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THE "BAD MAN," THE GOOD, AND THE SELF-RELIANT^{d1}

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***885** When we think of the many famous ideas associated with Justice Oliver Wendell Holmes—and with *The Path of the Law* in particular—one of the first that comes to mind is his famous image of the "bad man."¹ Although this metaphor has been one of Holmes's most lasting legacies, it has also been one of his most troubling as well, for it suggests that the deepest truths about the law can be found by adopting the perspective of someone who is "bad." It is one thing to say that wisdom comes from the mouths of babes or even from fools; it is quite another to say that we should look to the worst among us for insight.

Indeed, the metaphor of the "bad man" has haunted Holmes's legacy. Although it seems to mesh well with his unsentimental, positivist approach to law,

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¹ See Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459, reprinted in 78 B.U. L. Rev. 699, 701 (1998). We ordinarily try to avoid sexist language in our writing whenever possible. However, two of the central concepts of this Article are expressions used by Holmes in the 19th century—the "bad man" and the "good man." Rather than avoid these expressions entirely, we have placed them in quotes whenever they are invoked.

it has also probably contributed to the recurrent image of Holmes as nothing more than an insensitive moral skeptic, who regarded law purely instrumentally, and for whom the only real truth was the truth of raw power.² It is this image of Holmes that has been dragged out again and again whenever people have tried to dismiss his ideas by defaming his character.³ In fact, we agree with Holmes's critics that the "bad man" is a bad metaphor. It is bad not only because it conveys a misleading attitude toward law, but because—as it has normally been understood—it may also well be inconsistent with Holmes's larger views about law, morality, and the place of the individual in society. Revealing those more implicit ideas—and showing how they are obscured by the unfortunate metaphor of the "bad man"—is the goal of the present Essay.

One of the central influences in Holmes's thought was Ralph Waldo Emerson, and behind many of Holmes's most important pronouncements can be found traces of Emerson's thought. We think that this is as true of *The Path of the Law* as any of Holmes's other writings. Our goal in this Essay is to convince you that a better way to understand law, and indeed, perhaps a better way to understand Holmes's own view of the law, is not from the perspective of the "bad man," but, rather, from the perspective of a more Emersonian, "self-reliant," person.

I. The "Bad Man" and the "Good Man"

The entire reference to the "bad man" in *The Path of the Law* is quite brief. It comes near the beginning of the address, when Holmes is "lay[ing] down some first principles for the study of this body of dogma or systematized prediction which we call the law . . ."⁴ He immediately states that understanding law depends on a sharp analytical separation between law and morals. As a way

² This is not to say, though, that the image is wholly undeserved. It was Holmes, after all, who asked "What proximate text of excellence can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power." Oliver Wendell Holmes, Montesquieu, in *Collected Legal Papers* 250, 258 (1920).

³ See, e.g., Ben Palmer, *Holmes, Hobbes, and Hitler*, 31 *A.B.A. J.* 261 (1945), for the most notable example of this genre. A far more recent example is Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 *Fla. L. Rev.* 353 (1997). An alternative strategy has been to deny Holmes's influence and importance. See Louise Weinberg, *Holmes's Failure*, 96 *Mich. L. Rev.* 691, 692 (1997) (decrying Holmes's "littleness" and arguing that Holmes is greatly overrated as a thinker and as an influence on the shaping of American Law).

⁴ Holmes *supra* note 1, at 458, 78 *B.U. L. Rev.* at 700.

of making this point, Holmes notes, altogether correctly, "that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force."⁵ This "bad man" is defined as one who "cares nothing for an ethical rule which is believed and practised by his neighbors," yet he "is likely nonetheless to care a good deal to avoid being made to pay money" or go to jail.⁶ "Thus, if you want to know the law and nothing else," Holmes tells us, "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."⁷

At first glance, the image of the "bad man" seems perfectly clear. He is a version of the ideal-type of homo economicus interested only in maximizing his own individual preferences, indifferent to others except insofar as they ~~serve~~ serve as material obstacles to fulfilling egoistic desires. The "bad man" appears to have no notion of moral obligation; he seems to be asocial in the most profound sense.⁸ Yet it is important to note that Holmes does not offer us the "bad man" in isolation. Instead, Holmes contrasts him to the "good man," even if the point, ironically or not, is that the "good man" has little to tell us about the nature of law. One is reminded of Mae West's famous response when someone exclaimed "Goodness!" upon seeing her character's impressive diamond ring: "Goodness," she drawled, "had nothing to do with it."⁹ Like Mae West, Holmes seems to

⁵ Id.

⁶ Id.

⁷ Id, 78 B.U. L. Rev. at 701.

⁸ Robert Ellickson, a fellow participant at the Boston University symposium, suggested this account of the "bad man." As will become clear momentarily, this interpretation, whether or not faithful to Holmes's actual views, overstates the case. A bad person may be neither amoral nor egoistic: he or she may desire to protect friends and family—consider the example of a mafia chieftan—and so may be quite a social creature. Such a "bad man" is not utterly without mores, he is merely one whose mores differ radically from those of the larger society around him. In an essay published after the present essay was initially drafted, David Luban offers an account of the "bad man" that is considerably closer to Ellickson's. See 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, 1564 (1997) ("In short, Holmes's 'good man' is the man of conscience, and Holmes's 'bad man' is not.").

⁹ *Night After Night* (Paramount 1932), quoted in Bartlett's *Familiar Quotations* 685 (16th ed., Justin Kaplan ed., 1992). Indeed, she made this the title of her autobiography; see Mae West, *Goodness Had Nothing to Do With It*

suggest that the good person is, as a practical matter, useless in helping us to understand the operational meaning of law¹⁰ even if Holmes might resist any suggestion that "goodness" is irrelevant to assessing the worth of particular lives.

But are things really so clear cut? If Holmes really thought the good person irrelevant to the understanding of law, why did he bother to mention him at all? One need not be a full-blown (post-)structuralist to recognize that things are sometimes best understood in terms of their opposites, and that goodness and badness form a pretty basic binary opposition in our culture. There is a reason, after all, that parents tell their children that Santa Claus spends the months leading up to Christmas determining who has been good *888 and bad in the previous year; they hope their present-hungry children will attempt to figure out the difference. So to understand what Holmes means by the "bad man," perhaps we had better look at what he means by the "good man" and the good person's view of the law.

The "good man," Holmes tells us, is motivated by conscience. Adherence to conscience, rather than fear of some predicted misfortune, offers the good person a "reason[] for conduct."¹¹ Presumably, the good person would not violate a just or morally binding law even if public authorities stopped punishing its violation or the courts were closed. Hence Holmes's definition also seems to imply that for the good person, law is something other than predictions of official behavior; instead, law is a norm that generates a feeling of obligation to obey it, regardless of the probability of state-enforced sanctions resulting from disobedience. This, we take it, is the point of Holmes's statement that the good person "finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."¹²

(1957). Or, as Ms. West put it on another occasion, "I used to be Snow White, but I drifted." Joseph Weintraub, *Peel Me a Grape* 47 (1975).

¹⁰ We purposely use the term "operational meaning" rather than, say, "nature of," in order to emphasize the basic pragmatism of Holmes's approach. He is not, we think, offering what might be termed a legal "ontology." He does not think it important to offer a philosophical definition of law good for all purposes, much less insight into the "essence" of law or a theory of the conceptual preconditions of law being law. The latter issues might be addressed by an academic legal philosopher. However, there is no reason to believe that *The Path of the Law* or the "bad man" test was directed at that audience. Holmes's argument was offered as a heuristic account of law for ordinary lawyers interested in determining, as a practical matter, what they should say to clients who ask if "the law" will be a hindrance or a help to them in achieving their purposes, and who are prepared to spend good money to find out the answer.

¹¹ Holmes, *supra* note 1, at 459, 78 B.U. L. Rev. at 701.

¹² *Id.*

As soon as we begin to unpack this formula, however, something very puzzling begins to happen. Holmes's "good man" starts to look increasingly like his "bad man," and his "bad man" increasingly resembles his formulation of the "good man." Consider, for example, that Holmes uses the "sanctions of conscience" to explain why the "good man" obeys the law. These "sanctions" presumably range from feelings of guilt to the fear of hellfire; and the "good man" can surely predict that they will descend upon him if he misbehaves. Thus, both Holmes's "good man" and his "bad man" seem to be defined in terms of responses to sanctions. Of course, we are not claiming that Holmes has accurately described the motivations of good and bad persons; rather, we are pointing out how impoverished his psychological model seems to be. Holmes's picture of the "good man" more resembles a person driven by a dominating superego than a mature individual whose ego can exercise at least some measure of autonomous reflection and judgment. In short, if a "bad man" is defined as one driven by the fear of punishment, the Holmesian "good man" is just a special case of his "bad man"—he is a "bad man" driven by the fear of sanctions existing outside the law. This may seem to be a play on words, but if so, it is one generated by Holmes's peculiar choice of language.

Conversely, if a "good man" is defined as a person driven by the sanctions of his conscience, Holmes's "bad man" becomes a special case of his "good man." Most "bad men" who break or manipulate the law—particularly the civil law—are not sociopaths, totally devoid of conscience and moral purpose. Rather, their conscience is simply directed in different (and perhaps to us morally reprehensible) ways. Nor are they purely egoists; often they seek to benefit their friends, their relatives, their associates—or even their clients—at the expense of strangers or other people to whom they ***889** feel they owe a reduced duty. For example, Mafia members and other criminals may have well-developed codes of conduct and honor, yet they may regard the law as an obstacle to work around or to ignore when conditions permit.

There are still deeper problems with Holmes's formulation: Holmes's contrast of the "good man" and the "bad man" assumes that only the latter is important to understanding the law. The "bad man" is important because he is always threatening to disobey law if it is to his advantage and if he can get away with it.¹³ By contrast, Holmes suggests that the "good man" is less important to

¹³ This formulation suggests that the "bad man" may be more interested in whether his misconduct will be detected and prosecuted by others than in the particular content of court decisions. David Luban has suggested that the Holmesian bad man is in fact "pretty tame," because he does not "consider enforcement possibilities as well as enforcement outcomes." See Luban, *supra* note 8, at 1571. Even if Luban offers a tenable reading of *The Path of the Law*, because of Holmes's insistence on courts as the focus of attention, his criticism could hardly apply to Holmes's Legal Realist disciples whom his essay influenced. They correctly emphasized that law is the province of many, many officials, and

understanding the practical meaning of the law. But if so, it must be because he lacks those qualities associated with the "bad man"; that is, because he is more likely to obey the law rather than strategize around it or break it on the sly.

Yet this distinction raises two important questions: First, does Holmes really believe that a "good man" is likely to obey the law when the "bad man" will not? Second, if so, why does Holmes believe that the "good man" is more likely to obey the law? Is it because the law is usually good or because it is usually good to obey the law?¹⁴

Consider the first of these questions. Does Holmes really believe that the "bad man" disobeys more often than the good person? Perhaps the point of his contrast between the good and the bad person is merely that the sanctions of the good person's conscience are "vague[]." Thus, although good and bad people disobey the law in equal numbers and with equal frequency, the *890 behavior of the "bad man," being egoistical, is relatively predictable, while the behavior of the "good man," being driven by private conscience, is relatively uncertain.

However, this will not do. Once we see that the "bad man" is also driven by conscience, albeit one different from that of many of his fellows, we cannot necessarily assume that his actions are more predictable. We may not know his idiosyncratic private preferences anymore than we can know the particular pangs of conscience that drive the good person to disobey the law. Put another way, we can say only that bad people violate the law when it serves their preferences, however those are defined, while good people violate the law when the law seems unjust to them, however their vision of justice is defined.

In any case, the whole point of Holmes's theory is to understand the practical operations of law. It is not clear that viewing the law from the perspective of the "bad man" gives us a proper understanding of law if people

any understanding of "the law in action," rather than the mere "law on the books," had to take account of the likely behavior of these officials.

¹⁴ These ambiguities are implicit in his definition of the "good man," "who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." *Id.* One could read this sentence to suggest that sometimes the good person "finds his reasons for conduct []... inside the law." *Id.* That is, sometimes conscience demands that the good person obey the law because it is the law. If so, then the reason why the good person usually obeys the law is because it is usually good to obey the law. On the other hand, one might more plausibly read Holmes as saying that whether or not good people's conduct is within or without the law, their reasons for action must be found in the sanctions of their own individual consciences. Under this reading, the good person usually obeys the law because the law is usually good, and the good person obeying his conscience will rarely stray from it. Nevertheless, as we shall shortly discover, both of these accounts are unsatisfactory, albeit for different reasons.

break the law as much from the "vaguer sanctions" of conscience as from self-interested calculation. So Holmes must be assuming that most examples of law breaking stem from "bad men," and not good citizens. And this leads us to the second question—whether the reason why good persons usually obey the law is because it is usually good to obey the law or because the law is usually good.¹⁵

We begin by noting that Holmes could hardly have believed that the good person will usually obey law because it is usually good to obey the law. Imagine someone who says: "Whenever I feel torn between two potential possibilities of action, I always ask what the legally-constituted authorities ask of me, and then I behave accordingly." This speech may in fact be consistent with some accounts of how law gains its authority.¹⁶ But would any of us say that a person who routinely thinks and acts this way is a "good person," even if he or she is (by definition) law-abiding? As Holmes himself tried to emphasize in *The Path of the Law* and elsewhere, law and morality are two separate things. Holmes was a determined opponent of that version of classical natural law that makes the notion of "unjust" or "immoral" law a contradiction in terms. For Holmes, as for later positivists, what made law "law" was precisely the possibility that it could be

¹⁵ There is a final possibility. Perhaps Holmes believed that the "bad man" was more important than the good one because most law breaking occurs by "bad men," not because "bad men" are more predictable, but simply because there are so few good ones who disobey out of conscience. According to this picture, one which we think is not at all uncharacteristic of the pessimistic Holmes, the vast majority of people are neither good nor bad. They are simply sheep, obeying the law out of habit. "Bad men" and good alike disobey law, but so few good people exist who disobey law for reasons of conscience that they can be safely ignored in understanding law.

This is, of course, an empirical assumption, and Holmes gives us no reason to think that it is true. It depends on the nature of the legal regime and equally importantly on the nature of the specific law whose operation one wishes to understand. In very unjust regimes, for example, one might find considerable civil disobedience based on conscience. Even in otherwise relatively just societies one might expect considerable civil disobedience against particular laws that people think are unjust. Hence, if Holmes is assuming relatively little lawbreaking by a relatively small number of good persons, his assumption seems question begging.

¹⁶ See Joseph Raz, *Authority and Justification*, in *Authority* 115-41 (Joseph Raz ed., 1990). Raz argues that the authority of law consists in its providing people with reasons for action that displace the reasons they already have. See *id.* at 124. Law has authority over people if people are more likely "to comply with reasons which apply to [them] (other than the alleged authoritative directives)" if they accept the law "as authoritatively binding and tr[y] to follow [it], rather than by trying to follow the reasons which apply to [them] directly." *Id.* at 129 (emphasis omitted).

unjust and immoral. Given his rejection of natural law premises, Holmes could not possibly have believed that a person who routinely obeys the will of the authorities because it is their will was a "good person."

Both Holmes and his audience clearly recognized that sometimes the law mandates the performance of an immoral act, or forbids performance of a moral act. After all, Holmes was speaking in Massachusetts, which had been famous for its opposition to chattel slavery and to the return of escaped slaves under the fugitive slave laws. Anyone listening to Holmes who was of the same age (56 years old in 1897), would have been thirteen on June 2, 1854, when Anthony Burns and other fugitives were returned to slavery in the name of fidelity to the iniquitous Fugitive Slave Act of 1850.¹⁷ None of them would have had to be reminded that law and morality often diverge.

A more contemporary example might be the dilemmas surrounding assisted suicide. Does compliance with the law automatically make our decision justifiable, insulated from criticism as "immoral" ? Faced with a loved one racked with interminable pain and suffering, is it a sufficient reason to refuse to assist suicide that all but one state currently outlaws the practice and that the United States Supreme Court upheld the constitutionality of such prohibitions?¹⁸ Is the "good man" the one who argues that "I personally believe that my patient ought to receive a prescription for a potentially fatal drug, but I refrain from prescribing or delivering it because the law prohibits it" or, perhaps even more to the point, "I personally believe that my brother ought to be allowed his wish to be spared further suffering, but since the law prohibits my placing the fatal dosage on his tongue, I will not do so" ? Conversely, if one is a doctor living in Oregon—which permits narrowly defined forms of assisted suicide—is it completely unproblematic, as a moral matter, to honor a patient's request for a potentially fatal prescription?

At most we might allow the "good person" to say that there is a *prima facie* obligation to obey the law. But this means only that anyone who would

¹⁷ The story of the Burns case is superbly told in Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 *Cardozo L. Rev.* 1793, 1793-1858 (1996). For months previous, Boston had been the scene of civil disturbances and protests. On the day of Burns's extradition to the South, Finkelman notes, Boston was "an occupied city," as "[s]oldiers and policemen lined the streets" and "soldiers, policeman, and one hundred and twenty recently deputized federal marshals" guarded the courthouse. *Id.* at 1794. "The moral quality of these newly created guardians of the law seemed to mock justice." *Id.* See also generally Albert J. Von Frank, *The Trials of Anthony Burns: Freedom and Slavery in Emerson's Boston* (1998).

¹⁸ See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (upholding Washington state's ban on physician assisted suicide against a facial due process challenge).

violate the law has the burden of persuasion of demonstrating good grounds for doing so. Only a particular (and not, to our minds, very successful) version of natural law theory could claim that obedience to law was always mandated of good persons. And Holmes, as we know, was not a devotee of any form of natural law.

The remaining possibility is that Holmes believed that the good person is less important to understanding law breaking than the bad person because the laws are generally good and so good persons will usually obey them for reasons of conscience. But this seems unfounded as an empirical matter; it certainly could not be true of all legal systems, including the legal system existing in the United States in 1897. As we have seen—and as Holmes himself well understood—systems of law are rarely wholly just, and the more unjust the law appears to the good person, the less likely that person is to obey it.

Indeed, the ubiquity of unjust laws and unjust legal systems threatens to reverse once again the stereotype of the good person who obeys law and the bad one who cares for nothing other than the extent to which it is the proxy for predictions of official force. There may be many occasions when the "bad man" is delighted to discover that playing by the rules means that official force will be brought to bear against his adversaries. Even as good persons may avoid obeying unjust laws when they can, the wicked will often insist on enforcing the letter of even the most iniquitous laws when it suits their interests, and they may gladly take advantage of loopholes in otherwise good laws.

Conversely, when good people obey the law, they may not do so simply because it is the law. Rather, they may obey because the law is a good one, or because they judge that it would be better to obey the law than to incur the bad (in the moral sense) consequences that might flow from disobedience. The law is not in and of itself a sufficient reason for obedience; rather it is one feature in a larger moral environment that the good person must consider. To paraphrase (and reverse) Holmes's famous phrase, the good person has as much reason as a bad one for wishing to avoid an encounter with the public force. Taking the interests of others and the legal environment into account, the good individual weighs up the moral advantages and disadvantages of various courses of action.

We seem to have arrived at a curious reversal. One who usually obeys the law may be a very bad, or at least morally obtuse, person, while the so-called "bad man"—initially conceptualized as one who stands ready to disobey the law whenever "the price is right," hence his interest in prediction of the incidence of public force—may actually be a good person disobeying an unjust law. The good person takes the existence of the legal system and the various consequences that flow from disobedience into account in deciding whether or not to violate the law, but he or she does not obey it simply because it is the law. Rather, good people obey the law because it is right, or because, given the balance of consequences, more good will flow from obedience than disobedience. And implicit in this formulation is the possibility that if the law strays too far from what conscience demands, the good person will have no hesitation in breaking or

evading it. One of Holmes's major purposes in offering the figure of the "bad man" was to insist in the separation between law and morals. But it has become increasingly clear that the "good man" is just as important to this demarcation as his "bad man."

One might object at this point that Holmes's metaphor has an equally important purpose: the "bad man" stands as a symbol of his "predictive theory of law"—that the real law, the law in practice, consists in how people use it and respond to it. Hence to understand law we should approach it from the perspective of a "bad man" because bad people, malsocialized in the norms that we ordinarily identify with acceptable conduct, will respond to incentives to break or evade the law—unless, of course, the law suits their interests, in which case they will gladly obey it.

Yet what if the law itself is bad? Might a good person not also want to break it or evade a bad law? Might an opponent of slavery not want to avoid returning a fugitive slave? Might not a conscientious objector wish to evade fighting in an unjust war? Surely to understand how a law will be applied in practice, whether and how often it will be complied with, and how many individuals will seek to evade it, one must take into account the possibility of civil disobedience or morally inspired evasion.¹⁹

Thus, the "bad man" does not seem to have a monopoly even when it comes to the predictive theory of the law. Rather, to understand how the law works in practice, we must take into consideration both the "bad" people who evade it because it conflicts with their private agendas, and the "good" people who evade it because it conflicts with their sense of justice. For if we assume that good people usually do not disobey law, or that people who disobey law usually are not good, we assume an equation between law and justice that Holmes himself would never have accepted.

II. The Self-Reliant Individual

We seem to have reached an impasse. The famous passage that almost everyone has regarded as a definitive statement both of Holmes's positivism and his predictive theory of law turns out to undermine itself. The distinction *894 between "good" and "bad" people does not do the work that Holmes intended.

It is time to discard the confused metaphor of the "bad man" and exchange it for one more relevant, and—dare we say it—more authentic to Holmes's life and thought. Almost thirty years ago, one of us (Levinson) completed a dissertation on Holmes that argued, among other things, that he could

¹⁹ And we must not forget that the line between moral objection to law and personal self-interest is often difficult to draw. Human motives are often untidy mixtures of conviction and opportunism.

be understood as an Emersonian.²⁰ Much of the argument was biographical, focusing, for example, on the fact that Emerson was well known to the Holmes household and that Holmes indeed acknowledged the influence. Thus, Holmes in 1876 sent the Concord philosopher a note to accompany one of his first legal essays: "Accept this little piece as . . . a slight mark of the gratitude and respect I feel for you who more than anyone else first started the philosophical ferment in my mind."²¹ Lest one think this is mere flattery written for the occasion, note Holmes's 1930 comment to Sir Frederick Pollock, one of his oldest friends, that "[t]he only firebrand of my youth that burns to me as brightly as ever is Emerson."²² If Emerson was Holmes's "firebrand," burning brightly in both youth and old age, perhaps it is time to offer an Emersonian reading of *The Path of the Law*. Indeed, many arguments, images, and turns of phrases in Emerson's most famous essay, *Self-Reliance*,²³ could with little effort find a home in *The Path of the Law*.

An Emersonian reading is consistent with the larger themes of Holmes's life and work. Nevertheless, we cannot establish a definitive and direct influence from *Self-Reliance* to *The Path of the Law*, much less argue that Holmes "intended" the reading that we are about to offer, though we believe that our reading does no violence to the text. What we do insist, though, is that we can understand Holmes better if we read him through Emerson, and if we look at law through the eyes of the "self-reliant individual" rather than the "bad man." Why Holmes chose the "bad man" rather than "the self-reliant man" as his provocative metaphor is beyond our abilities to answer. David Seipp has suggested in an interesting and highly provocative essay that *The Path of the Law* is basically a sport.²⁴ It was the product of numerous factors, including Holmes's

²⁰ See Sanford Levinson, *Skepticism, Democracy, and Judicial Restraint: An Essay on the Thought of Oliver Wendell Holmes and Felix Frankfurter* (1969) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

²¹ Mark DeWolfe Howe, *Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870*, at 203 (1957).

²² *Holmes-Pollock Letters: The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, at 264 (Mark DeWolfe Howe ed., 2d ed. 1961). Holmes also reproached Harold Laski for criticizing Emerson: "Emerson, I think, had the gift of imparting a ferment.... To my ear some of Emerson's sentences sing, or did when I read them, enchantingly." *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916-1935*, at 474 (Mark DeWolfe Howe ed., 1953).

²³ Ralph Waldo Emerson, *Self-Reliance*, in *Essays and Essays: Second Series 35-73* (Morse Peckham ed., 1969).

²⁴ See David J. Seipp, *Holmes's Path*, 77 *B.U. L. Rev.* 515, 516 (1997).

general desire to shock his tender-hearted listeners,²⁵ his *joie de vivre* sparked by an affair of the heart with Lady Clare Castletown,²⁶ and possibly even Holmes's acquaintance with Melville Davisson Post's *The Strange Schemes of Randolph Mason*, a book "contain [[ing] seven stories about a mysterious New York lawyer who advised clients how to commit murder and other crimes without legal consequences."²⁷ The ultimate validity of Seipp's arguments is for historians and biographers to determine. Nevertheless, we think the terminology of "self-reliance" not only works better analytically, it also makes Holmes's argument more attractive, and—dare we say it—more Holmesian.

"Every law which the state enacts, indicates a fact in human nature; that is all."²⁸ This Emersonian dictum, with its heavily inflected "every" and "all" (try speaking the sentence aloud), suggests a positivized notion of law that deprives it of any necessary majesty (or legitimacy) to supplement its brute existence. To be sure, Emerson, like Holmes, would not have questioned the premise that many laws do have moral grandeur, but this is a completely contingent fact. The "essence" of law, as it were, is its amorality, its facticity.²⁹

²⁵ See *id.* at 537.

²⁶ See *id.*

²⁷ *Id.* at 542.

²⁸ Ralph Waldo Emerson, *History*, in *Essays and Essays: Second Series*, *supra* note 23, at 9.

²⁹ Perhaps the best example of this point is the Fugitive Slave Act, which Emerson openly despised. See Robert D. Richardson, *Emerson: The Mind on Fire* 495-99 (1995). Indeed, so fervent was his opposition that in an 1854 speech on the Act he sounded almost like a natural lawyer. Pronouncing it an "immoral law," Emerson suggested that "an immoral law cannot be valid." See Ralph Waldo Emerson, *The Fugitive Slave Act*, in *The Selected Writings of Ralph Waldo Emerson* 866 (Brooks Atkinson ed., 1950). Nevertheless, Emerson had no illusions that the Fugitive Slave Act was not valid law from the standpoint of the legal system, and he denounced "[t]his filthy enactment" as "the most detestable law that was ever enacted by a civilized state" and announced that "I will not obey it by God." Richardson, *supra*, at 498. Emerson scathingly attacked Massachusetts judges for their willingness to collaborate with slavery by enforcing the Fugitive Slave Law: "What avails their learning or veneration? At a pinch, they are no more use than idiots." *Id.* at 881. And he delivered a strong speech on November 18, 1859, on behalf of John Brown, even as Brown stood condemned to death for his raid on Harper's Ferry. See Ralph Waldo Emerson, *John Brown*, in *Selected Writings of Ralph Waldo Emerson*, *supra*, at 879-882.

If moral grandeur is not a product of the sheer fact of enactment, neither is it the product of mere age. There is an obvious affinity between Holmes's and Emerson's views of history. Whatever Holmes's fame as an historian of the common law, he accorded the past no intrinsic moral authority. In *The Path of the Law* itself, Holmes "look[s] forward to a time when the part played by history in the explanation of dogma shall be very small,"³⁰ and of course the same essay includes his famous and flamboyant pronouncement that "[i]t 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."³¹ One has little doubt that Emerson would have applauded these sentiments. "Whence then this worship of the past?"³² Emerson wrote. "The centuries are conspirators against the sanity and majesty of the soul."³³

And consider what is almost certainly the most famous single passage from *Self-Reliance*: "Whoso would be a man must be a nonconformist. He who would gather immortal palms must not be hindered by the name of goodness, but must explore if it be goodness. Nothing is at last sacred but the integrity of our own mind."³⁴ These words are so famous that we must struggle to avoid thinking of them as clichés. In one sense this is ironic given that Emerson, like Holmes, is attacking the power of clichés. But reading these words afresh, it is not too much of a stretch to interpret Emerson, in *Self-Reliance*, as arguing that the standard beliefs and notions of one's society (including, of course, any naive joinder of law and morality) should be washed in what his disciple Holmes called "cynical acid."³⁵ Above all, Emerson thought, the self-reliant individual must avoid confusing what society calls good with what really is good.

In this passage Emerson offers his own "hermeneutics of suspicion" about the ordinary language of morality. "Good and bad," he tells us, "are but names very readily transferable to that or this; the only right is what is after my constitution, the only wrong what is against it. . . . I am ashamed to think how easily we capitulate to badges and names, to large societies and dead

³⁰ Holmes, *supra* note 1, at 474, 78 B.U. L. Rev. at 712.

³¹ *Id.* at 469, 78 B.U. L. Rev. at 708.

³² Emerson, *supra* note 23, at 54.

³³ *Id.*

³⁴ *Id.* at 41.

³⁵ Oliver Wendell Holmes, *Address Delivered at the Dedication of the New Hall of the Boston University School of Law* (Jan. 8, 1897), quoted in Seipp, *supra* note 24, at 551.

institutions."³⁶ Ultimately, "[w]hat I [and presumably you, the implied reader] must do, is all that concerns me [and all that should concern you], not what people think"³⁷ The world is full of busybodies "who think they know what is your duty better than you do."³⁸ Undoubtedly, they also enact laws that purport to announce our duties. Emerson tells us "[i]t is easy in the world to live after the world's opinion; but the great man is he who in the midst of the crowd keeps with perfect sweetness the independence of *897 solitude."³⁹

To be sure, what Emerson finds "sweet" others might denounce as a kind of radical egoism. At times Emerson's "great man" seems to be a sort of Nietzschean *Übermensch*, ready to attack social pieties and work for the "transvaluation" of values too easily taken for granted. (Indeed, Nietzsche's admiration for Emerson is by now well-established, and both Richard Posner and David Luban, among others, have noted the similarities between Holmes and Nietzsche.⁴⁰) We ought to recognize that the Emersonian "great man" who discards society's values is not necessarily a more admirable figure than the "conformist" who clings to conventional values. That obviously depends on the values themselves. Under some circumstances, the "great man" might be a very "bad man" indeed, while we would all express relief for the presence of conformists among us even if their "goodness" is simply due to the fact that they blindly follow a law that is basically just. Yet the transvaluing great person might also be genuinely great, and later generations might honor such great people precisely because they possessed sufficient resources of "self-reliance" to avoid callow submission to banal notions of duty, including those congealed in the law of their time.

Today people might object to Emerson's views on very different grounds: They might contend that the Emersonian conception of self-reliance is unrealistic in the late twentieth century, in which the social construction of the individual is so well-accepted as to become a cliché. How can we believe in Emerson's principle of self-reliance, forswearing the opinions of the community, when our very forms of understanding—including the very notion of the "self" that ostensibly understands—are shaped by the community? Whatever else might

³⁶ Emerson, *supra* note 23, at 42.

³⁷ *Id.* at 469, 78 B.U. L. Rev. at 708.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See, e.g., Richard A. Posner, Introduction to *The Essential Holmes* at xviii-ix (Richard A. Posner ed., University of Chicago Press 1992); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 *Duke L.J.* 449, 478 n.96 (1994).

be said about our attempt to wed Holmes and Emerson, isn't the very notion of self-reliance implausible in our jaded age of social constructionism and post-modernism?

In fact, we think that Emerson makes as much sense in our age as in his own. What Emerson meant by self-reliance was naturalness and spontaneity: the ability and the will to follow one's nature, regardless of how that nature came to be. That nature has power over us regardless of our attempts to evade it.⁴¹ This is the real meaning of his often quoted and often misunderstood ***898** expression that "[a] foolish consistency is the hobgoblin of little minds."⁴² Emerson's point was that we should not strain to act consistently with what we thought was right in the past. Rather, our moral imagination should be forward-looking, without fear of contradicting some past self of ours that had, perhaps, decided an issue differently. Indeed, fears of contradiction are illusory, for the consistency of our moral character will shine through:

I suppose no man can violate his nature. All the sallies of his will are rounded in by the law of his being as the inequalities of Andes and Himmaleh are insignificant in the curve of the sphere. Nor does it matter how you gauge and try him. A character is like an acrostic or Alexandrian stanza; read it forward, backward, or across, it still spells the same thing.⁴³

Emerson did not deny that one's nature is shaped by the influence of society; he merely insisted that each of us has a specific nature, that it is unique and that it makes of each of us a unique individual. Indeed, he insisted that we will return to our natures—whether socially constructed or otherwise—as inevitably as the point of a compass returns to the magnetic north. For Emerson, nature was not in contradiction to human freedom, but its source. Our natures may be shaped by living in society, but the exercise of our moral judgment, and the application of our sense of decency, are our own and no one else's. Some people

⁴¹ Indeed, the problem that social constructivism seems to pose for Emerson's notion of self-reliance is already produced by his recurrent emphasis on the trope of "nature" and "the natural." Emerson often suggests that the Self is a manifestation of Nature, and that each individual is compelled to follow his or her own nature. If the Self is so dependent on Nature, what can it mean to be "self-reliant" ? This is neither the time nor the place for a detailed exegesis of the concepts of Self and Nature in Emerson's thought. What we do wish to emphasize, however, is that the language of social construction does not fundamentally alter a problem that already appears in Emerson's writings.

⁴² Emerson, *supra* note 23, at 47.

⁴³ *Id.* at 48.

are cowards and others are courageous, some are conformists and others rebels, and this is true regardless of the fact that the nature of all is socially constructed.

Emerson's self-reliant individual rejects the rule of others and stands as the model figure of the independent self. It takes relatively little effort to see Holmes's own idealized self-portrait as just such an autonomous, relentlessly independent, thinker. Consider, for example, Holmes's remarks about the Arctic explorer Nansen, offered to Brown students at their 1897 commencement (the same year as Holmes's talk at Boston University).⁴⁴ As he speaks of Nansen, one can easily imagine him speaking of himself. "In the first stage" of exploration, Holmes remarks, "one has companions."⁴⁵ "But if he is a man of high ambitions"⁴⁶ —and who can doubt from even the barest acquaintance with Holmes's life that his own ambitions were the highest?—"he must leave even his fellow-adventurers and go forth into a deeper solitude and greater trials. He must start for the pole. In plain words he must face the loneliness of original work. No one can cut out new paths in company. He ***899** does that alone."⁴⁷ This is self-reliance indeed. Even if we find this language somewhat hyperbolic, and even if we accept the communitarian criticisms of the "self as autonomous chooser,"⁴⁸ we suspect that very few Americans can resist entirely the power of Holmes's imagery and its Emersonian call to question authority and decide for oneself how to live one's life. (Perhaps, a communitarian might respond, the resonance of these words in the American soul shows how much we are constituted by our identity as Americans.)

Yet choices always are made within a context, including the brute facts that effectively structure the options open to oneself. For most of us these facts certainly include law and institutions of law enforcement. Because there are laws and because there is law enforcement, there may come occasions when, as Thoreau suggested to his friend Emerson, the only place for the genuinely "good man" is in jail, or fighting alongside a vigilante like John Brown. The self-reliant man may have to surrender his liberty or his life to rid the world of an evil like slavery. Presumably, Emerson's failure to join Thoreau behind bars in opposition

⁴⁴ See Oliver Wendell Holmes, Address at Brown University Commencement, in 3 Collected Works of Justice Holmes 518 (Sheldon Novick ed., 1995).

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ See Michael J. Sandel, Liberalism and the Limits of Justice 1-183 (1982); Michael J. Sandel, The Procedural Republic and the Unencumbered Self, 12 Pol. Theory 81, 81-97 (1984).

to the Mexican War and to the expansionist slavocracy behind the War is evidence that he did not think the benefits of civil disobedience worth the price. It is impossible, though, to believe that this prophet of self-reliance would have castigated Thoreau for daring to question the authority of the state. In any case, "self-reliant" individuals—those who choose (and take genuine responsibility for) their own values and actions—would have every incentive to ask about the consequences of their contemplated actions (including the legal consequences) and then to decide accordingly.

III. The Self-Reliant Individual and Legal Governance

In this essay we have argued that one can easily replace the Holmesian "bad man" with the self-reliant individual without loss. Indeed, the substitution comes with considerable gain. Self-reliant individuals include not only criminals and egoists, but also people like Thoreau, or John Brown, who decide to violate the law in the interest of what they believe is a higher good. To understand the law, we must take into account not only people who violate law because of wicked motives or callous self-interest, but people who violate it because they have the courage to stand up to what the rest of us know is unjust, and people who violate it because they judge it inconsistent with their values, whether these values seem right or wrong in our eyes.

Our rejection of the metaphor of the "bad man" is based on our conviction that to understand law we must also understand the different varieties of human character and motivation. We do not think that our emphasis on these matters is at all inconsistent with the sort of tough-minded positivism that ***900** Holmes attempted to offer us in *The Path of the Law*. Quite the contrary, we think that it has always been implicit in the positivist vision. Consider as an example H.L.A. Hart's eloquent argument on behalf of the rigorous separation of law and morality:

So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.⁴⁹

Moreover, a shift to the "self-reliant" individual is valuable because it emphasizes the multiplicity of perspectives about the law. As lawyers we are often trained to think of the law in terms of governance; that is, we understand the law from the perspective of the state, which wants to know what set of rules will create the right incentives for behavior leading to the effects the state desires to

⁴⁹ H.L.A. Hart, *The Concept of Law* 210 (2d ed. 1994).

produce. This instrumental conception of law views law essentially as the servant of public policy goals; it stands in marked contrast to a conception of law as the protector of individual rights (or a private sphere of individual liberty) on the one hand, and a vision of law as the working out of the inherent logic of existing doctrinal categories on the other. This instrumental conception is entirely familiar to American legal scholars, especially those living in the generations after Legal Realism. It is the conception that Holmes promoted and announced as the wave of the future in *The Path of the Law*. Indeed, *The Path of the Law* stands as one of the first programmatic statements of the instrumental conception.

But in opposing the instrumental conception of law to other conceptions—such as the protection of rights or the elaboration of doctrine, we tend to forget another important aspect of this vision—that it is a conception of law that views matters from the perspective of the state and its agents. It is a conception in which individuals and groups are objects of governance by the state. They are collected, organized, selected, rejected, coerced, bribed, taxed, subsidized, punished, and rewarded in order to achieve particular ends. The "bad man" fits well into this perspective, because the "bad man" is simply another of the conceptual tools that the state uses to determine the appropriate mix of incentives—be they inducements or punishments, carrots or sticks—to push, cajole, and direct subjects into appropriate forms of behavior. If the "bad man" regards the law as little more than a pricing system, the law can happily respond by setting the appropriate prices.

Focusing on the self-reliant individual, however, requires us to look at law ***901** from the perspective of an individual, living within a matrix of legal regulation, and subject to its punishments, who regards it with no particular sense of moral awe or legitimation, and even as a potential obstacle to the achievement of the good and the just. One could, of course, say this is exactly what Holmes meant by the "bad man," and we do not deny the potential truth of this. What we do deny is that "bad man" is a felicitous way of evoking someone committed to the moral life and concerned that a life lived entirely within the law may lead in fact to immorality and injustice.

From the state's perspective, the "best" citizen is precisely the one who believes that law is self-justifying and who will, sheep-like, do whatever the law requires. The second best citizen is a certain kind of "bad man," who simply wants to avoid pain and discomfort and hence can be made an object of governance by providing the optimal mixture of rewards and punishments, subsidies and taxes, carrots and sticks necessary to achieve the state's goals. In Emersonian terms, the state may well be happiest with people who either do not know their own minds, because they are mired in conventional ways of thinking and behaving, or people who can safely be treated as unproblematically predictable objects of impersonal incentive structures. The self-reliant individual, on the other hand, is the most dangerous to the state, for this individual denies the state its accustomed moral legitimacy, and resists being treated as an mere object of prediction and structuring. The greatest threats to the state, in other words, are those people who have the courage to think for themselves.

Both the Holmesian "bad man" and the Emersonian "self-reliant" individual understand that the law does not legitimate itself. Each is determined to go his or her own way. But the self-reliant citizen is more dangerous in this sense: The self-reliant individual understands that ovine acceptance of the legal status quo may threaten not only one's personal safety (like complacent sheep on the way to slaughter), but, far more importantly, one's integrity, because one ends up collaborating with what is in fact an evil regime. We should teach our students that there is nothing "bad" about accepting Holmes's basic structure of analysis, though it may well be "bad" to be the kind of radical egoist that Holmes's language suggests. But we should also remind them that the alternative to radical selfishness is not giving over one's conscience to the legal sovereign. It is, instead, to adopt a genuine responsibility for one's own thoughts and deeds.

We think that this Emersonian interpretation puts Holmes's theory of law in a much more admirable light. At the same time, we recognize that it is possible that these conclusions are not Holmesian at all.⁵⁰ Holmes was a complex character whose personality displayed many seemingly contradictory sides.⁵¹ Perhaps the true Holmes was the one who suggested that his *902 epitaph should be "Here lies a supple tool of power."⁵² Perhaps Holmes really meant it when he followed his reference to the "bad man" by avowing that "[t]he law is the witness and external deposit of our moral life" and that "[t]he practice of it, in spite of popular jests, tends to make good citizens and good men."⁵³ After all, we know that Holmes was a statist, and the state, of course, is always worried about the presence of too many self-reliant citizens who question its authority.⁵⁴ Perhaps for all of Holmes's iconoclasm and desire to shock—which David Seipp offers as the

⁵⁰ This would certainly be the conclusion of David Luban. See Luban, *supra* note 8, at 1563-64.

⁵¹ Indeed, Posner noted that Holmes's thinking demonstrated a wide variety of often contradictory philosophical strains. See Posner, *supra* note 40, at xix-xx (detailing that one could find pragmatism, altruism, liberalism, materialism, aestheticism, utilitarianism, militarism, and other strains in Holmes's work).

⁵² Yosai Rogat, *The Judge as Spectator*, 31 U. Chi. L. Rev. 213, 249- 50 (1964) (quoting Holmes).

⁵³ Holmes, *supra* note 1, at 459, 78 B.U. L. Rev. at 700.

⁵⁴ Indeed, one might argue that he was a statist of a particularly unattractive kind. David Luban claims that while H.L.A. Hart insisted that the state had to be more than a "gunman writ large," Luban, *supra* note 8, at 1566 (quoting H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 603 (1958), Holmes "did think of the state as a gunman writ large," *id.*, and that the state was no less admirable for that.

best way to understand The Path of the Law—Holmes remained at root an utterly conventional conformist.

If so, that is not a Holmes that we think it worthy to commemorate a century later. We much prefer the Holmes who was true to his Emersonian roots. We much prefer the Holmes who preached the gospel of self-reliance, both in his words and through his deeds. That is the Holmes worth remembering. That is the Holmes we celebrate today.