

# Bad for Good: Perspectives on Law and Force

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**Abstract** Typically, the ‘Bad Man’ whose role we have to assume according to O.W. Holmes in order to ‘know the law and nothing else’, is considered to be both morally impoverished and analytically deficient. This paper argues that, quite on the contrary, the Bad Man’s perspective is most useful in order to doctrinally explore a legal system and to cast light on the general relationship of law and force.

## 1 Introduction: Full House

I have to admit that ‘The Force of Law’ left me slightly bemused. Not as far as the argument or the style of its presentation are concerned, of course: Fred Schauer has written a truly remarkable book.

Much rather it was the multitude of different characters I came across, signifying distinct perspectives on the concept of law and its features, I found quite overwhelming, to say the least. There was the ‘Bad Man’, and his counterpart, the ‘Good Man’, of course; who is not, however, to be mistaken for the ‘Good Citizen’. There was the ‘Puzzled Man’, sometimes also referred to as the ‘Ignorant Man’ or the ‘Man who wishes to arrange his affairs’. And there were the ‘Moral Man’ and his contemporarily reshaped twin, the ‘Moral Person’. And as if this happy bunch of people, matched in number perhaps only by what the universes of Marvel and DC Comics have to offer in various masked vigilantes, was not enough, there were some of the most interesting tribes to be encountered as the ‘Society of Angels’ and the ‘Race of Devils’.

To be fair: I came across most, but not all, of these characters and social groups in ‘The Force of Law’. However, their multitude got me curious and led me to meet some more when mulling over the questions Fred so elegantly addressed. Not all of them were perfect strangers, of course. I had read Holmes’s ‘Path of the Law’ when I was a law student in the US and was thus familiar with his concept of the

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‘Bad Man’ and his brother the ‘Good Man’; just as I was familiar with Hart’s critique of the ‘Bad Man’ that gave birth to the ‘Puzzled’ or ‘Ignorant Man’. And some earlier attempts to walk in the ways of legal theory had introduced me to Kant’s ‘Race of Devils’. Still: The rest of the ‘happy bunch’, as I casually referred to them before, were new acquaintances. Or at least to me they were, as they knew each other, of course; being members of some kind of a ramified patchwork family with the ‘Bad Man’ as some kind of common ancestor.

As it happens with families, whether they are of the patchwork variety or not, the relationship of their members is not always without frictions. The same is the case with our clan. As, even setting aside the tribes referred to before, many of the characters listed above came to life, or, to phrase it more soberly: were developed, in the course of a wide ranging debate that originated in the effort to bring the Bad Man (or some version of him and what he stands for) to justice. The purpose of this contribution is somewhat different: What I will try to do is rather to attempt to *do* justice to ‘the Bad Man’.

## 2 Family Ties

In order to do that, I will at first try to bring at least some order into the kinship so described and to briefly introduce the family members, starting with the Bad Man himself who, as already indicated, starts to tread the ‘The Path of the Law’ by way of Holmes’s (1897, 459) famed statement that

[i]f 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.

More than six decades later it was Hart (1972 [1961], 39) who, discarding the Bad Man, suggested that

law [should] be equally if not more concerned with the “puzzled man” or “ignorant man” who is willing to do what is required, if he only can be told, what it is [... o]r with the “man who wishes to arrange his affairs” if only he can be told how to do it.

Not long since, this perspective has been complemented by Shapiro’s (2011, 70) conception of the ‘good citizen’ who

accept[s] that the duties imposed by the rules are separate and independent moral reasons to act.

Not complementing, much less complimenting, Hart’s view most recently Schauer (2015, 62) introduced the ‘moral man’, or rather: the ‘moral person’:

the person who acts for reasons other than self-interest but who does not need the motivations or prescriptions or instructions of the law to get her to do so.

We see: Even leaving angels and devils aside for the time being, this family tree is confusing as it is, or perhaps better: it is in need of further clarification as to how exactly these characters are related and which basic approaches they stand for.

Let us start by Hart's 'puzzled' or 'ignorant' man 'who wishes to arrange his affairs' as opposed to the Bad Man Holmes contrived. Hart (1972 [1961], 88), in dismantling the Austinian theory of law as coercive orders, created this character in order to emphasize the importance of what he called the 'internal point of view' of those who accept the normativity of a given rule as opposed to the external point of view, the view of 'those who reject [the] rules [of a given group] and are only concerned with them when and because they judge that 'unpleasant consequences are [...] to follow violation'. Simply put: According to Hart, the puzzled man follows the law as a matter of principle, because it is the law; the Bad Man would—if ever, only obey the law because of the threat of sanctions.

Hart's antithesis to Holmes's position proved to be exceptionally successful. To what great extent may be illustrated by the fact that even Dworkin (1986, 14) followed suit, criticizing Holmes's Bad Man as conceptually deficient, 'impoverished and defective' even, for ignoring questions about the internal character of legal argument.

Shapiro's (2011, 70) image of the 'good citizen' takes Hart's argument further; as the good citizen will not (only?) comply with the law because it is the law, but because she 'takes the obligations imposed by the law as providing a new moral reason to comply.'<sup>1</sup>

This is, of course, far from implausible. Quite on the contrary: Why of all normative systems should the law not 'provide [...] guidance for those who want to live up to the [...] obligations' the system imposes? (Shapiro 2000, 208). And why should the law in providing that guidance not embody or even promote public morality? After all, Holmes (1897, 459) himself emphasized that '[t]he law is the witness and the external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it tends to make *good citizens* and *good men*' (my emphasis).

Yet precisely because of that, and Schauer, not to mention his criticism from an empirical perspective (see Schauer 2015, 57–74),<sup>2</sup> admirably pointed that out, such an argument actually may prove too much: Focusing on law's normativity tends to eclipse that people may, and may even to a large extent, act on moral principles detached or at least independent from legal directives; that people indeed may be, and may act as, 'moral persons' (Schauer 2015, 62). Accepting this, however, means to accept the lack of a distinctive feature that would allow for isolating the impetus to follow the law specifically in those cases and as far as legal demands and demands of morality are aligned.

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<sup>1</sup>For a related concept of the 'good citizen' see Twining (1973, 281).

<sup>2</sup>An earlier version of this argument was offered by Kelsen (1961, 24–28) who pointed out that '[w]e do not know exactly what motive induce men to comply with the rules of law' (*id.* 24).

Therefore, in order ‘to know the law and nothing else’ (Holmes 1897, 459) it may indeed prove to be useful to strip our character of any normative standards of the sort; a view, it has to be added, Holmes was not the first to advance. About 100 years earlier it was, after all, Immanuel Kant (1887 [1797], 48) who stated in the ‘Metaphysics of Morals’ that,

[a] strict Right [...], is that which alone can be called wholly external [...]. Such Right is founded, no doubt, upon the consciousness of the Obligation of every individual according to the Law; but if it is to be pure as such, it neither may nor should refer to this consciousness as a motive by which to determine the free act of the Will. For this purpose, however, it founds upon the principle of the possibility of an external Compulsion, such as may co-exist with the freedom of every one according to universal Laws.

So, to speak with Kant, to find the ‘strict right’, ‘pure as such’, it seems the Bad Man’s perspective cannot casually be discarded; at least not in favor of his ‘puzzled’ relative or the ‘good citizen’ relying merely on the internalized normativity of a certain set of rules. After all, it cannot be doubted that Holmes was correct at least in this one point: ‘a bad man has as much reason as a good one for wishing to avoid an encounter with the public force’ (Holmes 1897, 459).

Of course, even if only allegorically, it seems to be quite a sinister picture Holmes paints, and oftentimes it was criticized for being just that; giving way, as one commentator stated, to Holmes’s desire ‘that lawyers should disconnect themselves from morality, to destroy their morality and faith’ (Miller 2005, 231); being ‘washed with cynical acid, and divorced from ethical values’ as Fuller (1966, 92–93) put it, depicting an individual, as Kennedy (1976, 1773) tells us, ‘concerned with law only as a means or an obstacle to the accomplishment of his antisocial ends.’

### 3 Breaking Bad

But perhaps the Bad Man is just misunderstood, as arguably some (or perhaps even many) men presumed to be bad are. Perhaps the Bad Man and the view of law he stands for are not as bad as it seems. To find out, the allegations thus outlined have to be addressed. A topic that luckily has attracted quite a lot of attention since the *Path* was published for the first time 120 years ago; most recently by Fred Schauer...

And it quite readily turns out: The Bad Man is not bad after all; which at second glance hardly comes as a surprise; he can’t be, precisely because he is stripped from any normative standards; precisely because he is ‘divorced from ethical values’ (Fuller 1966, 92–93) of any kind. Holmes (1897, 459) makes that very clear by contrasting him with the ‘good man’ who, quite consistently covering the puzzled man, the good citizen and the moral person, ‘finds [...] *reasons* for conduct, [either] *inside the law* or *outside* of it’ (my emphasis).

And indeed I have to admit that, at least when compared to the ‘puzzled man’ who only wants to get by and the zealous character of the ‘good citizen’, I never have been wholly unsympathetic to the Bad Man’s position. As the Bad Man, for better or worse, does not act on any of the reasons of the kind; which, however, makes him an *amoral*, not an *immoral* actor (Twining 1973, 281). The ‘good man’, on the other hand, indeed is a *moral* actor which, of course, makes the good man not a good person per se, judged by moral standards, but rather a person *acting* on normative *reasons* of various kinds,<sup>3</sup> while the Bad Man, to paraphrase the way Schauer (2015, 47) expressed it, is somebody who ‘plan[s] his live and his activities in the shadow of the law’. And while that is quite a shadow, it does not necessarily provide the conditions for mischief to thrive and to prosper: ‘[T]he ‘bad man’ is not a criminal’ (Fisch 2006, 1595); and looking through his eyes neither ‘make[s] us more effective counselors of evil’ (Hart 1951, 932), nor does it ‘destroy our morality and faith’ (Miller 2005, 231). As—even putting aside that he lacks ‘a moral compass’ (Beerman 1998, 941)—the ends he intends to accomplish needn’t be at all ‘antisocial’ (Kennedy 1976, 1773).

Still more, as it is question begging whether the Bad Man intends to accomplish certain ends at all, whether the Bad Man actually exists in his own right or whether he is just a shorthand version of an infinite multitude of different personae, inclined to ‘know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves’ (Holmes 1897, 457), which in an infinite process of subtraction, starting from ‘the bad man [a]s the lowest common denominator’ (Perry 2000, 172); ‘a cognitive rather than an affective device’ (Twining 1997, 202); a ‘heuristic’ (Rosenberg 1995, 46) that allows for a ‘disenchanted’ (Gordon 1997, 1014)<sup>4</sup> view on the law, to read its ‘tea leaves’ (Beerman 1998, 939), far from the limelight of normativity.

So ‘the economic or ‘bad man’s’ point of view’ (Soper 2005, 233) are not necessarily to be equated; as he may be more than just a ‘rational calculator’ (Luban 1997, 1571), while still being just that nevertheless.

‘[O]ur friend the bad man’ (Holmes 1897, 461) may rather be a ‘learned’ friend, a scholar,<sup>5</sup> fathoming the law’s reach and thus proving his ‘prudential point of view’, as Perry (2000, 165) labeled it.<sup>6</sup> His may be the perfect vantage point for the kind of doctrinal arguments that, introspectively analyzing and structuring legal rules, specifically trade under the name ‘dogmatic’ in the German-speaking jurisprudential realm (just see Dedek and Schermaier 2012, 364).<sup>7</sup> For it is, as

<sup>3</sup>According to this reading, the ‘good man’ is not (as Luban 1997, 1564 and 1572 argues) necessarily a ‘man of conscience’ (also see Fisch 2006, 1595).

<sup>4</sup>Also see Blank (2011, 641).

<sup>5</sup>Baird (2009, 740) similarly referred to the Bad Man as a ‘scientist’.

<sup>6</sup>Which is why Fuller’s (1966, 93) argument, that ‘it is a peculiar sort of bad man who is worried about judicial decrees and is indifferent to extra-legal legal penalties, who is concerned about a fine of two dollars but apparently not about the possible loss of friends and customers’ goes astray.

<sup>7</sup>For a more detailed analysis of ‘Rechtsdogmatik’ as a tool of legal analysis and the jurisprudential assumptions this approach rests on see Kirchhof et al. (2012).

Holmes (1897, 476) tells us, ‘this body of dogma or systematized prediction which we call the law’.

Such a reading seems all but far-fetched.<sup>8</sup> If it proves to be correct, the Bad Man’s view indeed tends and *intends* to unfold what Lon Fuller, even if with disparaging irony, ascribed to it: ‘[T]he law is that which concerns one who is concerned only with the law.’ (Fuller 1966, 93). And so, even if Douglas Baird may, at least from a certain normative perspective, be correct by stating that ‘[b]reaking a promise and then paying damages is not the same as keeping a promise in the first place’ (Baird 2009, 740); from the perspective of somebody ‘who is concerned only with the law’, it might just be.

Of course, some may object that if that should prove to be correct

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, [as] 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. (Beerman 1998, 944)

I respectfully disagree. Of course: a truly Bad Man would. Still, as I have tried to establish, Holmes’s Bad Man is far more curious than he is bad. And as Luban (1997, 1571) amply demonstrates, ‘there is no hint in *Path* or elsewhere that Holmes’s [...] Bad Man “who cares only for the material consequences” [...] would consider enforcement probabilities as well as enforcement outcomes.’

Sure: according to Holmes (1897, 457), ‘[t]he object of our study [...] is prediction, the prediction of the incidence of the public force through the instrumentality of the courts’. And yet the Bad Man raises the question ‘what a court would do if his conduct were litigated, [...] not how likely it is that his conduct will be litigated’ (Luban 1997, 1571). The predictions Holmes writes about in the *Path* are ‘predictions [...] generalized and reduced to a system’ (Holmes 1897, 458); ‘a body of dogma enclosed with definitive lines’ (Holmes 1897, 459). ‘This’, however, as Stephen Perry put it, ‘is what [...] law books are supposed to do’ (Perry 2000, 179).

Following this reading, we found ourselves quite a tame Bad Man (also see Luban 1997, 1581), a Bad Man who rather pretends than acts (also see Twining 1997, 218–220); or perhaps: we found *ourselves*, pretending to be bad men about to act; ourselves acting “as if”.

## 4 Angels and Demons

Still, whether the Bad Man thus tamed does indeed provide a useful analytic tool to ‘know the law and nothing else’ depends on whether or not the presupposition underlying this heuristic is indeed a valid one. Obviously therefore: if the Bad Man ‘cares only for the material consequences which [his knowledge of the law] enables

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<sup>8</sup>Even if it comes, as we shall see, at the price of perceiving Holmes in this regard to a lesser extent as a *realist* in the strict sense.

him to predict' (Holmes 1897, 459), the question as to the interrelation of law and coercion can no longer be avoided. Fortunately, Fred Schauer wrote a book on the topic.

Still, also focusing on law and coercion only from the angle of the specific problem at hand, it is plain to see, as Alschuler (1997, 368–369) among others demonstrated, that the Bad Man's position is particularly vulnerable to Hart's arguments against the latter being an essential element of the former.

So, does the Bad Man have any answers to Hart's questions as to the 'legality' of rules conferring the power to make trusts, wills, contracts, or laws? (Hart 1972 [1961], 26–48). Or more generally: does the Bad Man have any answer to the question whether laws not backed by (appropriate) sanctions, 'imperfect laws' (Austin 1832, 24–25) in the Austinian sense, are to be considered laws at all from his point of view? And if not, wasn't the Bad Man then rightfully discarded? After all, as Scott Shapiro, further developing Hart's arguments, extensively demonstrated, '[t]here is [overall] nothing unimaginable about a sanctionless legal system' (Shapiro 2011, 169). But then: What is the use of our Bad Man?

Sure enough: Such a sanctionless legal system may hardly be effectively established for a society of bad men in the first place; much rather it would presuppose a 'community of saints' (see Yankah 2008, 1234–1235) or maybe even a society of angels. But on the other hand: Sanctionless or not—would angels need laws in the first place? After all, legal theorists like Lon Fuller famously argued that 'in a society of Angels there would be no need for law.' (Fuller 1964, 55). Of course, he was not the first to do so: Already Madison famously stated that '[i]f men were angels, no government would be necessary' (Cooke 1961, 349).<sup>9</sup> And the idea has deeper roots still; as, for example, a rabbinic story shows, in which Moses convinces God to give the Torah to Israel rather than to the Angels who demanded to receive it themselves, as 'the angels do not need the law' (see Dershowitz 2000, 197).

But weren't the angels in the end right to make their claim? Indeed, it is perfectly comprehensible that they may want to have legal rules; they are, after all, as far as the Scripture is concerned not omniscient,<sup>10</sup> and thus in need of certain guidelines. Consistently, we may agree with Fuller (1964, 55) when he puts the above-quoted statements into perspective: Because

if, in order to discharge their celestial functions effectively, angels need "made" rules, rules brought into existence by some explicit decision, then they need law.

What they do not need, however, as Raz (1999, 159–160) would add about 10 years later, are means of coercion in order to ensure the obedience of the angelic community, as angels, also the rabbinic story referred to above assures us of this

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<sup>9</sup>The Federalist No. 51.

<sup>10</sup>See e.g. Matthew 24:36 (KJV): 'But of that day and hour knoweth no man, no, not the angels of heaven, but my Father only'.

(Dershowitz 2000, 197), lack the capacity of doing evil, of violating the law in the first place. But is this presumption actually valid?

Angels are, compared to humans, as St. Thomas Aquinas, who after all was attributed the sobriquet ‘Doctor Angelicus’, explains, rational ‘creatures, which are more perfect and thus nearer to god’, *perfectiores et Deo propinquiores* (Aquinas 1922, 94)<sup>11</sup>; but rational *creatures* still, lacking not only omniscience but evidently also infallibility; which characters as the devil and his fellow demons, fallen angels as they are—may well prove, united, as Aquinas explains, by their common wickedness, *ex communi nequitia*—‘to carry out their own wickedness’—*ad propriam nequitiam exequendam* (Aquinas 1922, 92).<sup>12</sup>

Taking that into account, not only does our Bad Man, may he be the most rational of all calculators, pale in comparison to one of those demons who seem to be out and about to eventually maximize the evil they may spread; also we may have to accept that, even from the opposite angle, also angels, being *rational* and *fallible* creatures, indeed may *need* laws.

This may mean, even if we have to mend his argument a little: Thomas’s revered teacher Aristotle may well have been right by stating that someone not subjected to the laws of a state must be either a ‘beast or a god’ (Aristotle 1895, 13). While *all* the remaining rational, but fallible creatures may indeed be in need *of* and subjected *to* the law; a subjection, however, which consistently may be achieved ‘even’, as Immanuel Kant in his essay on Perpetual Peace famously observed, ‘for a race of devils, if only they are intelligent.’ (Kant 1903 [1795], 153–154). That, however, so Kant continues, comes at the price to ‘know the mechanism of nature in order to use it on men, organizing the conflict of the hostile intentions present in a people in such a way that they must compel themselves to submit to coercive laws. *Thus* a state of peace is established in which laws have force.’

## 5 Law and Order

By following this path where legal and political theory merge, taking into account angels, devils, their fellow demons as well as ‘rational, but fallible creatures’ in general, I have, it has to be admitted, long since abandoned a conceptual in favor of a sociological view, or perhaps more correctly: an anthropological perspective, quite conservatively asking for the ‘why’ of the municipal state and its laws; which, to refer again to Thomas Aquinas, typically leads back to the point that ‘the notion of law contains two things; first that it is a rule of human acts [in any case not for gods and beasts, and effectively not for angels and demons]; secondly that it has coercive power’ (Aquinas 1915, 71)<sup>13</sup>; the latter, of course, being a necessary

<sup>11</sup>Summa Theologica I Q 109, 4.

<sup>12</sup>Summa Theologica I Q 109, 2.

<sup>13</sup>Summa Theologica IIa Q 96, 5.

consequence of the former which is at the very core the anthropological presupposition underlying the concept of law so understood. Whether these ‘exingencies of human nature’, as Green (1996, 1703) referred to them are; (or as Shapiro (2011, 173–174) put it, ‘the problem of bad character’ is) based on experience (also see Hart 1972 [1961], 189) or rather, as Kant supposes, in reason, may extensively be discussed. At this point, however, it may suffice that it is quite reasonable to trust experience on that matter; making, in any case, the Bad Man quite a plausible poster boy for this perspective.

We find the locus classicus of this argument, of course, not in the writings of Thomas Aquinas or Kant but in those of Thomas Hobbes who famously argued that ‘without human law all things would be common, and this community cause of encroachment, envy, slaughter, and continual war of one upon another’, and that in order for ‘any laws [to] secure one man from another [and thus in order to secure peace, there is a need for] laws living and armed’ (Hobbes 1971, 59). Thus, ‘where there is no coercive power erected [...] there is no Common-wealth’ (Hobbes 2010 [1651], 88). This presupposition, and its consequence: to deprive men from their rightfully employed capacity to arbitrarily use force in realizing their aims, has been emphasized and reemphasized more often than may be counted even by the most diligent scholar.

Still, the way force and peace supplement one another in this perspective (see Bobbio 1965, 326) has always been quite fascinating to me. ‘Force’, as Kelsen (1961 [1945], 21) observed, is employed to prevent the employment of force in society; a phenomenon asking, as it has prominently, and oftentimes, been held for a *monopoly* of force (just see von Jhering 1877, 319 or Weber 2008, 6). ‘The peace of the law’, so understood, to quote Kelsen (1961 [1945], 22) again, is ‘a condition of monopoly of force, a force monopoly of the community’ which uses this monopoly ‘to bring about the desired behavior of [its members] by the enactment of [...] measures of coercion’ (Kelsen 1961 [1945], 18).

And yet, even if we agreed to accept this as a plausible answer as to how and why force makes its entrance to the law, we are, of course, far from inferring just from this, that definitions like von Jhering’s (1877, 318) who saw ‘law as the embodiment of coercive norms in a given state’ (my translation) are indeed sufficient; such a perspective, as Schauer admits, ‘is simply wrong’ (Schauer 2015, 167). Of course, on the other hand, no one would dispute, or so I assume, that empirically, and even more so in the modern regulatory state, laws in many (quantitatively perhaps even in most) cases are indeed coercive; backed by the community’s monopoly of force. But that arguably does not suffice in order to perceive, as Kelsen among others does, law as a whole as a coercive order (Kelsen 1961 [1945], 18). After all, as Hart put it, ‘the legal system is surely not to be [...] simply identified with compulsion’ (Hart 1958, 603).

## 6 Conclusion: Bad Man Returns

And so it seems, rather than making progress over the last pages, I have been running circles with the Bad Man on my back; and that I should rather drop him than to continue this rather fruitless endeavor: If law is not necessarily coercive, the Bad Man who is concerned with ‘the material consequences his knowledge enables him to predict’ (Holmes 1897, 459) seems to have a very limited understanding of his subject; thus diverging quite significantly from Holmes’s attribution he would actually ‘know the law’.

Still: As even bad men deserve second, perhaps even third, chances, I will, by way of a conclusion, give it one last try, changing the perspective and asking the question anew: what if, for the Bad Man to be a useful analytical tool, it is not important whether laws *eo ipso* are coercive? What if for law to be a coercive order it is unnecessary to *identify* it with compulsion?

Of Course, Raz (1972, 834–835) is correct, just as Hart (1972 [1961], 26–48) was before him: large parts of the law are not concerned with proscribing certain actions: the laws of contracts and wills rather enable people to successfully arrange their lives in society than to coercively interfere with their designs. But that does not say anything about, much less *against*, the coercive character of the legal system as such: If the Bad Man enters into a contract with another, no matter if bad or good, Holmes explicitly states ‘[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’ (Holmes 1897, 462). A while ago I submitted that for somebody ‘who is concerned only with the law’ this ‘focus on the material consequences’ (Holmes 1897, 459) may doctrinally well be plausible. But possibly it goes well beyond grasping the isolated and immediate consequences of a given action or omission.

Think about the ‘knowledge’ Holmes expects our Bad Man to have in order to ‘predict [...] the material consequences’ of his deeds in the case at hand. He has to accept and to understand the legal concept of a contract as well as the conventional structures the law provides in order to create a contractual obligation in the first place. He has to accept and to understand that a judge is endowed with the capacity to adjudicate any quarrel arising out of this contractual obligation; as well as he has to accept and to understand that the judgement putting an end to this quarrel may indeed be determined not by the contractual obligation so created by the employment of certain conventional structures as provided by law but by other legal rules created by legislative or regulatory bodies etc. etc.

Only with this knowledge the endeavors of our Bad Man in predicting ‘the material consequences’ of his actions will prove to be successful. This knowledge, however, not only makes our Bad Man quite a formidable doctrinal scholar. In order to obtain it, he is also required to adhere in a quite well-behaved manner to the interplay of primary and secondary rules as described by Hart (1961, 77–96).

‘Puzzled’ as he thus may be, he still is driven by a sting, brought about by the interdependence of those single elements he recognizes as part of the legal system; an interdependence on which the force of the law is built. And so, ‘our [learned]

friend the bad man' makes an interesting observation: that law, in both meanings of the word, sanctions its rules; that in doing so, law is indeed an *organization* of force (Kelsen 1961 [1945], 21); that the legal system as a whole is to be perceived as a coercive order backed by the community's monopoly of force (see Lucas 1967 [1966], 56–62), even if its singular parts are not necessarily backed by that force (also see Rill 2011, 8); eventually that force, again in both meanings of the phrase, indeed serves as *ultima ratio regum*.

We may conclude against this backdrop: If we accept the Bad Man's capacity to grasp the legal system to such an extent, we sure should make amends. Because then, the Bad Man would indeed live up to what Dickens wrote in 'The old curiosity Shop': '[I]f there were no bad people, there would be no good lawyers' (Dickens 1850 [1841], 288).

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