theory? Like our bad man of contract law, who will breach his contract wherever it is profitable to do so, the bad man of tort law will also breach his tort-based “duty” whenever it is profitable to do so.

Consider, for example, the following facts. The CEO of a large auto manufacturer wishes to offer an affordable subcompact car, and is presented with one of two choices by his design engineers. If the CEO selects choice number one, then a fuel tank will be placed above the rear axle of the car, which will increase the car’s safety by allowing additional crunch space in the event of a rear-end collision (which customers will appreciate) while reducing the available trunk space (which customers will not appreciate) and decreasing overall sales (which the company will not appreciate). If, on the other hand, the CEO selects choice number two, then the fuel tank will be placed behind the rear axle of the car, thereby reducing the car’s safety by reducing the available crunch space in the event of a rear-end collision and causing the gas tank to explode (which will cause some individuals to suffer agonizing burn deaths and burn injuries), but increase the trunk space (which those who survive will appreciate) and increase overall sales (which the company will appreciate). How should the company make its decision? What advice would you, as the lawyer, give to a company in this position?

If the CEO (or his lawyer) behaves like the bad man, he will not choose his course of conduct based on his internal “vaguer sanctions of conscience,” but by recourse to an external cost-benefit analysis. If the total revenue generated by pursuing option number two exceeds the total revenue generated by option number one by a large enough margin to pay for the increased cost of accidents generated by option number one, then option number two will be pursued, but not otherwise. The human lives at risk are only important to the extent that their loss in an accident must be paid for by the company.

Let us add one further wrinkle to this hypothetical. The CEO has decided to pursue option number two for the reasons just discussed, but before the cars are manufactured, he is again approached by his design engineers and told that about 180 individuals are expected to suffer agonizing burn deaths from the exploding gas tanks, and another 180 are expected to undergo serious burn injuries, but that all of these deaths and injuries can be prevented by reinforcing the automobiles at a cost of a few extra dollars per automobile. In this case, how is a CEO employing Holmes’s bad man calculus expected to behave?

First, he will put before him Learned Hand’s formula, $B < PL$, and will start plugging in numbers. Suppose he predicts¹¹² that each death will cost the company \$200,000, and each burn injury will cost the company \$67,000. He also knows that about 180 individuals are expected to suffer each type of injury. Multiplying 180 by \$267,000, he calculates that the total cost to the company of the deaths and injuries that will be caused if the

112. Recall that the “bad man,” by definition, “cares only for the material consequences which such knowledge enables him to predict.” Holmes, *supra* note 3, at 459.

repairs are not undertaken will be roughly \$50 million. He has now calculated PL, but still needs a figure for B. To get this figure, the CEO will not be too interested in the few extra dollars it might cost per car to undertake the repairs, but will be very interested in knowing how much it will cost to repair each car in the entire fleet. Suppose he is told that the cost of such repairs is around \$137 million. Plugging this number into B, he now recognizes that $B > PL$, and the company can avoid being found negligent if it invests \$137 million to reduce \$50 million of harm. But he also recognizes something else. If he does not require the company to undertake any repairs whatsoever, then B will be less than PL, and, per the Learned Hand formula, a court will find the company negligent. This seems bad at first, but upon further reflection, is not so bad after all. This is because the CEO also predicts that the damages it will be required to pay by a court in the event of being found negligent will only be PL, or \$50 million, which would be *lower* than the cost of the repairs, or \$137 million, for an \$87 million “savings.” Needless to say, the CEO adopting the bad man approach will *not* elect to have the repairs made.¹¹³

As you have probably guessed, the “hypothetical” above was more than loosely based on the facts of a real case, *Grimshaw v. Ford Motor Company*.¹¹⁴ The car was a Pinto, the company was Ford, and the public was furious.¹¹⁵ Acknowledging, in some vague sense, that cost-benefit takes place in boardrooms across corporate America is one thing. Allowing a company to gamble with human lives is another thing entirely. It was in large part for this reason that the jury required Ford to pay an additional \$125 million in punitive damages,¹¹⁶ and why Holmes’s views (if these in fact be his true views)¹¹⁷ are not infrequently met with hostility among scholars, judges, and the public alike.

In fact, when the rubber of facts meets the road of Holmes’s theory upon which the Pintos of the world drive, the logical implications of accepting (let alone indulging) the bad men of the world seem unpalatable. With the availability of punitive damages, it seems, the bad man need not be

113. Barbara Ann White, *Risk-Utility Analysis and the Learned Hand Formula: A Hand that Helps or a Hand that Hides?*, 32 ARIZ. L. REV. 77, 131 n.279 (1990) (“In making its cost-benefit analysis, Ford used the figures calculated by the National Highway Traffic and Safety Association to be the value of human life (\$200,000) and serious burn injury (\$67,000). Using an estimation of 180 burn deaths and 180 serious burn injuries per year, Ford calculated that the benefits that would be realized by adding safety devices to the Pinto’s fuel tank, in terms of lives saved and injuries prevented, would equal approximately \$50 million dollars, whereas the associated costs would be \$137 million dollars.” (citing S. Kinghorn, *Corporate Harm—A Structural Analysis of the Criminogenic Elements of the Corporation* 218 (1984) (unpublished dissertation))).

114. 174 Cal. Rptr. 348, 384 (Cal. Ct. App. 1981) (“There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits.”).

115. See generally Schwartz, *supra* note 101, at 1041–43; White, *supra* note 113.

116. Although the amount was later reduced to \$3.5 million by the trial judge. See *Grimshaw*, 174 Cal. Rptr. at 358.

117. In Part III, I return to these facts to work out a more logical and palatable implication of Holmes’s theory than has so far been represented here.

indulged by the good people of this world. Yet, if punitive damages were ever abolished or seriously limited, on the one hand, and the bad man were allowed to continue running rampant over the legal landscape, on the other, then indulge him we must, even if doing so would tend to produce the sort of results seen in *Grimshaw*. Shockingly, this seems to have been the latest move made by our courts, and it has happened in no less than the highest court in the land. It is this most recent move that we turn to in the next section.

C. The Bad Man's Theory of Punitive Damages: From Punishment and Deterrence to Predictability and Efficiency

[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another.

— Justice David Souter, *U.S. Supreme Court*¹¹⁸

Even in the uncertain world of punitive damages, one thing has always been certain: this area of law has always been beyond the bad man's reach. This is because, since the first common law punitive damages cases were decided more than two centuries ago,¹¹⁹ courts have maintained¹²⁰—and

118. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008) (Souter, J.) (citing Holmes, *supra* note 3, at 459).

119. Common law courts first recognized punitive damages in 1763 in *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (C.P.); *Lofft*, 1 and *Huckle v. Money*, (1763) 95 Eng. Rep. 768 (K.B.); 2 Wils K.B. 205. A few decades later, the concept began to make its way into the common law of the United States in the cases of *Genay v. Norris*, 1 S.C.L. (1 Bay) 6, 7 (1784) and *Coryell v. Colbough*, 1 N.J.L. (Coxe) 77 (1791). In *Coryell*, the judge instructed the jury to award damages “for example’s sake, to prevent such offences in [the] future.” *Coryell*, 1 N.J.L. (Coxe) at 77. The concept was subsequently acknowledged by the U.S. Supreme Court in *Day v. Woodworth*, 54 U.S. (13 How.) 362, 370 (1851), where the court held that “the jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant” in certain instances, including “actions of trespass and all actions on the case for torts.” *Id.*

The concept of punitive damages, of course, stretches back thousands of years and can be found in sources as diverse as the Mosaic Law, *see Exodus* 22:9 (King James) (“For all manner of trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing, which another challengeth to be his, the cause of both parties shall come before the judges; and whom the judges shall condemn, he shall pay double unto his neighbor.”); the Code of Hammurabi, *see THE CODE OF HAMMURABI* ¶ 265, at 48 (L.W. King trans., NuVision Publications 2007) (c. 1780 B.C.E.) (“If a herdsman, to whose care cattle or sheep have been entrusted, be guilty of fraud and make false returns of the natural increase, or sell them for money, then shall he be convicted and pay the owner ten times the loss.”); the Hittite Law and the Code of Manu, *see James B. Sales & Kenneth B. Cole, Jr., Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1119 (1984); the Twelve Tables of the Romans, RUSS VERSTEEG, *LAW IN THE ANCIENT WORLD* 345 (2002) (noting that under the Twelve Tables, a “thief was required to pay quadruple damages (*i.e.*, four-times the value of the objects that he had attempted to steal”); Greek Law, *see* 1 ROBERT J. BONNER & GERTRUDE SMITH, *THE ADMINISTRATION OF JUSTICE FROM HOMER TO ARISTOTLE* 78 (1938) (“The penalty [for assaulting a slave girl] was double the amount of the injury.”); and even Egyptian Ptolemaic Law, *see* VERSTEEG, *supra*, at 165 (“As a rule, a convicted thief had to return stolen goods to the individual to whom they belonged, and, in addition, pay damages to the victim of double or triple (the cases vary) the value of the

continue to maintain¹²¹—that punitive damages exist to punish and deter present and future wrongdoers. Such twin goals, it would seem, speak directly to the bad man who would engage in nefarious but profitable conduct, for he must now be worried not only about the price he must pay for his conduct in terms of compensatory damages, but the additional punitive damages a court may impose to punish him and deter others from engaging in such conduct. Punitive damages, in other words, were traditionally reserved for those who *intentionally* engaged in prohibited conduct whenever the price was right to do so (i.e., the bad man).

This makes the bad man's recent appearance and use in the landmark decision of *Exxon Shipping Co. v. Baker*,¹²² a case decided by the highest court in our land, all the more shocking. In *Exxon*, the Supreme Court has seemingly made a radical departure from the principles that have governed punitive damages for the last several hundred years by making the twin pillars of punitive damages jurisprudence (punishment and deterrence)

stolen goods (what modern law might call 'punitive damages'."); see also *id.* at 185 ("[A] thief had to return the stolen goods and pay double or triple their value, as a kind of punitive damages.").

120. See, e.g., *Wilkes*, 98 Eng. Rep. at 498–99 ("Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.").

121. *Exxon*, 128 S. Ct. at 2621 ("Regardless of the alternative rationales over the years, the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct."); *Philip Morris USA v. Williams*, 549 U.S. 346, 351 (2007) ("Punitive damages are awarded against a defendant to punish misconduct and to deter misconduct," and "are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." (quoting Joint Appendix at 283a, *Philip Morris USA*, 549 U.S. 346 (No. 05-1256), 2006 WL 2147483)); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("[C]ompensatory and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes. Compensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.' By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution." (citations omitted) (quoting *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001))); *Cooper Indus.*, 532 U.S. at 432 ("Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter . . . operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 54 (1991) (O'Connor, J., dissenting); RESTATEMENT (SECOND) OF TORTS § 903 (1979)); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); *Haslip*, 499 U.S. at 19 ("[P]unitive damages are imposed for purposes of retribution and deterrence."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67 (1981) ("Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.").

122. 128 S. Ct. 2605 (2008) (finding that punitive damages should not be so high as to prevent an agent—like the bad man himself—from being able to predict the cost of violating the law).

harder to implement than ever before. As we shall soon see, not only has the “bad man” been given free reign by the Supreme Court to ride roughshod over the rights of others, but the Court has also taken the remarkable and unprecedented step of announcing that the law, far from being sacrosanct, may be broken by those who are willing and able to pay a pre-specified price.¹²³

On March 23, 1989, Captain Joseph Hazelwood, a relapsed alcoholic with a heightened tolerance for drink,¹²⁴ consumed an amount of alcohol that would have made most non-alcoholics pass out¹²⁵ before attempting to navigate the 900-foot long supertanker *Exxon Valdez* through the dangerous, icy waters along the Prince William Sound. As it approached midnight, Captain Hazelwood, realizing that the icy waters were in a worse condition than usual, radioed the Coast Guard and asked for permission to navigate the supertanker across “a less icy path” taken by the previous outbound ship.¹²⁶ The Coast Guard approved the request, which traded one danger for another by allowing Captain Hazelwood to avoid the icy waters only by steering the supertanker around the dangerous Bligh Reef near the Alaskan coast. Unfathomably, just two minutes before Captain Hazelwood was required to make a turn around the reef, he inexplicably “put the tanker on autopilot, speeding it up, making the turn trickier, and any mistake harder to correct”¹²⁷ in order to retire to his cabin “to do paperwork.”¹²⁸ In

123. Even more importantly, the Supreme Court’s reasoning has already found its way into our lower courts, where the Court’s initial misunderstanding of Holmes’s bad man, if not checked, threatens to do particular damage. *See, e.g.*, *Bridgeport Harbor Place I, LLC v. Ganim*, No. X06CV040184523S, 2008 WL 4926925, at *12 (Conn. Super. Ct. Oct. 31, 2008) (“As cogently expressed by the Supreme Court, “[a] penalty should be reasonably predictable in its severity, so that even Justice Holmes’ “bad man” can look ahead with some ability to know what the stakes are in choosing one course of action or another And when the bad man’s counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.” (citing *Exxon*, 128 S. Ct. at 2610)).

Although the metaphor of the bad man was not previously unknown to judges deciding punitive damages cases, as illustrated in *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454 (Miss. 1983) (finding a Mississippi Chancery court is allowed to grant punitive damages because the “bad man” could foresee the possibility of paying such damages) and Luban, *supra* note 1 (discussing Holmes’s prediction theory, morality in the law, and the relationship between punitive damages and the bad man), the Supreme Court’s recent endorsement of the bad man approach to law is unprecedented, and illustrates how dangerous a misunderstood idea may become.

124. Indeed, Captain Hazelwood had recently “completed a 28-day alcohol treatment program while employed by Exxon, as his superiors knew, but dropped out of a prescribed follow-up program and stopped going to Alcoholics Anonymous meetings.” *Exxon*, 128 S. Ct. at 2612. In fact, as the Supreme Court noted, drinking was nothing new to captain Hazelwood, who could be found drinking “in bars, parking lots, apartments, airports, airplanes, restaurants, hotels, at various ports, and aboard Exxon tankers.” *Id.*

125. Captain Hazelwood had “downed at least five double vodkas in the waterfront bars of Valdez, an intake of about 15 ounces of 80-proof alcohol, enough ‘that a non-alcoholic would have passed out.’” *Id.* (quoting *In re Exxon Valdez*, 270 F.3d 1215, 1236 (9th Cir. 2001)).

126. *Id.*

127. *Id.*

his stead, Captain Hazelwood placed Joseph Cousins, an unlicensed pilot, and helmsman Robert Kagan, a non-officer, in charge of navigating the supertanker around the Bligh Reef.¹²⁹ Unfortunately, Cousins and Kagan failed to make the required turn, and the supertanker slammed into the reef, tearing open the hull of the ship from which oil began to spill. At this point, Captain Hazelwood rushed up from his cabin, where he “tried but failed to rock the *Valdez* off the reef, a maneuver which could have spilled more oil and caused the ship to founder.”¹³⁰ All in all, about eleven million gallons of crude oil were spilled into the Price William Sound.¹³¹ As for Captain Hazelwood, it was estimated that his blood-alcohol level was about .241, or “three times the legal limit for driving in most States,” at the time of the oil spill.¹³²

After finding that both Exxon and Hazelwood were reckless, the jury awarded \$287 million in compensatory damages and assessed additional punitive damages in the amount of \$5 billion against Exxon and \$5000 against Hazelwood.¹³³ The Ninth Circuit remitted the amount of punitives to \$2.5 billion, and the case was appealed to the Supreme Court, in part, to determine whether the punitive damages were excessive.¹³⁴

After briefly tracing the history of punitive damages in England and America, the Court reaffirmed its commitment to the twin goals of “retribution and deterring harmful conduct.”¹³⁵ It noted, however, that “American punitive damages have been the target of audible criticism in recent decades,”¹³⁶ and that much of this criticism revolves around “the stark unpredictability of punitive awards.”¹³⁷ To reign in this “stark unpredictability,” the Supreme Court invoked the help of Holmes’s bad man, and held that: “[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes’s ‘bad man’ can look ahead with some

128. *Id.*

129. *Id.*

130. *Id.* at 2613.

131. *Id.*

132. *Id.*

133. *Id.* at 2614.

134. *Id.* Although the case was decided under principles of maritime common law, a recent search on Westlaw indicates that the case has already begun exerting influence over punitive damages cases in general.

135. *Id.* at 2621.

136. *Id.* at 2624.

137. *Id.* at 2625. Interestingly, the Court came to its realization that punitive damages are starkly unpredictable only several paragraphs after noting that

[a] survey of the literature reveals that discretion to award punitive damages has not mass-produced runaway awards, and although some studies show the dollar amounts of punitive-damages awards growing over time, even in real terms, by most accounts the median ratio of punitive to compensatory awards has remained less than 1:1. Nor do the data substantiate a marked increase in the percentage of cases with punitive awards over the past several decades. The figures thus show an overall restraint and suggest that in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter.

Id. at 2624–25 (footnotes omitted).

ability to know what the stakes are in choosing one course of action or another.”¹³⁸

The Supreme Court went on to state that:

Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases.¹³⁹

Here, then, is the first example ever of the highest court in our land not only acknowledging, but *endorsing*, Holmes’s bad man, by helping him do what he could never do before: calculate with certainty the cost of breaking the law. Recall that, in *Grimshaw*,¹⁴⁰ the Ford Motor Company behaved as one would generally predict Holmes’s bad man to behave,¹⁴¹ but Ford found its calculations less than reliable in significant part due to the jury’s imposition of punitive damages. But now, with a 1:1 ratio representing the upper limit of punitive to compensatory damages, a bad man can choose with impunity among any number of nefarious activities so long as he is rich enough to pay the legal price of his behavior, and will care little about whether the damages imposed by a court are called “compensatory” or “restitutionary” or even “punitive”—to him, it is all the same.¹⁴²

Once again, one can immediately see how useful such a theory would be to the bad man. When followed,¹⁴³ such a theory allows him to predict, with a fair degree of accuracy, how a court would rule, and thereby provides him with external guidance (via the threat of possible sanctions) regarding the appropriate precautions to take.

While the bad man must have been head over heels over the Supreme Court’s recent ruling, a good man should be puzzled and, frankly, a bit troubled by all of this. The good man should wonder whether the bad man’s indulgence is either necessary or desirable, even if the Supreme Court’s stated purpose of reigning in “stark unpredictability” of punitive

138. *Id.* at 2627 (citing Holmes, *supra* note 3, at 459).

139. *Id.* at 2633.

140. *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981); *see infra* Part II.B.

141. *See, e.g.*, Schwartz, *supra* note 101, at 1041–44; *see also Grimshaw*, 174 Cal. Rptr. at 384 (“There was evidence that Ford could have corrected the hazardous design defects at minimal cost but decided to defer correction of the shortcomings by engaging in a cost-benefit analysis balancing human lives and limbs against corporate profits.”).

142. Holmes, *supra* note 3, at 461 (“[F]rom [the bad man’s] point of view, what is the difference between being fined and being taxed a certain sum for doing a certain thing? . . . What significance is there in calling one taking right and another wrong from the point of view of the law? It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it. If it matters at all, still speaking from the bad man’s point of view, it must be because in one case and not in the other some further disadvantages, or at least some further consequences, are attached to the act by the law.”).

143. *See supra* note 111 (comparing scholarly commentary on judicial use of something akin to the Hand formula prior to its formulation in *Carroll Towing*).

damages is a noble one. And, at this point in the discussion, one may well wonder whether Holmes's theory is worth the paper it has been printed (and reprinted) on, and whether we should not outright abandon a theory that advocates the breaking of one's solemn word whenever doing so is profitable, allows one to commit negligence when the benefits exceed the costs, and refuses to truly punish wrongdoers by making punitive damages so predictable that a bad man will consider them as part of the cost of doing business.

If these were in fact Holmes's views, then the above-stated criticisms would render his theory, in my view anyway, unpalatable. But as I argue in the next part of this Article, Holmes's views were much more complex, and not only permit, but actually embrace, what has been previously thought to be inconsistent with his views: a good man approach to law.

III. SLAYING HOLMES'S JURISPRUDENTIAL DRAGON: HOLMES'S BAD MAN MEETS ARISTOTLE'S GOOD MAN

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.

— *Oliver Wendell Holmes*¹⁴⁴

One of the biggest mistakes people make when they read Holmes (who, admittedly, invited such misinterpretations with his tendency to choose words as much for their shock value as for the meaning they convey) is to confuse Holmes's enthusiasm for the bad man approach to law with a certain enthusiasm towards helping the bad man himself. This approach, for example, has been taken by several courts¹⁴⁵ and commentators, but could not be further from Holmes's actual intentions. Although Holmes certainly spilled his fair share of ink discussing the bad man, Holmes did not desire to help him but instead to advocate the separation of law and morality for the simple purpose of facilitating clear thinking¹⁴⁶ about the

144. Holmes, *supra* note 3, at 469.

145. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008) (Souter, J.); *Bridgeport Harbor Place I, LLC v. Ganim*, No. X06CV040184523S, 2008 WL 4926925, at *12 (Conn. Super. Ct. Oct. 31, 2008) (“As cogently expressed by the Supreme Court, ‘[a] penalty should be reasonably predictable in its severity, so that even Justice Holmes’ ‘bad man’ can look ahead with some ability to know what the stakes are in choosing one course of action or another. . . . And when the bad man’s counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage The common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances.” (quoting *Exxon*, 128 S. Ct. at 2610)).

146. Holmes, *supra* note 3, at 464 (“For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.”).

concept of law.¹⁴⁷ Because the bad man does not care about moral nature of a right or a duty, but only about the legal consequences attached to violating a right or failing to perform a duty,¹⁴⁸ Holmes thought that we should attempt to see the world from the bad man's eyes if we were ever to truly understand the law.

But, many have wondered, does Holmes's theory pay too much attention to the bad man's point of view?¹⁴⁹ If we are to truly understand the law, should we not instead be concerned with the perspective of the good man, who follows the law for conscience's sake and probably represents how most people behave and think about the law?¹⁵⁰ And, if most people actually think about the law from the perspective of the good man, would not an internally based, good man view of the law tell us a lot more about how the law actually works? Holmes would answer these critics in a word: no.

In *The Federalist* No. 51, James Madison famously wrote: "If men were angels, no government would be necessary."¹⁵¹ Coming from the pen of the father of the Constitution, who was himself advocating a new form of government, the implication was obvious: because men are not angels, a successful form of government should take this fact into account. This point could hardly have been lost on Holmes, who was himself advocating a new theory of law, and must himself have recognized that a legal system would be unnecessary among a population of angels or good men, who, after all, could find their "reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."¹⁵² More to the point,

147. Recall that, according to Holmes, the bad man understood law as a prophecy about what the courts would do in fact, i.e., in the event that a bad man violated a legal right, or failed to perform a legal duty. *See id.* at 460–61 ("Take the fundamental question, What constitutes the law? . . . [I]f we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the . . . courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

148. *Id.* at 461 ("Take again a notion which as popularly understood is the widest conception which the law contains;—the notion of legal duty, to which already I have referred. We fill the word with all the content which we draw from morals. But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.").

149. Kennedy, *supra* note 14, at 1773–74 ("Of what possible benefit can it be that the bad man calculates with certainty the contours within which vice is unrestrained? Altruism proposes an altogether different standard: the law is certain when not the bad but the good man is secure in the expectation that if he goes forward in good faith, with due regard for his neighbor's interest as well as his own, and a suspicious eye to the temptations of greed, then the law will not turn up as a dagger in his back. As for the bad man, let him beware; the good man's security and his own are incompatible.").

150. *See Hart, supra* note 32, at 932. Discounting the importance of Holmes's "bad man" theory of law, Hart wrote that Holmes's "conclusion . . . that law is something entirely separate from morals," and his suggestion that we see law from the bad man's perspective, was unhelpful at best, and would "make us more effective counsellors of evil" at worst. *Id.* He went on to ask: "Do not lots of good men obey the law, even though they might not be caught, and is not that fact important?" *Id.*

151. *THE FEDERALIST* No. 51, at 349 (James Madison) (Jacob E. Cook ed., 1961).

152. Holmes, *supra* note 3, at 459.

Holmes must have recognized, like Madison did, that in a government populated by bad men, a legal system, if it is to be successful, should take this fact into account.¹⁵³ Both men, it seemed, had the bad man on their minds.

But why, in the case of either Madison or Holmes, should a successful government or legal system take the bad man into account, and see the world through the bad man's eyes? One reason, which has already been briefly touched upon, is purely descriptive: we should take the bad man into account to better understand "[w]hat constitutes the law."¹⁵⁴ We can do this, according to Holmes, by stripping the law bare, and seeing how it actually works in practice. Although this descriptive component was an important part of Holmes's agenda, it is too often emphasized as Holmes's primary aim, whereas it was actually the beginning of a larger normative enterprise.

In an underappreciated passage of significant importance, Holmes analogizes the bad man to a dragon for a very specific purpose:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.¹⁵⁵

Just as a knight would lure a dragon out of his cave and "count his teeth and claws"¹⁵⁶ to see what sort of an enemy he is up against, so too would someone like Madison or Holmes wish to see what sort of an enemy he is up against by removing morality from the equation to see the world through the bad man's eyes. If this is all there was to Holmes's agenda, we should be very disappointed indeed, for the same reason that legal reformers are disappointed with those within the critical legal studies movement who would tear down sacred institutions while leaving nothing in their place. But in the very next sentence, Holmes reveals a much grander normative vision: the knight sizes up the dragon for the sake of doing one of two things: taming him, or killing him. There is an analogue in our understanding of the bad man. The knight is the good man, who must size up the bad man not merely for the sake of understanding the law, but for the purpose of making the law effective by either taming the bad man (i.e., reforming him internally), or killing him (i.e., imposing external sanctions to reform him externally).

153. In fact, Holmes himself could have written: "If men were angels, no system of laws would be necessary, but because the bad man exists, a system of law taking into account this fact is necessary."

154. *Id.* at 460; see Fisch, *supra* note 27, at 1595, 1612. Professor Jill E. Fisch notes that although Holmes's "bad man label is strikingly normative," Holmes's "purpose in describing the separation of law and morals was to help us understand what the law is, not to argue for what it should be." *Id.*

155. Holmes, *supra* note 3, at 469.

156. *Id.*

Thus, in response to our original question “why should a government or legal system be preoccupied with the bad man?” Holmes provides two non-mutually exclusive explanations: one internal, and the other external.

First, one can focus on the bad man to *reform his soul* by making him *become* more like a good man, thereby allowing him to better govern himself, internally, through his more refined and developed inner “sanctions of conscience.”¹⁵⁷ Alternatively, one can focus on the bad man with a desire to *shape his actions* by making him *behave* more like a good man, not for the purpose of actually making him good (though this would be a welcome benefit), but to better deal with those recalcitrant individuals through the external sanctions of the law who have proven that they are beyond internal reform. In the remainder of this Article, I flesh out this underappreciated portion of Holmes’s vision, and show how it makes a difference in the way we ought to understand both Holmes’s theory and the law itself. In the process, I hope to show Holmes’s theory as one that is much more normatively palatable than has been previously acknowledged, in that it focuses on the bad man not for his own sake, but for the sake of the good man, at least so far as Holmes understood this term.

A. *Bridging the Moral-Legal Divide Part I: Aristotle’s Good Man and the Internal Point of View*

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.

— *Oliver Wendell Holmes*¹⁵⁸

Besides a seemingly offbeat reference Holmes made to taming a dragon, what evidence do we have for believing that Holmes thought the bad man could be reformed through the vehicle of law, a claim that has been specifically doubted elsewhere?¹⁵⁹ Early in his speech, shortly after he introduced the bad man in an attempt to “dispel a confusion between morality and law,”¹⁶⁰ Holmes, recognizing the possibility that he might be misunderstood, offered the following cautionary statement:

157. *Id.* at 459.

158. *Id.*

159. See KRONMAN, *supra* note 26, at 126 (“A bad man may become an expert in [predicting how judges will behave] without ceasing to be bad, that is, without acquiring any of the public-spirited concerns that motivate judges. Holmes assumed that a person can possess an expert understanding of judicial behavior but continue to be bad himself. He assumed, to put it differently, that the acquisition of such expertise does not require that one be, or have the effect of turning one into, a good man motivated by the unselfish concerns of a judge.”).

160. Holmes, *supra* note 3, at 459; see also *id.* at 459–60 (“The law is full of phraseology drawn from morals, and by the mere force of language continually invites us to pass from one domain to the other without perceiving it, as we are sure to do unless we have the boundary constantly before our minds.”); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 253 (2006) (“In an address called *The Path of the Law*, Holmes famously worried over a century ago that our tendency to drench legal concepts in moralism would render the former less than clear and most decidedly less than liberating.”).

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 that I ask you for the moment to imagine yourselves indifferent to other and greater things.¹⁶¹

Unfortunately for Holmes, his request has been unkindly ignored since the moment it was uttered. But if we take Holmes at his word and let him speak for himself, he offers us several important clues regarding how the law is to be understood. First, he makes clear that he believes that the law is fundamentally moral, in that the laws that currently exist were, when they were first promulgated, essentially moral laws,¹⁶² and are still, in some sense, limited by morality.¹⁶³ Further, he makes clear that he is not asking us to disentangle morality from law to be a villain,¹⁶⁴ but to help us understand the law.¹⁶⁵ And third, in what must be the most ignored sentence in all of Holmes's writings, he believes that a proper understanding of the law is important not for its own sake, but because, in part, it allows one to "tame" (by reforming their behavior internally) those who would transgress the law's moral dictates through "practice" or habit.¹⁶⁶

Holmes's idea that a bad man may become good by habit is, somewhat shockingly, a quintessentially Aristotelian idea, and could have been written by the father of natural law himself. Indeed, viewed through an Aristotelian lens, which Holmes himself peeked through from time to time, Holmes's thought takes on an entirely different significance. Several thousand years before Holmes said that "[t]he practice of [law] tends to make good citizens and good men,"¹⁶⁷ Aristotle himself recognized that "[m]oral goodness . . . is the result of habit," as "none of the moral virtues is engendered in us by nature, since nothing that is what it is by nature can be made to behave differently by habituation."¹⁶⁸ Thus, according to Aristotle, the only way of

161. Holmes, *supra* note 3, at 459 (emphasis added).

162. *Id.* ("The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.").

163. *Id.* at 460 ("No doubt simple and extreme cases can be put of imaginable laws which the statute-making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it.").

164. Seipp, *supra* note 27, at 552 ("Holmes was 'the bad man.'").

165. Holmes, *supra* note 3, at 459 ("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.").

166. *Id.* at 459, 469.

167. *Id.*

168. ARISTOTLE, *supra* note 84, at 31; *see also id.* at 32 ("Men will become good builders as a result of building well, and bad ones as a result of building badly. Otherwise there would be no need of anyone to teach them: they would all be *born* either good or bad. Now

becoming just was to *act* justly, for although “we are constituted by nature to receive” moral virtues, “their full development in us is due to habit.”¹⁶⁹ Of course, this begs the question: how does one begin to act justly in the first place? As with Holmes,¹⁷⁰ Aristotle recognized that it was through the practice of following just laws, which legislators have laid down for this very purpose:

Anything that we have to learn to do we learn by the actual doing of it: people become builders by building and instrumentalists by playing instruments. Similarly we become just by performing just acts, temperate by performing temperate ones, brave by performing brave ones. This view is supported by what happens in city-states. Legislators make their citizens good by habituation; this is the intention of every legislator, and those who do not carry it out fail of their object. This is what makes the difference between a good constitution and a bad one.¹⁷¹

In this passage, Aristotle tells us that people become just by habit, and individuals habitually practicing just laws will tend to internalize the particular moral characteristics manifested in these external promulgations of public morality. Further, he suggests that the lawmaker (and, by extension, our common law judges) should legislate (or decide tough cases) with this fact in mind. Furthermore, because Aristotle believed that individuals do not possess moral goodness *ex nihilo*,¹⁷² the internal good man perspective cannot even begin to operate until moral content is poured into an essentially amoral vessel, whereby what was once external begins the process of ossification into an internal point of view.¹⁷³

It should be noted that, according to Aristotle, the bad man will never truly *become* good *until* his acts become sufficiently internalized to become what Holmes terms part of the good man’s inner “sanctions of conscience.”¹⁷⁴ But, as Aristotle recognized, through practice¹⁷⁵ this is possible, and one could soon become virtuous¹⁷⁶ and good.

this holds good also of the virtues. It is the way that we behave in our dealings with other people that makes us just or unjust . . .”).

169. *Id.* at 31.

170. Holmes, *supra* note 3, at 459 (“The practice of [the law], in spite of popular jests, tends to make good citizens and good men.”).

171. ARISTOTLE, *supra* note 84, at 32.

172. *Id.* (“Men will become good builders as a result of building well, and bad ones as a result of building badly. Otherwise there would be no need of anyone to teach them: they would all be *born* either good or bad.”).

173. Perhaps, indeed, the best way of beginning such a process is to impose external sanctions, as per Holmes; for again, according to Aristotle, there are no internal standards before this time to guide behavior.

174. Holmes, *supra* note 3, at 459; see ARISTOTLE, *supra* note 84, at 37. Aristotle himself recognizes that

virtuous acts are not done in a just or temperate way merely because *they* have a certain quality [e.g., conforming to the external requirements imposed by law], but only if the agent also acts in a certain state, that is (1) if he knows what he is doing, (2) if he chooses it, *and chooses it for its own sake* [i.e., not for the sake of avoiding a legal sanction], and (3) if he does it from a fixed and permanent disposition.

Id. (second emphasis added).

Because it was Holmes who, perhaps better than anyone else, articulated a theory that can help realize Aristotle's dream of making men virtuous—if not initially due to the good man's own inner conscious, then due to the bad man's continual practice¹⁷⁷—he is probably better thought of as the good man's friend than the law's villain. Indeed, there is no incompatibility with encouraging the good man to be governed by his inner “sanctions of conscience,” on the one hand, and attempting to reform the moral fabric of the bad man by requiring him to perform just actions for the purpose of becoming just, on the other. In fact, it may be argued, Holmes's bad man theory of law does a *better* job of making men virtuous than a purely internal point of view, for as Aristotle himself recognized, the difficulty in saying that “people must perform just actions if they are to become just” is that those who “do what is just and temperate . . . are just and temperate already.”¹⁷⁸ This, indeed, is the contradiction of the internal framework. Holmes's theory, far from being unfavorably disposed toward the good man, helps add to his ranks, whereas a purely internal theory would not be capable of helping those who are not already good and just become good and just.

If Aristotle and Holmes are correct, then the practice of law, at least where such laws are just, will increase the ranks of good men. There will, however, always be those who remain, despite the best efforts of the good man, bad. For these “dragons of the law” who have failed to internalize the law's inner teachings,¹⁷⁹ we, like the knight, will need another weapon to fight them. That sword, according to Holmes, is the external sanction.

B. Bridging the Moral-Legal Divide Part II: Holmes's Bad Man and the External Point of View

A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.

— *Oliver Wendell Holmes*¹⁸⁰

175. Which can be supplied with the gentle prodding of external sanctions, as will be discussed in Part III.C, *infra*.

176. ARISTOTLE, *supra* note 84, at 37–38 (“[I]t is from the repeated performance of just and temperate acts that we acquire virtues.”).

177. Holmes, *supra* note 3, at 459 (“The practice of [law], in spite of popular jests, tends to make good citizens and good men.”); *cf.* ARISTOTLE, *supra* note 84, at 37 (“[P]eople must perform just actions if they are to become just”); *id.* at 31 (“Moral goodness . . . is the result of habit.”).

178. ARISTOTLE, *supra* note 84, at 37.

179. Or, worse yet, have internalized the bad man's point of view. *See, e.g.*, Alschuler, *supra* note 27, at 375 n.84 (“[M]y argument is that ‘the bad man has crept into the collective unconscious of the legal profession.’ Once people internalize the ‘bad man’ perspective, the assumption that easily evaded law is *not* law becomes routine. Because that is what Holmes' definition says, it encourages the view that taking advantage of loopholes is unproblematic and that nearly everyone will do so.”).

180. Holmes, *supra* note 3, at 459.

In the previous section I discussed how Holmes's bad man theory of law reflects, in part, an Aristotelian theory of law that recognized law's ability to help make the bad man good through his habit of continually practicing (or obeying) just laws. In this section, I discuss Holmes's specific focus on those individuals who, despite the best attempts of the good man, nevertheless fail to internalize the law's inner morality. For these individuals, according to Holmes, we can never hope to explain how the law *actually works* by recourse to a purely internal point of view. More specifically, if one views—as Holmes did—a legislature's or judge's¹⁸¹ job as requiring the making, interpreting, and applying of laws for a population containing few angels, one will probably experience little success dealing with these bad men of the law without adopting an external view of law. The remainder of this section attempts to show why this is so.

Holmes's external view of law, of course, has been heavily criticized over the years. Some have accused it as being antagonistic to the good man approach to law,¹⁸² corrupting,¹⁸³ misplaced,¹⁸⁴ and woefully incomplete.¹⁸⁵ To look at the matter this way, it seems to me, is to completely misread Holmes. As I have argued above,¹⁸⁶ Holmes was sensitive to the internal point of view, and recognized that “[t]he law is the witness and external deposit of our moral life” and encapsulated “the history of the moral development of the race.”¹⁸⁷ His focus on the external

181. It is important to note that Holmes thought of judges as legislators or “‘law-makers,’ continuously engaged in making and revising ‘policies’ to provide ‘expedient’ solutions for new social problems.” ROSENBERG, *supra* note 74, at 4.

182. Kennedy, *supra* note 14, at 1773–74 (“Of what possible benefit can it be that the bad man calculates with certainty the contours within which vice is unrestrained? Altruism proposes an altogether different standard: the law is certain when not the bad but the good man is secure in the expectation that if he goes forward in good faith, with due regard for his neighbor’s interest as well as his own, and a suspicious eye to the temptations of greed, then the law will not turn up as a dagger in his back. As for the bad man, let him beware; the good man’s security and his own are incompatible.”).

183. Hart, *supra* note 32, at 932 (arguing that Holmes’s suggestion that we see law from the bad man’s perspective, was unhelpful at best, and would “make us more effective counsellors of evil” at worst).

184. H.L.A. HART, *THE CONCEPT OF LAW* 39–40 (1961) (wondering why the law should be concerned exclusively with the “bad man” rather than, for example, the “puzzled man” or the “ignorant man” or with the “man who wishes to arrange his affairs,” all of whom are “willing to do what is required, if only he can be told what it is”).

185. See, e.g., *id.* (“It is of course very important, if we are to understand the law, to see how the courts administer it when they come to apply its sanctions. But this should not lead us to think that all there is to understand is what happens in courts.”); Hart, *supra* note 32, at 932 (“Do not lots of good men obey the law, even though they might not be caught, and is not that fact important?”); Dale A. Nance, *Rules, Standards, and the Internal Point of View*, 75 *FORDHAM L. REV.* 1287, 1295 (2006) (“Much modern theorizing about law has failed to recognize the full importance of maintaining and cultivating the internal point of view among the citizenry. The ‘bad man’ theory of legal obligation is perhaps the most conspicuous failure in this regard. When Holmes gave his famous ‘bad man’ speech, ‘The Path of the Law,’ at Boston University School of Law, he was advising students on the best way to think of legal obligation and, therefore, the best way to advise clients. . . . Yet, it is hardly the best way to preserve and cultivate the internal point of view among the citizenry to have lawyers advising clients by taking the external point of view.”).

186. See *supra* Part III.A.

187. Holmes, *supra* note 3, at 459.

point of view, therefore, was undertaken not to disparage the internal point of view, but to strengthen it by protecting its most devout practitioners—the good men.

Our first job, therefore, is to dispel the myth that adopting an external view of the law automatically entails a rejection of the internal, good man approach to law. No less a figure than Aristotle himself, the father of virtue ethics and firm believer that laws should be enacted to make more men virtuous, adopted an external (and anachronistically Holmesian) view of law:

For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equals, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it.¹⁸⁸

These words, it seems, could have been penned by Holmes himself! But why would the developer of the good man approach adopt a purely external approach? What, in other words, can be gained by such a move?

As discussed earlier,¹⁸⁹ Aristotle, like Holmes, understood that people tend to become just by following just laws, and saw this as a normatively important component of the law. But Aristotle, like Holmes, also recognized that the internal point of view could only explain why those who had already internalized law's inner morality behaved as they did. It could say little, however, about how people came to behave morally in the first place, or why those who rejected law's inner morality still appeared to conform to the law's dictates, and appeared to behave *as though* they were moral and *as though* they were governed by the same "sanctions of conscience" as the good man himself. According to Holmes, one cannot hope to explain the behavior of these individuals, or to understand how legislatures and judges might affect their behavior, without recourse to an external point of view, and it is for this reason that Holmes adopted such a view.

It must be remembered that Holmes dedicated his life to the law, and understood, perhaps better than anyone else, that law not only had its basis in morality,¹⁹⁰ but depended for its very existence on the continuing support of the community.¹⁹¹ But he served in the Civil War and sat on the federal and state bench as well, and knew from these experiences that many individuals were not governed by their "vaguer sanctions of conscience,"

188. 2 ARISTOTLE, *Nicomachean Ethics*, in THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION bk. V, 1132a2–a9, 1132a19, at 1786 (Jonathan Barnes ed., Princeton Univ. Press 1984) (c. 384 B.C.E.).

189. See *supra* Part III.A.

190. Holmes, *supra* note 3, at 459 ("The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.").

191. *Id.* at 460 ("I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced.").

but needed external sanctions to shape their behavior to the general standards adopted by the community. Therefore, for Holmes, the purpose of adopting the external point of view was to understand how the law actually works to impose order on those initially resistant, and the best way of doing this was, in Holmes's view, to understand the bad man.¹⁹²

So how, exactly, is the bad man to be understood? What, exactly, guides his behavior? First, it must be recalled that a bad man will not look to the law as a statement of right and wrong, for morality does not play a role in his calculations. Nor will the bad man be compelled to follow the law's commands out of a desire to become a good man himself, or out of any deep respect for those who make (or follow) the law. Rather, the bad man will only understand law in terms of the "material consequences which such knowledge enables him to predict,"¹⁹³ and will therefore only look at the material consequences, i.e., the predicted punishment¹⁹⁴ that will be imposed on him for violating the law, in deciding whether or not to comply with the law's demands.¹⁹⁵ Indeed, it is this view—the bad man's view that violation of the law is a "cost of doing business" whenever the bad man's business runs counter to the spirit and letter of the law—to which courts and commentators most often object.¹⁹⁶

So how, exactly, does Holmes's bad man decide upon a course of action? According to Professor Albert W. Alschuler, the bad man acts even worse than Holmes himself imagined:

Holmes should have visited with the bad man longer. Contrary to what this scoundrel told Holmes, he did not care two straws for what the

192. *Id.* at 469 ("When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength.").

193. *Id.* at 459.

194. Holmes refers to this as the bad man's "prophecies of what the courts will do in fact." *Id.* at 461; *see also* *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (Holmes, J.) (defining law as "a statement of the circumstances in which the public force will be brought to bear upon men through the courts"); 2 HOLMES-POLLOCK LETTERS, *supra* note 37, at 212 ("It starts from my definition of law (in the sense in which it is used by the modern lawyer), as a statement of the circumstances in which the public force will be brought to bear upon men through the courts: that is the prophecy in general terms.").

195. It is for this reason that Holmes said, nearly a full century before the law and economics movement really gained momentum, that the "man of the future" is the man of economics, Holmes, *supra* note 3, at 469, for it is the economist who will best understand the cost-benefit analyses in which the bad man engages whenever deciding whether or not to obey a certain law.

196. Indeed, the "bad man" view of the law has been cited as a reason to dismiss an argument by the losing party, as in *Goldberg v. City of Atl. City*, 4 N.J. Tax 195 (N.J. Tax Ct. 1982), where the court, citing *General Motors Corp. v. City of New York*, 501 F.2d 639, 649 (2d Cir. 1974), agreed that the rules of professional conduct are not written for a bad man reading and held that a law firm cannot gain consent to a conflict of interest when a public interest is involved, contrary to the firm's argument. *Goldberg*, 4 N.J. Tax at 200, 213. Similarly, the "bad man" view of the law has been cited by judges as a reason to interpret a statute in a particular way so to prevent promoting a "bad man" style of interpreting a statute, as in *Cuevas v. Royal D'Iberville Hotel*, 498 So. 2d 346 (Miss. 1986), where a dissenting justice argued that the government should not be indifferent to a hotel's choice when the hotel chose to violate the law and pay penalties for violation of a local alcoholic beverage control law. *Id.* at 356–57 (Robertson, J., dissenting).

Massachusetts or English courts would do in fact. He cared what the *sheriff* would do. The sheriff, not the courts, had the guns, the padlocks, the battering rams, the handcuffs, the nightsticks, the dogs, the deputies, and the jails. What the courts did might predict what the sheriff would do, just as axioms and deductions might predict what the courts would do. In the end, however, the bad man was concerned about the sheriff. If, after the courts had spoken, the sheriff would take a bribe and permit the bad man to flee to Rio, the bad man would laugh at the axioms, the deductions, the courts of Massachusetts, and the courts of England all together.¹⁹⁷

Although written somewhat facetiously and intended as a criticism of Holmes's theory, this statement is not really that troublesome for Holmes after all. The problem, in fact, with Professor Alschuler's statement is not that it goes too far, but that it does not go far enough. The bad man, it will be shown, is worried about much more than Alschuler himself imagined.

So what is a bad man concerned about when deciding upon a particular course of (potentially illegal) action? First and foremost, he is wondering whether he will be caught, and therefore cares about the probability that someone will report him. Next, he wants to know whether, if reported, he will be captured, and therefore is interested in the probability of the sheriff arresting him. If arrested, he is worried about the chance of being charged with an offense, and wants to know about the prosecutor who may prosecute him, the jury who may determine his guilt or innocence, and the judge who may sentence him, in order to determine how likely he is to pass through this ordeal unscathed. And he also wants to know the consequences attached to each of these events. How bad, after all, will prison, or a fine, really be? For this, the bad man will want to know about the warden in charge of his prison, the guards who will oversee his activities, and the other prisoners who he may be locked up with, and on, and on, and on.¹⁹⁸

In short, at each stage of analysis, what the bad man really cares about is the probability of a cost (broadly defined) being imposed on him, multiplied by the quantum of that cost.¹⁹⁹ Behind this logic is Holmes's assumption

197. Alschuler, *supra* note 27, at 372.

198. See Fisch, *supra* note 27, at 1597 ("An additional concern is the extent to which the bad man will be constrained by legal sanctions. Some commentators have worried that, in predicting the cost of disobeying the law, the bad man will not simply calculate the cost of legal sanctions, but will further consider the likelihood that those sanctions will be imposed. Robert Gordon terms this a 'restate[ment] . . . [of the Holmesian] "bad man's" view of legal rules as prices discounted by sanctions—or, to reduce it still further, by the probability of enforcement of sanctions.'" (alteration in original) (quoting Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1192 (2003)) (citing Williams, *supra* note 71, at 1291)). Professor Fisch ultimately rejects this view, however, and notes that "[a]lthough this reading of Holmes is plausible, I do not read Holmes as incorporating the risk of nonenforcement into the bad man's calculation." *Id.*

199. Because Holmes was originally giving his speech to law students (i.e., future lawyers), it is probably the case that he was concerned about how they ought to understand the law, and probably formulated his bad man theory with them in mind, rather than the bad man himself. See, e.g., Stephen R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory*, in *THE PATH OF THE LAW AND ITS INFLUENCE*, *supra* note 26, at 158, 179 (explaining

that, although the bad man cannot be influenced by morality, he is by nature a rational animal,²⁰⁰ and can be influenced by the threat of sanctions.²⁰¹ The bad man, in short, is the calculating man.²⁰²

This understanding allows us to see what we are up against by, in Holmes's words, getting "the dragon out of his cave" and "count[ing] his teeth and claws, and see[ing] just what is his strength."²⁰³ But Holmes is also quick to remind us that this "is only the first step."²⁰⁴ We—and here Holmes was speaking primarily to the good men among us—must next decide "either to kill him, or to tame him and make him a useful animal."²⁰⁵ But how, exactly, does one accomplish this? In the very next sentence, Holmes tells us that it is through economics: "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."²⁰⁶

It is "the man of statistics and the master of economics" who is best equipped to deal with the bad man's behavior, not only by understanding that the bad man is, at his core, a calculating man²⁰⁷ motivated by external sanctions,²⁰⁸ but by understanding how best to manipulate these sanctions to influence the bad man's behavior for the good of the entire polity.²⁰⁹

that Holmes is predicting the law not from the bad man's point of view about the probability of enforcement, but from the perspective of courts and legislatures about the threat of legal liability). However, in either case, Holmes was fundamentally concerned about a prediction, or what Holmes calls a "prophecy" of what the enforcement authorities would do on a going forward basis.

A bad man contemplating his crime at an early stage, of course, generally needed to take a lot more factors into account (i.e., make more predictions) than a lawyer advising his client about the legal ramifications of acts already committed, but both the bad man and his lawyer were in the business of predicting. In other words, Holmes probably assumed in articulating his thesis that lawyers were not generally in the business of advising their clients, from the beginning, as to whether or not they should break a contract, break into a home, or punch a person in the nose. Rather, Holmes seemed to assume that the client has already broken her contract, or entered into a home, or punched another in the nose, and the lawyer is now being called upon to advise his or her client of the possible repercussions, or to predict, in other words, what a court was likely to do.

200. Here again we see affinities with Aristotle, who defined man as a "rational animal." See William C. French, *Natural Law and Ecological Responsibility: Drawing on the Thomistic Tradition*, 5 U. ST. THOMAS L.J. 12, 18 (2008).

201. Holmes, *supra* note 3, at 459 ("A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.").

202. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 298 (Wilfrid Harrison ed., 1960) ("Men calculate, some with less exactness, indeed, some with more: but all men calculate. I would not say, that even a madman does not calculate.").

203. Holmes, *supra* note 3, at 469.

204. *Id.*

205. *Id.*

206. *Id.*

207. BENTHAM, *supra* note 202, at 298.

208. Holmes, *supra* note 3, at 459.

209. HOLMES, *supra* note 47, at 36 ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.").

Elaborating on this point several paragraphs later, Holmes discusses how it is through economics that the good man judge will be able

to consider and weigh the ends of legislation, the means of attaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.²¹⁰

Holmes, in other words, understood that courts were in the business of “making policies that necessarily balanced the conflicting interests of different classes and ideologies vying for ascendance in the harsh and crowded conditions of industrial society.”²¹¹ Therefore, for Holmes, we ought to begin by recognizing “the legal reality of judges exercising a discretionary power to make policies motivated not by dictates of logic but by ‘experience’ of the ‘relative worth and importance of competing legislative grounds’ of social needs and values.”²¹²

Understood in this context, it now becomes clear why Holmes said that although the man of the present may be the doctrinal black-letter man, the man of the future would be the man of economics. For only with an understanding of the costs and benefits of a particular policy could one be in the position to choose the best policy for the polity.

The external point of view, therefore, far from abandoning the good man view of law or, worse, abandoning the “concepts of right and wrong—[and] values,”²¹³ actually helps further the good man’s agenda. It promotes the concepts of right and wrong, at least as these values—which are brought about by weighing the cost of the bad man’s conduct and the law’s interest in deterring him against the costs of enforcing the legal rules necessary to “tame” or immobilize the bad man—are understood by the community practicing them.

Thus, at its core, Holmes’s insistence on the separation of law and morality exists to help us understand the bad man view of law, which in turn helps us understand why the bad man behaves as he does,²¹⁴ which in

210. Holmes, *supra* note 3, at 474.

211. ROSENBERG, *supra* note 74, at 3.

212. *Id.* (quoting HOLMES, *supra* note 47, at 5; Holmes, *supra* note 3, at 466).

213. Robert Henry, *The Value(s) of Oliver Wendell Holmes, Jr.: Through a Magic Mirror Darkly*, THE GREEN BAG, Autumn 2001, at 105, 105 (reviewing ALSCHULER, *supra* note 26). Those who suggest that Holmes advocated a purely external point of view for understanding the law are therefore only right in part. And those scholars who suggest, as Alschuler does, that Holmes was revolting not “against formalism or against *a priori* reasoning,” but instead “against the objective concepts of right and wrong—against values,” *id.*, could not be further from the truth.

214. Holmes, *supra* note 3, at 459 (“The first thing for a business-like understanding of the matter is to understand its limits, and therefore I think it desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.”).

turn helps us deter the bad man, which in turn helps us protect the good man.

C. Bridging the Moral-Legal Divide Part III: Aristotle's Good Man Meets Holmes's Bad Man—the Mixed Approach

I have previously discussed Holmes's acknowledgment of the internal, good man approach to law,²¹⁵ and have argued that his adoption of the external, bad man approach to law, far from ignoring the good man, actually operates to his benefit.²¹⁶ In this section, I show how Holmes did not view the internal and external approaches to law as mutually exclusive, but as mutually complementary, and believed that these approaches can and should be synthesized not only in a normatively satisfying manner, but in a very particular way. Specifically, I argue that Holmes believed that although the good man approach to law was important, it was also, in and of itself, inadequate, in that the adoption of a good man approach to law would not necessarily lead to more good men.

This point was in fact recognized over two thousand years ago by Aristotle, who—again in words that could have been penned by Holmes himself—not only acknowledged that “a man becomes just by the performance of just, and temperate by the performance of temperate, acts,” as we have already seen, but further recognized that there does not exist “the smallest likelihood of any man's becoming good by not doing [good and just acts].”²¹⁷

In this important passage, Aristotle argues that good hearts are not enough to make a person just;²¹⁸ rather, good acts of the sort contemplated by legislatures and judges when they make new laws are necessary as well. Holmes also understood this fact, and frequently acknowledged that a good heart coupled with a bad act was still rightly punishable by law.²¹⁹ A purely internal point of view, it seems, was rejected by both Aristotle and Holmes as unable to explain how the law actually worked.

But so was the purely external point of view. Aristotle recognized that good acts practiced by the bad man due only to the threat of external sanctions are, in and of themselves, insufficient to make the bad man good. For a bad man to become good, the good act must be performed with a

215. *See supra* Part III.A.

216. *See supra* Part III.B.

217. ARISTOTLE, *supra* note 84, at 38.

218. Aristotle thought that a person with a good heart who failed to perform good acts, but who nevertheless considered himself just, was “like [an] invalid[] who listen[s] carefully to their doctor, but carr[ies] out none of his instructions. Just as the bodies of the latter will get no benefit from such treatment, so the souls of the former will get none from such philosophy.” *Id.*

219. HOLMES, *supra* note 47, at 33 (“[W]hile the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.”).

good heart.²²⁰ Turning to Holmes, this view seems to suggest, at first blush anyway, that it is impossible for the bad man to ever become good, for the bad man is someone who, by definition, is not moved to act based on his internal conscience, but out of fear of external sanctions. He is incapable, in other words, of uniting the good heart with the good act. But Holmes, in fact, thought that these approaches could be synthesized, and acknowledged that although the bad man may behave justly only by threat of external sanctions, and therefore not be just himself, the bad man may, over time, come to internalize the behavior he has repeatedly practiced, even though such practice was originally motivated by threat of external sanctions:

If I do live with others they tell me that I must do and abstain from doing various things or they will put the screws on to me. I believe that they will, and being of the same mind as to their conduct I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights.²²¹

In this remarkable passage, Holmes demonstrates how the bad man, who originally behaves in a certain way and follows certain laws only to avoid having “the screws” put on to him, may, through habituation and continual practice, come to “accept [these rules] with sympathy,” and will soon come to follow the law *not* due to his fear of the law’s external sanctions, but due to his internal respect for the law’s inner principles, which now reside deep within his “sanctions of conscience.” Holmes therefore demonstrates how, by first distinguishing morality from law and analytically separating the internal and external points of view, one may come to understand what the bad man view of law has to offer the legislator or judge by way of reforming the bad man and protecting the good,²²² thereby allowing the purely external point of view to be synthesized with the purely internal point of view to constitute a descriptively complete²²³ and normatively

220. ARISTOTLE, *supra* note 84, at 38 (“Acts, to be sure, are called just and temperate when they are such as a just or temperate man would do; but what makes the agent just or temperate is not merely the fact that he does such things, but the fact that he does them in the way that just and temperate men do.”).

221. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

222. Professor Robin West came close to grasping this insight when he wrote (but did not see that Holmes himself would have agreed, and suggested as much himself):

[I]t might behoove us to attend to the negative implication of Holmes’ *The Path of the Law* argument. Maybe Holmes was right when he insisted we should think about the law’s mandates from the perspective of the “bad man.” But it might also be true (in fact it might even follow from that Holmesian claim) that we should think about the distinctively moral questions regarding what lawmakers *ought* to do, including those moral questions with constitutional overtones, from the perspective of the moral man or woman who legislates, rather than so relentlessly from the perspective of the bad man who seeks to minimize law’s impact. There are likely strong moral arguments to the effect that legislators are under moral imperatives to use their power for good

West, *supra* note 160, at 254–55.

223. The view is descriptively complete because it does not pit the internal point of view against the external point of view, but recognizes that both operate coextensively, and that many rational individuals consider *both* the external ramifications of their actions and the internal rightness or wrongness of their behavior before engaging in many forms of conduct.

satisfying²²⁴ vision of law.²²⁵ Under Holmes's approach, in sum, the bad man may become the good²²⁶ man.²²⁷

Even so great a legal philosopher as H.L.A. Hart seems to have missed this point. In his otherwise impressive work, *The Concept of Law*, Hart noted that one of the problems with Holmes's bad man approach to law was that it assumed individuals only act to avoid sanctions, thereby defining the internal point of view "out of existence."²²⁸ But this way of thinking, though common,²²⁹ reads only one half of Holmes while ignoring the other.

224. The view is also normatively satisfying because it better protects the good man by more effectively deterring the bad man, while converting him to the good man's cause.

225. See, e.g., Finkelstein, *supra* note 19, at 1213 ("[While] the bad man adopts only an external perspective on the law [and] looks at law as a basis for predicting what others will do[,] . . . the person who seizes the law's internal aspect will look at legal restrictions as a signal that he should behave in a certain way; it provides him with a reason for behaving as the law demands."); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 603 (1996) ("The law can discourage [conduct] not just by 'raising the cost' of such behavior through punishments, but also through instilling aversions to the kinds of behavior that the law prohibits."); Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1401 (1999) ("[T]he most effective form of law-enforcement is not the imposition of external sanction, but the inculcation of internal obedience."); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 75 (2007) ("General deterrence operates not only, or even primarily, through external restraints, that is, because subjects hear and fear the relevant sovereign's commands backed by threats. The criminal law also deters through its long-term role in shaping, strengthening, and inculcating values, which encourages the development of habitual, internal restraints . . .").

226. The word "good" should not be taken in an absolutist sense here, for Holmes believed in a sort of relativistic truth based on the will of the majority, see, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (arguing that the majority has a right "to embody their opinions in law"), and not in anything like the idea of natural rights and natural law. See, e.g., Holmes, *supra* note 221, at 41 ("The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."); see also Harold J. Laski, *The Political Philosophy of Mr. Justice Holmes*, 40 YALE L.J. 683, 685 (1931) ("Mr. Justice Holmes' political outlook is a rejection of absolutist concepts. All principles are true in merely a relative way. The individual is not a subject of rights which the state is not entitled to invade. Men are social animals; and what they are entitled to do is a matter of degree, born of experience in some particular time and place. . . . So he rejects the idea of natural law. . . . And with the idea of natural law there goes also the idea of rights which, a little scornfully perhaps, he has defined as the 'hypostasis of a prophecy.'").

227. Or the self-reliant man, see, e.g., Levinson & Balkin, *supra* note 27 (suggesting that just as Holmes was influenced by Emerson, so too was Holmes's bad man influenced by (or, at the very least, can be better understood by reference to) Emerson's self-reliant man), or the reasonable man, see, e.g., *Blyth v. Birmingham Waterworks Co.*, (1856) 156 Eng. Rep. 1047 (Ex.); 11 Ex. 781 (opinion of Baron Alderson), in which the reasonable man of tort law was given shape. As an added benefit, even if, at the end of the day, Holmes's bad man approach does not, through habit, make good men (or self-reliant men, or reasonable men) of these previously bad men, any objective outsider judging this person's conduct would still not be able to tell the difference, so long as the threat of sanctions made the bad man behave *as though* he were good. And that, for Holmes and probably for many of us as well, is about as much as we could ever ask of the law.

228. HART, *supra* note 8, at 91.

229. See, e.g., Scott J. Shapiro, *What is the Internal Point of View?* 4 (Oct. 14, 2006) (unpublished manuscript), available at <http://papers.ssrn.com/sol3/>

As we have just seen, Holmes did *not* assume that individuals only acted to avoid sanctions but recognized in no uncertain terms that individuals were also governed by their inner “sanctions of conscience.” As a judge, however, Holmes was well aware that many individuals were not so governed, and it was these individuals who posed the greatest threat to the polity, in general, and to the good man, in particular. Holmes therefore encouraged us to focus on these individuals, not in order to define the internal point of view “out of existence,” as Hart maintains, but to preserve and strengthen the “internal point of view” by protecting its practitioners, i.e., the good man, while simultaneously converting the bad man to his cause. Holmes’s vision, like Aristotle’s, suggests that the law has a much more important role to play than merely deterring or punishing nefarious conduct: it has a role to play in *shaping* good conduct as well.²³⁰

Although it would take several full-length articles to fully sketch out the implications of applying a mixed Aristotelian/Holmesian approach to the areas of contracts, torts, and punitive damages, a few brief thoughts can be offered at this time. First, we must remember that the Aristotelian/Holmesian mixed approach does not exist for the sake of the bad man, but for the good man. This means that, while the bad man will himself feel deterred *within* the operation of these rules, and will therefore be more willing to obey laws with large penalties attached, and more likely to break laws with small penalties attached, a judge applying these rules ought not feel constrained to adjudicate the case according to the bad man’s calculus. Rather, the judge ought to take the laws as they currently exist into account not for the purpose of applying them as written, as would Holmes’s eighteenth-century “black-letter man,” but should consider the

papers.cfm?abstract_id=937337 (“The problem with Holmes’ theory, rather, is that he privileges one type of insider’s point of view over another. By focusing solely on the perspective of the bad man, sanction-centered theories define the other point of view, namely, the internal point of view, out of existence.”).

230. This analysis, of course, applies to the vast swath of law that also happens to be just, but none of this is to say that laws cannot be unjust, and thereby followed for the wrong reasons. Holmes has something to say about this phenomenon as well, and encourages us to carefully reconsider our law on a periodic basis, and remove those laws that no longer serve important social functions. See Holmes, *supra* note 3, at 469 (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”). When such laws are encountered, one must throw them out and begin anew by acting as “the man of statistics and the master of economics” would, and “consider and weigh the ends of legislation, the means of attaining them, and the cost.” *Id.* at 469, 474. In considering these ends, of course, even the economist must look *beyond* economics itself to the social good desired by the people themselves. See, e.g., *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) (arguing that the majority has a right “to embody their opinions in law”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 17 (2d ed. 1977) (arguing that efficiency theory cannot adjudicate between values but it can “clarify a value conflict by showing how much of one value—efficiency, surely an important, if not necessarily paramount, value in any society—must be sacrificed to achieve another”). What shape will these opinions take? There is every reason to believe they will take a moral shape, and may, in turn, be based on any number of theories of social justice, ranging from consequentialist (e.g., utilitarianism) to deontological (e.g., Kantian) to virtue-based (e.g., Aristotelian) theories of justice.

bad man's calculus in the context of the social policies embedded within these laws, as would the contemporary Holmesian "man of statistics and the master of economics."

1. The Mixed Theory of Contracts

As discussed above, the bad man theory of contracts, as it is traditionally understood, has been criticized on a number of grounds. If, as some moralists believe, "[a]n individual is morally bound to keep his promises"²³¹ and such promises, when enforced, "foster a society in which people can confidently rely on each other,"²³² then it is easy to see why some commentators would depict a society in which promises are kept for internal reasons as "morally superior to the state of constrained avarice depicted by 'badman' theories of legal obligation."²³³

Indeed, because Holmes's view of contracts is generally seen as the source of modern efficient breach theory, detractors usually criticize Holmes as its source before going on to attack the theory directly.²³⁴ For instance, Professor Daniel Friedmann attacks Holmes's way of looking at contract remedies as unacceptable, both normatively and descriptively,²³⁵ and rhetorically asks:

Why not generalize the proposition so that every person has an "option" to transgress another's rights and to violate the law, so long as he is willing to suffer the consequences? The legal system could thus be viewed only as establishing a set of prices, some high and some low, which then act as the only constraints to induce lawful conduct.²³⁶

Why not indeed! Were Holmes reading this today, he might well respond:

I have already generalized the proposition in such a manner, and indeed I have derived the specific proposition to which you cite from my broader

231. FRIED, *supra* note 50, at 16.

232. Farber & Matheson, *supra* note 70, at 942.

233. *Id.*

234. Perillo is one of few scholars who argues against the theory of efficient breach while denying that Holmes was its author. *See* Perillo, *supra* note 54; *see also* Friedmann, *supra* note 64.

235. Friedmann, *supra* note 64 (arguing that the theory fails normatively by undermining entitlement to contract promises, barring a bargained-for release from them; and descriptively by introducing inefficiency rather than efficiency through generating expensive transactions—e.g., litigation—rather than avoiding or reducing them). Friedmann analyzes Holmes's fundamental error as the "conclusion that the remedy provides a perfect substitute for the right, when in truth the purpose of the remedy is to vindicate that right, not to replace it." *Id.* at 1. However much one disagrees with Holmes, one should at least attempt to understand him correctly. Holmes did not believe legal rights stood alone. For Holmes, one had a legal right merely to the extent that one had a legal remedy: "One of the many evil effects of the confusion between legal and moral ideas . . . is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But, as I shall try to show, a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court;—and so of a legal right." Holmes, *supra* note 3, at 458.

236. Friedmann, *supra* note 64, at 1.

theory of the bad man. Your question, if anything, proves my point. The law does exactly as you say: it establishes a set of prices. And the bad man, caring as he does only for the external sanctions that may be imposed from without, rather than any moral law emanating from within, looks at the matter in exactly this way. It is for this reason that I once said:

The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.²³⁷

But you misunderstand me if you think, that by my uttering these words, I am condoning the bad man's behavior. Far from it.²³⁸ I wish to stop him just as much as you do. It is precisely for this reason that we must understand how the bad man thinks, so that when his case comes before the judge, or the law he violated is reconsidered by a legislature, a judge or legislature will be in a better position to count the bad man's "teeth and claws," and influence him accordingly.

In Holmes's view, a judge or legislature should not lament the fact that the bad man thinks and behaves as he does, but embrace it. Put differently, the lawmaker should realize that the bad man *will* think in such a morally despicable way, and must then weigh against the bad man's behavior the moral, social, economic, and political importance of requiring parties to keep their contracts. It must also consider what sort of external sanctions might be necessary to not only get the bad man to *behave* as the good man does, but to *think* as the good man does (i.e., to become good). In short, the lawmaker must "consider and weigh the ends of legislation, the means of attaining them, and the cost."²³⁹ If, after undertaking this analysis, the lawmaker decides, for example, to discourage efficient breach by stipulating that specific performance shall be the remedy for every breach of contract, I do not think Holmes would have a problem with this analysis, and would likely embrace it, so long as it was seen to be in the polity's best interest, as they themselves understand their preferences. This, I think, sets him far apart from the law and economic theorists who would look to Holmes as the founding father of their movement.

In sum, it is a mistake to view Holmes as pitting the external values of predictability and efficiency against the internal values of fairness and

237. HOLMES, *supra* note 47, at 236.

238. *See, e.g.,* Perillo, *supra* note 54, at 1087 ("Holmes equates a contractual breach with a tort, which in French means 'wrong.' Consequently, in Holmes's view, the breach of a contract was as much an offense against the law—a legal wrong—as a tort, not the free choice that the misinterpreters of Holmes believe he advocated. Indeed, from the bench, Holmes described a breach of contract as a wrong. In his judicial capacity, he certainly had approved of the grant of expectancy damages, and had allowed a price action where the seller had deposited securities in escrow, but the buyer had refused to pay, in essence requiring specific performance at law." (footnotes omitted)).

239. Holmes, *supra* note 3, at 474.

justice,²⁴⁰ for he was equally kind to both. Rather, Holmes simply believed that a focus on the external point of view was more conducive to protecting and fostering the internal point of view. Focusing on several more examples from the law of torts and punitive damages should help further illustrate this point.

2. The Mixed Theory of Torts

Just as contracts scholars have accused Holmes of favoring the amoral external point of view over the morally based internal point of view, commentators on tort law likewise have pitted these two theories against each other²⁴¹ and placed Holmes on the side that “envisions humans as rapacious, selfish beasts, and law as a coercive tool to keep us from destroying each other.”²⁴² With such an inauspicious welcome, an apology on behalf of Holmes seems in order.²⁴³

Behind these attacks exists the assumption that Holmes’s bad man theory of law is purely external, and the very real fear such theories “undervalue the internal standpoint.”²⁴⁴ The concern, in other words, is that if tort law is viewed merely “as a set of incentives, then the concept of ‘wrong’ tends to drop out,” and courts will instead choose to impose “liability on the agent who can avoid the loss at the least cost, regardless of any responsibility for or connection with the victim.”²⁴⁵ When *courts* adopt this behavior, or when scholars suggest that courts adopt this behavior, this is a very real danger indeed. But when the bad man adopts this behavior (as he inevitably does), and when lawmakers seek to understand him for the purpose of deterring, punishing, or reforming him, what was once to be feared is now to be embraced. The confusion is created, it seems, by conflating the descriptive with the normative, and assuming that one giving an account of the external, bad man view must also necessarily be advocating the normative acceptance of such a view. But this, as we have seen, is an idea Holmes clearly rejected. What is necessary here is to separate in our minds how the bad man himself views the law, and how the lawmaker who understands the bad man views the bad man. The former, as

240. Linzer, *supra* note 51, at 139 (“Predictability is an important value in law, as should be the promotion of economic efficiency. But most important are fairness and justice. If courts take the amoral approach of Holmes or the second *Restatement*, defaulting promisors will often be able to shift costs ignored by the law to promisees, parties who trusted their promisors and who must now take second best through money damages.”).

241. Linda Ross Meyer, *Just the Facts?*, 106 YALE L.J. 1269, 1297 (1997) (“One may either take an ‘external standpoint,’ the ‘bad man’ standpoint mentioned by Holmes, or an ‘internal standpoint,’ the standpoint of a member of a normative community. The first views law as a set of penalties to be avoided. From this deterrence-based perspective, the law involves no obligations; it is merely a fact about the world to take into account in making one’s self-interested decisions. The second understands law as imposing ‘obligations,’ that is, providing reasons for taking action, which one accepts as important and virtuous.” (citing HART, *supra* note 8, at 89–91)).

242. *Id.* at 1298.

243. The double entendre is intended.

244. Meyer, *supra* note 241, at 1297.

245. *Id.*

we have seen, will be concerned with maximizing his own well being, whereas the latter will have before its mind the protection of the good man, and the deterrence, punishment, and/or reform of the bad man.

Consider, again, the famous Learned Hand formula, in which we are told that negligence liability for a potential tortfeasor will depend on whether $B < PL$, where B is the burden or cost of precaution that must be undertaken by the defendant to prevent an accident, P is the probability of the accident occurring, and L is the magnitude of the loss.²⁴⁶ In the bad man's hands, such a formula will cause the bad man to "pay tort judgments to the accident victims rather than incur the larger cost of avoiding liability" whenever "the cost of accidents is less than the cost of prevention."²⁴⁷

Viewed from the internal, good man perspective, such a rule may seem morally repugnant, for it suggests that the bad man may decide to roll the dice and injure innocent victims, whenever it is profitable to do so (i.e., whenever it is more expensive to take precautions than it is to pay the cost of legal liability). Adopting such a standard has been criticized as "writ[ing] laws for the 'bad man,'" rather than for the good,²⁴⁸ and it is easy to see why such criticisms garner our sympathy.

However, as a descriptive matter, the Learned Hand formula brilliantly captures how the bad man actually behaves. Our real problems with this formula, it seems to me, are twofold: first, from the internal perspective, we lament that there are people who really behave this way; and second, from an external perspective, we lament the inputs used by the bad man. The first criticism is easy to understand, but the second requires some explanation.

All activities engaged in by all people at all times impose some risk on other parties. And this risk can almost *always* be reduced by incurring extra costs. All other things equal, cars that travel twenty-five miles per hour are safer than cars that travel one hundred miles per hour. All things equal, diesels driving twenty-five miles per hour are safer than compact cars driving twenty-five miles per hour. All things equal, diesel drivers wearing helmets are safer than diesel drivers who do not wear helmets. If we cared only about reducing risk, we could require every driver to wear a helmet when driving his or her diesel not more than twenty-five miles per hour. Yet, we do not do this. Why? Presumably, because diesels are expensive, driving faster is convenient, and helmets are uncomfortable. The costs, in short, are too high for the concomitant benefit to be realized.

So far, I take it that nothing I have said is controversial. Yet, change the facts a little, so that Ford is presented with a decision to spend a few extra dollars to save a hundred human lives, and such a formula seems repugnant.

246. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.).

247. Posner, *supra* note 100, at 33.

248. Leslie Bender, *A Lawyer's Primer on Feminist Theory & Tort*, 38 J. LEGAL EDUC. 3, 31 (1988) ("The legal standard of care may serve as the minimally acceptable standard of behavior, failing which one becomes liable. But the standard need not be set at the minimum—we do not need to follow Justice Holmes' advice and write laws for the 'bad man.'").

But, I submit, it is not the formula itself that is repugnant, but the inputs that bring it to life. What we are really angry about is the fact that PL used by Ford was too low, because Ford did not value human life highly enough. This must be the case, because, remember, Ford (and every automobile manufacturer worldwide) can *always* reduce the number of accidents by incurring extra expenses (e.g., making every car with a five inch thick stainless steel body), but we as a society do not require this because we as a society do not want to pay a fortune for the cars we drive.²⁴⁹ Thus, in cases in which the bad man does not take what the good man would deem adequate precautions, we should not blame the bad man, but ourselves. Why?

According to the mixed view, a judge or legislature will begin by recognizing that a bad man, by definition, behaves as I have described above. What the judge or legislature need not do, however, is blindly parrot the bad man's own analysis, using his inputs, and reaching the same results. Remember, under the mixed approach, a lawmaker will want to enact laws that, if followed, will tend to make bad men good, and will want to impose external sanctions that are sufficiently large to make the bad man follow such laws. How can this be done? Once again, the lawmaker must "consider and weigh the ends of legislation, the means of attaining them, and the cost."²⁵⁰ If the bad man is behaving rationally and not taking precautions where $B > PL$, but we, as a society, believe that such precautions should be taken, perhaps on account of some deep sense of justice, the problem is not with the bad man's math, but with the way we, as a society, are pricing his inputs. By taking Holmes's advice and trying to tame this particular dragon, we should increase the product of PL by, for example, increasing the value of human life to the point where we would agree with the bad man not taking a particular precaution, as when, for example, all cars must be manufactured with five inch thick stainless steel bodies.²⁵¹

249. See, e.g., Schwartz, *supra* note 101, at 1059 n.178 ("[T]he effect of Ford's avoidance of those safety precautions was to enable Ford to lower the Pinto's sales price. The cost savings, then, were essentially passed on to consumers."); White, *supra* note 113, at 131 n.280 ("Though the court views the two dollar expense as coming out of Ford's corporate profits, in fact, as economics tells us, and as has been repeatedly verified empirically, any increases in costs are ultimately passed on to the consumer. Even the legal circles understand and accept that fact, as is reflected in the courts' decision to impose strict liability on the grounds that manufacturers are better able to absorb the risks of harm by passing them on to consumers through higher prices.").

250. Holmes, *supra* note 3, at 474.

251. *Id.* at 466-67. We should, in short, recognize what Holmes explained over a century ago, that

the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses. . . . [T]he economic value even of a life to the community can be estimated, and no recovery, it may be said, ought to go beyond that amount. It is conceivable that

3. The Mixed Theory of Punitive Damages

Closely linked to the purely external view of tort law is the purely external view of punitive damages. Ignoring for the moment that such a view was never what Holmes had in mind, a purely external, bad man view of punitive damages is nevertheless still misunderstood. As with the discussion of tort law above, one must again insist on the clear definition of terms. Specifically, one must be sure to separate the external reasons that exist to govern the bad man's behavior (i.e., the quantum and probability of the external sanctions to be imposed), and the tools at the lawmakers' disposal to combat such behavior, i.e., the manipulation of these inputs.

In viewing an act exclusively through the lens of the bad man, one would see that individuals and companies who know exactly what they will have to pay in damages before undertaking dangerous activities will not have a financial incentive to reign in those activities whenever paying legal damages is less expensive (e.g., by taking more care, or by making their products any safer than absolutely necessary), and this, in turn, would lead to some difficult to digest outcomes for the good man.

We have already seen an example of this in our discussion of *Ford v. Grimshaw* above. There we noted that a "good man" governed by his "vaguer sanctions of conscious" might hope that Ford would be governed by such internal considerations as well, and should select the option that saves human lives. But we also discussed why this analysis was too simplistic, in that every decision, at some level, is a decision about risk, and the good man cannot hope to explain why a particular bad man behaves as he does by recourse to inner morality. Even more troublesome, this analysis fails to take into account how the bad man *actually* operates, which will hinder legislative and judicial efforts to reign in his activity. It is for this reason, Holmes would argue, that the bad man approach is necessary.

But, under the mixed approach, one must not misunderstand the bad man approach as one in which the bad man's activities are facilitated. One must not, in other words, do as our own Supreme Court has done in *Exxon Shipping Co. v. Baker*, and ensure that the penalty imposed is "reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another."²⁵² There is, in short, no need to help the bad man, and the point of the mixed approach, as discussed above, is merely to understand the bad man in order to deter, punish, or reform him. And it is difficult to see how one is adequately deterring the bad man by requiring that the punitive damages be limited to a 1:1 punitive to compensatory ratio, and even harder to see how such a ratio would allow courts to punish the

some day in certain cases we may find ourselves imitating, on a higher plane, the tariff for life and limb which we see in the *Leges Barbarorum*.

Id. at 467.

252. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627 (2008) (Souter, J.) (citing Holmes, *supra* note 3, at 459).

bad man for his activities.²⁵³ In short, in an unprecedented effort to accommodate Holmes's bad man, the Supreme Court seems to have misunderstood him in the worst possible way, and has allowed him to become evil, rather than forcing him to behave as though he were good, if not to become good himself in the process.

But remember that according to the mixed view, Holmes's bad man theory is not telling us that this is how the Fords or Exxons of the world *ought* to make decisions. Rather, Holmes's theory is pointing out that this is how the Fords and Exxons of the world *do* make decisions, and then leaving it up to the lawmakers to decide how they will change the inputs used by the bad man to ensure that these decisions better comport with public morality. And they can do this, as has been stated before, by putting on the hat of the "man of statistics and the master of economics," and by carefully "consider[ing] and weigh[ing] the ends of legislation, the means of attaining them, and the cost."²⁵⁴ They can, in short, increase the cost of a party that engages in morally reprehensible behavior by increasing the availability of punitive damages to punish and deter them, and this is best accomplished by ensuring that the wrongdoer's activities comport with notions of social morality.

In short, under the Aristotelian/Holmesian mixed approach, we ought to be less powerless than the Supreme Court supposes in our dealings with the bad man, and Holmes would have been the first to suggest that the good man be given the power to adequately punish the bad man, and to enact a penalty sufficient to deter him externally, and reform him internally.²⁵⁵

CONCLUSION

[The law] has the final title to respect that it exists, that it is not a Hegelian dream, but a part of the lives of men.

— *Oliver Wendell Holmes*²⁵⁶

253. Richard Abel, *Civil Rights and Wrongs*, 38 *LOY. L.A. L. REV.* 1421, 1430 (2005) ("Unless punitive damages are available, imposed, and sustained on appeal (a tiny fraction of cases), tortfeasors can continue to engage in wrongful conduct as long as they are prepared to pay its costs." (citing MARK PETERSON, *RAND INSTITUTE FOR CIVIL JUSTICE*, PUB. NO. N-2342-IJC, *PUNITIVE DAMAGES: PRELIMINARY EMPIRICAL FINDINGS* (1985))).

254. Holmes, *supra* note 3, at 469, 474.

255. Thus, Professor Pierre J. Schlag was quite right to recognize, as a descriptive matter, that

[b]y specifying a sharp line between forbidden and permissible conduct, rules permit and encourage activity up to the boundary of permissible conduct. The application of the same deterrent force to forbidden conduct regardless of how close or far it may be from permissible conduct, fails to distinguish between flagrant and technical violations.

Pierre J. Schlag, *Rules and Standards*, 33 *UCLA L. REV.* 379, 384–85 (1985). As a normative matter, however, we need to "predesig[n]at[e] and quantify[] the magnitude of the penalty to be applied," which would "allow Holmes' proverbial bad man to treat the deterrent as a fixed cost of doing business," *id.*, but should give the courts more flexibility under the mixed approach to take the nature of the violation into account (e.g., flagrant versus technical violations), and impose a penalty that not only fits the nature of the violation, but that will deter individuals from engaging in this sort of conduct in the future.

256. Holmes, *supra* note 3, at 473.

In this Article, I have traced Holmes's controversial "bad man" theory of law from its inception in 1897 to its current manifestations in the fields of contract law, tort law, and punitive damages jurisprudence, and have shown that its development, by law and economics scholars and our own Supreme Court, has unduly focused on the external point of view while ignoring the internal point of view that the theory was designed to serve. I have also shown how this view has been mistaken, with devastating consequences in the fields of contract law, tort law, and punitive damages jurisprudence. While Holmes undeniably advocated the separation of law and morality, he did it not to disparage morality, but to strengthen it, by deterring and reforming the bad man for the sake and protection of the good. In this regard, Holmes's thought has much more in common with that of the inventor of the good man himself, Aristotle, than it does with Bentham's, and the analytic separation between law and morality that Holmes encouraged was more for the benefit of the good man than has previously been supposed. Indeed Holmes, who is often thought of as the architect of the bad man paradigm, can better be thought of as a builder bridging the moral-legal divide and, in the process, allowing for the direct infusion of morality into legal discourse.