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## HOLMES'S GOOD MAN: A COMMENT ON LEVINSON AND BALKIN

JACK M. BEERMANN\*

Sanford Levinson and J.M. Balkin's paper ("L & B") is refreshing in the attention it pays to Holmes's oft-neglected "good [man], who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."<sup>1</sup> The good man provides a heuristic foil for Holmes's "bad man" whose conduct is motivated only by the potential material consequences, and thus L & B's analysis should help shed light on what is a puzzling metaphor in the folklore surrounding Holmes's *The Path of the Law*. L & B provide some interesting observations on the implications of Holmes's distinction between the good man and the bad man for understanding what appears to be a principal theme of *The Path of the Law*, the separation of law and morality. After pointing out that Holmes's bad man metaphor has provoked some rather extreme criticism not only of the speech but even of Holmes's character, L & B attempt to rehabilitate Holmes's bad man by offering, as a friendly amendment to Holmes's metaphor, Emerson's more palatable "self-reliant man."<sup>2</sup>

Emerson's self-reliant man is more attractive than Holmes's bad man because the self-reliant man, while perhaps every bit the individualist as the bad man, is searching for greatness, not the crude self-gratification invoked by the image of the bad man. As L & B explain, while the bad man decides whether to obey the law merely by weighing the potential consequences of disobedience against the desire to act out of "wicked motives or callous self-interest,"<sup>3</sup> the self-reliant man includes those who violate the law because they "like Thoreau, or John Brown . . . decide to violate the law in the interest of what they believe is a higher good."<sup>4</sup> We may not like the self-reliant

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<sup>1</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897), reprinted in 78 B.U. L. REV. 699, 701 (1998).

<sup>2</sup> See Ralph Waldo Emerson, *Self-Reliance*, in *ESSAYS AND ESSAYS: SECOND SERIES* 350-73 (Morse Peckham ed., 1969).

<sup>3</sup> Sanford Levinson & J.M. Balkin, *The "Bad Man," the Good, and the Self-Reliant*, 78 B.U. L. REV. 885, 899 (1998).

<sup>4</sup> *Id.*

man, because, as L & B point out, the class of self-reliant individuals may include people who violate the law out of values with which we disagree.<sup>5</sup> Yet L & B would argue that even those whose self-reliance leads them to take actions that we would find morally repugnant have a measure of nobility that transcends the question of whether their particular actions merit legal punishment or moral condemnation.

L & B's proposed substitution of the self-reliant man for the bad man thus raises some interesting possibilities in assessing Holmes's *The Path of the Law*, both in terms of what Holmes intended by the metaphor and what we, as lawyers in a vastly changed intellectual environment, can learn by reading and re-reading Holmes's tantalizing essay. However, in my view, L & B should have devoted more attention to Holmes's good man, because by doing so they might have recognized that Emerson's self-reliant man resembles Holmes's good man much more closely than Holmes's bad man.

It is my hope in this brief comment to consider in a bit more detail Holmes's good man in light of L & B's invocation of Emerson's self-reliant man and to offer some observations on how the good man can help to illuminate the meaning of *The Path of the Law*. In the end, I reject L & B's suggestion that Emerson's self-reliant man can be substituted for Holmes's bad man. In my view, such a substitution is inconsistent with the core meaning of Holmes's essay, that the perspective of the bad man provides a useful tool for understanding the law because the bad man views law as a set of potential material consequences and not as an abstract set of concepts. Compounding this error is the tendency by L & B, shared by others, to view Holmes's speech as an essay about human behavior, which it was not, rather than an essay about how lawyers can best serve their clients who need to know the probable legal consequences that might arise from a course of conduct.

It is worthwhile to examine once again Holmes's statement of the relationship between the conduct of the good man and the law. After laying out his definition of the work of lawyers and of law itself as "prophecies" of what courts will do, he turns to his attempt to "dispel a confusion between morality and law."<sup>6</sup> In the famous passage that appears to reinforce his view of law as prophecy, Holmes states:

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.*<sup>7</sup>

While it seems pretty clear why the bad man obeys the law (out of fear of the material consequences of disobedience), why does the good man obey the

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<sup>5</sup> *Id.*

<sup>6</sup> Holmes, *supra* note 1, at 459, 78 B.U. L. REV. at 700.

<sup>7</sup> *Id.* at 459, 78 B.U. L. REV. at 701. (emphasis added).

law? L & B offer a couple of different readings of this passage. The first is the fact that something is law is relevant to the good man's conscience, that is as a matter of conscience the good man feels at least a *prima facie* obligation to obey the law as written, independent of its likelihood of being enforced.<sup>8</sup> Holmes's good man thus feels an ethical duty to obey the law simply because it is the law. On this view, the good man is the antithesis of the self-reliant man whose primary distinguishing character trait is independence of thought and action. L & B state that:

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.<sup>9</sup>

Given Holmes's definition of law as a prediction of the legal consequences of a course of conduct, it is easy to understand how this reading reinforces Holmes's direction to lawyers that they can learn more about law from the perspective of the bad man than the good one. The good man appears to be examining the law as written, i.e. in the statute books, and deciding whether to obey based upon considerations of personal morality and not based on the actual consequences of disobedience. This perspective reveals nothing about the actual consequences of disobedience. Only the perspective of the bad man, who is ever calculating the potential consequences of violating the law, can help reveal the correct reading of the tea leaves of the law.

With this reading, neither Holmes nor L & B offer any explanation for why the good man would find law in a different place than the bad man. Holmes's good man here appears to be the naive law student or non-lawyer who has not yet learned that the meaning of a statute can rarely if ever be discerned without reference to its interpretation in court. The bad man is the man with better legal training because he knows that even one desiring to obey every nook and cranny of the law better look to the courts rather than the bare words of statutes in the statute books. Perhaps Holmes's point is that the good man is morally superior because he does not take into account the probability of a violation being discovered. However, if that is Holmes's point, it is not very clearly made.

L & B, however, develop a second reading of Holmes's passage which is

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<sup>8</sup> See Levinson & Balkin, *supra* note 3, at 888.

<sup>9</sup> See *id.* There is some confusion in L & B's account. They state at the beginning of the quoted passage that the "good person would not violate a just or morally binding law" even if it were no longer enforced. Then they state that law "generates a feeling of obligation to obey it" without the "just or morally binding" qualification. It is unclear to me whether L & B mean to refer only to just laws or to all laws in their discussion of the reasons why Holmes's good man obeys the law.

at odds with the notion that the good man obeys law out of at least a prima facie ethical duty to do so regardless of the consequences. L & B focus on Holmes's phrase "vague sanctions of conscience"<sup>10</sup> and state that Holmes offers another reason for the good man's obedience to the law, that the good man is "motivated by conscience" in the sense that "feelings of guilt or the fear of hellfire" are among the "sanctions" of conscience that motivate the good man to obedience.<sup>11</sup> L & B recognize that this reading reduces the differences between the good man and the bad man. Now both are motivated by the desire to avoid sanctions, one material, the other spiritual.<sup>12</sup>

L & B recognize that this may be a superficial reading of Holmes's words, and they are led to the natural question of the good man's attitude toward unjust laws. It is here that L & B, in my view, come very close to a satisfying reading of Holmes. They state that while the fact that something is law may be, to the good man, a prima facie reason for obedience,<sup>13</sup>

[t]he 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.<sup>14</sup>

I agree with L & B that Holmes's good man's conduct is the product of considerations independent of the law, but I do not find evidence in Holmes for L & B's assertion that the fact that a law exists is relevant to the good man's conduct. To L & B, this process of calculation of the consequences of disobedience, perhaps raising a lesser of two evils problem (obedience of a morally bad law where disobedience has morally bad consequences), places the good man once again as an equivalent of the bad man because both take consequentialist approaches to deciding whether to obey the law.

L & B attempt to break out of this dilemma by raising the possibility that Holmes was wrong to say that we cannot learn about the law by observing the behavior of the good person, who may evade the law "because it con-

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<sup>10</sup> Holmes, *supra* note 1, at 459, 78 B.U. L. REV. at 701.

<sup>11</sup> Levinson & Balkin, *supra* note 3, at 888.

<sup>12</sup> *The Path of the Law* does contain additional evidence that Holmes thought that the good man would be motivated, at least in part, by consequentialist considerations. Holmes wrote that "a bad man has as much reason as a good one for wishing to avoid an encounter with the public force" which could be read to imply that the good man is motivated, at least in part, by a desire to avoid undesirable legal consequences. Holmes, *supra* note 1, at 459, 78 B.U. L. REV. at 700. In my view, Holmes's main point was to explain why the bad man might often obey the law. The mention of the good man here is not elaborated sufficiently to be of much help in understanding Holmes's view of the good man.

<sup>13</sup> See Levinson & Balkin, *supra* note 3, at 892.

<sup>14</sup> *Id.* at 893.

flicts with their sense of justice.”<sup>15</sup> L & B state that “the bad man does not seem to have a monopoly even when it comes to the predictive theory of the law.”<sup>16</sup> They appear here to conclude that conduct evading the law has similar predictive content to conduct in obedience to the law. But besides being directly contrary to Holmes’s stated view, this conclusion is built on a faulty premise. We do not learn about the law by observing evasions, or conduct at all for that matter, we learn about the law by adopting the point of view of someone who needs to know about the law in order to decide how to act. This is the point of Holmes’s speech—he is speaking to prospective lawyers on how they can provide the best professional advice to their clients who need to know the likely legal consequences of various possible courses of conduct. On my reading, which is elaborated below, the law is irrelevant to the good man, so we cannot learn at all about the law by adopting the point of view of the good man. The bad man, on the other hand, lacking a moral compass, looks to law to decide how to act, and it is from his point of view that, according to Holmes, we can learn about the law. Even if we could learn about law from conduct, we can learn nothing from either the good man or the bad man about law when they evade the law, for neither’s actions in such cases arise from law.

It is this error, in my opinion, that leads L & B to look to the self-reliant man as a substitute for the bad man. Because both the good man and the bad man, on L & B’s view, take consequentialist attitudes toward obeying the law, L & B conclude that Holmes’s use of the moniker “bad man” was not intended to express a sense of moral condemnation. The bad man is merely a better teaching tool than the good man for helping prospective lawyers understand the nature of law among two consequentialist candidates. Thus there is no reason to assume that Holmes would reject, as a friendly amendment, recasting his teaching tool in a way that is just as effective without the bad man’s baggage.

I find L & B’s substitution of Emerson’s self-reliant man for Holmes’s bad man fatally inconsistent with Holmes’s analysis for three reasons. First, the description of the self-reliant man in Part II of L & B’s paper is nothing like Holmes’s description of the bad man but rather is strikingly similar to Holmes’s description of the good man. The key character trait of Emerson’s self-reliant man is that the self-reliant man makes his own judgments about morality and does not follow conventional morality merely because it has been accepted by society. As L & B quote Emerson: “Who so 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.”<sup>17</sup> As L & B ob-

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See Levinson & Balkin, *supra* note 3, at 896, quoting Ralph Waldo Emerson, *Self-Reliance*, Reprinted in *Essays and Essays: Second Series* 36-76, 41 (Morse Peckham, ed.

serve, "Emerson's self-reliant individual rejects the rule of others and stands as the model figure of the independent self."<sup>18</sup> This is much closer to Holmes's description of the good man, whose "reasons for conduct, whether inside the law or outside of it, [lie] in the vaguer sanctions of conscience."<sup>19</sup> The good man, just as the self-reliant man, decides on a course of conduct independently, without reference to the conventions, or laws, of others, but rather out of considerations that arise out of a personal morality. It is the ability and courage to act out of one's personal morality that distinguishes both Emerson's self-reliant man and Holmes's good man. Holmes's bad man, by contrast, operates out of crude selfish impulses and the self-preservation instinct of a lowly creature unworthy of moral praise. Upon reading this section of L & B's paper, I expected them to equate Emerson's self-reliant man with Holmes's good man, but they never did. Rather, they stick to their observation 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.'"<sup>20</sup>

My second reason for finding Emerson's self-reliant man inconsistent with Holmes's bad man is that under Holmes's analysis, one cannot learn about the law from the viewpoint either of Emerson's self-reliant man or Holmes's good man, while one can learn about law by adopting the point of view of Holmes's bad man. As noted above, both Holmes's good man and Emerson's self-reliant man shape their conduct without apparent regard for law or conventional morality. The self-reliant man is expected to make independent moral decisions. The viewpoint or conduct of the self-reliant man teaches us only about that man's view of morality. Similarly for Holmes's good man, conduct is shaped by the "vaguer sanctions of conscience."<sup>21</sup> L & B interpret this to mean that the good man is a consequentialist, fearing feelings of guilt or eternal damnation. In my view, this overreads the reference to the sanctions of conscience which I interpret instead to signify that the good man's conduct is influenced by personal morality, not by law. But this little disagreement with L & B is of no moment, since even if they are correct, then adopting the viewpoint of the good man, or observing his conduct, would teach us only about the content of the good man's conscience and not about the law. It is only the vantage point of the bad man, from which law is an important datum, that can teach the astute lawyer to recognize what the law actually is.

Holmes's description of the good man could be amended to allow the good man's point of view to have some instructive value. Holmes's apparent view that the law is irrelevant to the good man evokes a somewhat primitive view

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<sup>18</sup> See Levinson & Balkin, *supra* note 3, at 898.

<sup>19</sup> Holmes, *supra* note 1, at 459, 78 B.U. L. REV. at 701.

<sup>20</sup> Levinson & Balkin, *supra* note 3, at 894.

<sup>21</sup> Holmes, *supra* note 1, at 459, 78 B.U. L. REV. at 701.

of the law under which a law-abiding person can avoid contact with the legal system merely by obeying all of the law's negative commands. In contemporary society, and I imagine to a lesser extent even in Holmes's Massachusetts, the legal system must often be navigated in order to engage in many legal and even morally admirable pursuits. Given a more contemporary understanding of the pervasiveness of regulation, it might be argued that even Holmes's good man, in using legal tools to accomplish good ends, could help teach what the law is in instances in which the good man follows the law to accomplish his goals, at least when the law has no apparent moral content.

Finally, L & B's reading of Holmes's bad man as compatible with Emerson's self-reliant man violates a cardinal tenet of Holmes's analysis, it results in the conflating of law and morality. If we can learn about the law by adopting the point of view of the self-reliant man, who chooses his conduct based upon considerations of personal morality, then it must be that the study of law and morality are linked in a way that Holmes would find unacceptable. Because the self-reliant man decides how to act out of his personal morality, the argument that we can learn about law from his views or conduct is an argument that we can learn about law by learning about morality. This is exactly the opposite of the central point of *The Path of the Law*, that to learn about law, the student must separate law from its moral roots.

There are statements in *The Path of the Law* that might have led L & B to conclude that the perspective of the self-reliant man could be as instructive as the perspective of the bad man. Holmes stated that "[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."<sup>22</sup> This statement describes the bad man's attitude toward a law that stands in the way of his selfish aims and may describe the self-reliant man's attitude toward a law that offends his personal sense of morality. However, the fit with the self-reliant man's attitude toward an unjust law is not very good, since the self-reliant man may, on considerations of morality, view a stay in jail as the morally preferred result both to obedience and to undetected evasion. Only the bad man provides the untainted specimen that can help the lawyer, convinced by Holmes to disregard morals when studying law, to learn the limits of the law.

There is one sense in which Holmes's analysis leaves substantial room for learning law from the good man, and another sense in which the bad man might be an unreliable guide to the content of the law in operation. While I read Holmes as characterizing the good man as finding the law irrelevant to his conduct, there is no suggestion in Holmes that the jails are loaded with good men whose consciences guided them to violate the law. While Holmes argued strenuously that the student of the law should make a strict intellectual separation between law and morality, Holmes also stated rather emphatically that morality and law are related when he wrote, "The law is the wit-

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<sup>22</sup> Holmes, *supra* note 1, at 459, 78 B.U. L. REV. at 700.



ness and external deposit of our moral life. Its history is the history of the moral development of the race."<sup>23</sup> The good man's views, although not influenced by the law, should in most cases coincide with the law since morality has had a strong influence on the development of the law. L & B thus err when they state that that "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."<sup>24</sup> Rather, given what Holmes said about the relationship between morality and law, it seems likely that he would have accepted the statement that L & B say he would have rejected. To Holmes, good people are likely to obey the law and people who disobey law are likely to be bad people, since the law is heavily influenced by morality. What saves Holmes from the charge that he equates law and morality is that, in his view, it is a happy coincidence that the law and the beliefs of the good man and the self-reliant man will not differ, but to understand law you must forget about morality and focus only upon the legal system's reaction to conduct.

The way in which the bad man's point of view, as described by Holmes, is rendered less than a perfectly reliable guide to the content of the law involves the fact that, in addition to the reaction of the courts, the bad man is likely to take into account the probability of detection when deciding whether to obey the law. Holmes defines law purely in terms of what courts do. There is no suggestion in *The Path of the Law* that Holmes would conclude that the bad man has discovered "law" when he decides to go forward with his chosen course of conduct because he can avoid detection even if he believes that if he were caught his conduct would be condemned by a court (either with a criminal conviction or civil judgment). I don't attempt an answer to the metaphysical question of whether a crime committed in the forest that no one but the criminal knows about is actually a crime or whether Holmes would include the probability of detection in his definition of law as prophecy. Rather, I mean only to point out that if the probability of detection is not included in the definition, then the bad man's conclusions are less reliable if the incentives created by the legal system to obey the law are not perfect. If the error is on the side of under-deterrence, then the bad man's point of view is ambiguous because he may conclude that conduct is "illegal" but undetectable. Even if Holmes was not attempting to answer any moral questions in *The Path of the Law*, not discussing whether the lawyer adopting the point of view of the bad man should take into account the probability of detection leaves the prospective lawyer with less than complete advice and the potential for a troubling moral dilemma.

I conclude where I began, with Holmes's description of the good man, and I note another apparent affinity between that description and Emerson's self-reliant man in an aspect of *The Path of the Law* that has startled me from the

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<sup>23</sup> *Id.* at 459, 78 B.U. L. REV. at 700.

<sup>24</sup> Levinson & Balkin, *supra* note 3, at 894.

first time I read Holmes's essay. There is no suggestion in *The Path of the Law* that there is any independent moral value in the act of obeying the law. The bad man obeys out of fear of consequences and the good man obeys only in the sense that the good man's behavior, motivated by conscience, happens to coincide with the dictates of the law as long as law is influenced sufficiently by morality. It is unsettling to imagine that Holmes's image of the good man did not include at least some deference to established legal norms, that Holmes did not believe that there was a moral duty to obey the law unless perhaps the particular law violated a countervailing moral duty. This conveys a decidedly negative view of the law. Yet Holmes insisted he was not using "the language of cynicism."<sup>25</sup> As I read *The Path of the Law*, Holmes believed that the good man's conscience would lead the good man to act in accordance with the requirements of the law because the primary influence on the content of the law is morality. This is not the language of cynicism. Perhaps, however, rather than attempt to infuse moral content into a metaphor that Holmes employed as a device to separate law from its moral roots, we should view Holmes's bad man metaphor in the pedagogical terms in which it was offered, as a useful teaching tool, no more and no less.

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<sup>25</sup> Holmes, *supra* note 1, at 459, 78 B.U. L. REV. at 700.