

# LAW IN THE EYES OF A BAD MAN: A CRITICAL REFLECTION ON OLIVER HOLMES'S POSITIVIST THEORY OF LAW

By

**Isaac Chidi Igwe, PhD**  
Department of Philosophy  
Nnamdi Azikiwe University, Awka  
ic.igwe@unizik.edu.ng

## **Abstract**

This study is a reflection on Oliver Wendell Holmes's positivist theory of law, with a specific focus on his thesis of law in the eyes of a Bad Man. Accordingly, the paper seeks to know what Holmes set out to achieve in his journey into Jurisprudence. It argues that Holmes' interest is how to give a new interpretation of law along the positivist's perspective only, devoid of moral bottleneck. In this sense, he envisages a notion of law that separates law from morals. This he anchors on the principles of "Predictability" and "Separability". When law is separated from morals, what emerges as Holmes' new orientation of law is its results and efforts. Understood as such, the paper further reflects on what he holds ought to be the motive for the obedience and study of the law vis-à-vis the material cost of disobedience and his attempts to expunge moral content from legal prescriptions. In deploring the method of analysis, this paper observes that although Holmes may appear to have rejected a parallel moral consideration in his approach to law, he nonetheless admits in disguise that law by its very nature, takes care of morals in form of aggregate morality. The paper challenges this disguised moral admission which was smuggled in to appease the legal moralism proponents. Decisively, while passively conceding that there is a distinction of substance between the spheres of law and morality, the study defends the Good Man's approach to law which stems from the universality and internal cohesion principles, and furthermore submits that there is an internal measuring parameter with which to ascertain when manmade laws wander away from idealities.

**Keywords:** Law, Badman, Goodman, Duty/Right and Material Consequence

## **Introduction**

Justice Oliver Wendell Holmes could be classified as belonging to the American legal positivism. As a supreme court Justice in America, he contributed immensely to the development of the American legal system. As a matter of fact, the revolution in modern contract theory owes a great deal to Holmes' input, most especially his view on legal duty and right. He believes in the practicability of law. Accordingly, when one studies law, one should approach it as a profession rather than as a mystery. The major aim in doing this according to him, is to prepare the student to be able to appear before a judge, and to gather enough knowledge which will be used in advising a client with a view to keeping them out of court.<sup>1</sup> As a pragmatist, he believes in the constancy of the changing universe, hence, law itself ought to be made to align with this fluxibility of human experience. To this end, his legal thinking can safely be classified along *constructivity* and *revolutionary* trajectory.

In what could appear like the Hobbesian conception of man, Holmes, views man as a self-interested and self-seeking being. Man puts his interest towering above that of his neighbours. Along the same line, Holmes conceives man as a pain-avoiding being, who tries all he can to avoid any action or experience which causes him pains or discomfort. Consequently, when man weighs between two alternative actions, he first and foremost considers the one which will bring him less pain. Speaking about Holmes, Francis Biddle writes, that, by this self-centered approach, Holmes

thought that in the last analysis, man rightly preferred his own interest to that of his neighbor, and did not believe in the Christian precept to love thy neighbor as thyself, which was the test of the meddling missionary: if men thought more about their jobs and less about...their neighbours they would accomplish more in the world.<sup>2</sup>

Holmes feels that there has been a kind of confusion in the previous conception of law. This confusion according to him is the smuggling of moral contents and metaphysical principles into law by the moralists and the theologians. Therefore, he sets out to strike a difference between them. With this knowledge in mind, this paper reflects on these issues which Holmes points out as the problem with the moralists' argument with regard to law. It further seeks to underscore Holmes's notion of the law and its interest. Holmes in his bid to clarify the meaning of the law, presents us with the *bad man's* approach. This paper examines Holmes' positivism, with a specific focus on his theory of the *bad man*.

Therefore, since the whole discussion of Holmes is anchored on law and bad man's approach, the paper is segmented into three parts. In the first part, it discusses briefly the dichotomy between *legal* positivists and naturalists conception of law, vis-a-vis law and morals. Subsequently, it further looks at Holmes responses to the moral consideration with regard to law. In the second segment, the paper examines the Holmesian *bad man* and his attitude towards law proper. Under this, the study pries into the bad man's attitude towards contract, tort and punitive laws.

In the third segment, an attempt is further made to reinterpret what Holmes really means as regard the place of morals in law contrary to what many scholars perceive of him. Moving further, it concludes by arguing that the Holmesian bad man's approach to the law, if sustained, would go against the universality principle and as such, endangers the society should such attitude to law be universalized.

### **Law and Morals**

Law as a body of rules which governs human conduct, has over time attracted a plethora of controversies regarding its nature, origin and basis for its validity. At the centre of these controversies is the question of what should serve as the basic norm (Grundnorm) of the law. In addition to this, is whether there is a relationship between law and morals. In addressing the above mentioned challenges, there are two levels of approaches. The first is from the legal positivist's perspective and the second is from the naturalist's perspective. For the former, the legal positivism as it is usually called, believes that law has procedure which other wise defines the legal system. Consequently, if a law follows through the legal procedures before becoming law, it automatically has the effect of law. John Austin, Jeremy Bentham, Hans Kelsen, etc., agree with this view although with

varying degree in their expressions. Austin for instance, views law as an order backed by sanctions, as a system of rules with procedures. Along this line, legal positivism or legal formalism sustains the belief in the ability of a law to undergo the law making procedures in order to have its validity.

Accordingly, as to whether there is an affinity between law and morals, they maintain that law is morally neutral. It is along this line that H. L. A Hart, talks about the nature of law based on certain facts of the human condition and system of rules<sup>3</sup>. As observed by Andrei Marmor, Hart models his theory of law along the line of descriptive and morally neutral thinking. He reasons that a philosophical account of the nature of law ought to strive to avoid any form of morality. It should present the nature of law that is applicable in all perspectives<sup>4</sup>. For Kelsen, the main challenges of the theory of law revolves around how to provide an explanation of legality and legal normativity devoid of jurisprudential reductionism. That is, a legal theory cannot be reduced to other domain He then views law as a system of norms which is arranged hierarchically although with interconnectivity of relationships. Each norm depends on the authority of another higher norm, till it gets to the basic norm (grundnorm) which does not derive its validity from another norm<sup>5</sup>. Therefore, Kelsen seeks to establish what he calls the *pure theory of law* which will end up removing all traces of metaphysical elements from law.

On the other hand, the Naturalists/moralists argue: since the central aim of law is to achieve justice, how do humans know when there is a miscarriage/perversion of justice? On the ground of this, they posit that there are principles of law that are stronger, towering high and above any state given law. As such, whenever any law conflicts with these principles, such law becomes devoid of validity. These principles they believe are the laws of reason/natural law which guided man before the emergence of organized state. Being that law is just a means whose end is justice, the moralists insist that there ought to be a certain principle which could be used as standard with which to weigh law, so as to know when it actually attains its end. Accordingly, they further contend that there is a necessary connection between law and morality. In other words, for law to be valid, it must have gone through moral scrutiny and whatever lacks moral legitimacy lacks legal validity. Beyleveld and Brownsword write:

...the concept of legal validity is a concept of moral legitimacy. In relation to law, this entails that rules lack legal validity, lack status as laws insofar as they are morally illegitimate in some specified way or ways. The moral values which are to be employed in making such a judgment and the form in which congruence with them constitutes legal validity...<sup>6</sup>

Therefore, an instructive point in the discussion between the legal positivists and moralists is that both of them agree that the law is meant for the orderliness of the society, and as an instrument for justice. However, their point of departure remains the criteria for the validity of law. In search of this validity, Holmes' response calls for further discussion.

### **Holmes' Concern about Law**

Holmes, as one of the American legal positivists, seeks a proper calibration of the law.

Just like John Austin, Hans Kelsen, Jeremy Bentham and a host of others, he believes that there is need to expunge from law, all forms of moral contents which often dilute its applicability and effectiveness. He believes that law has many other attributes. In this sense, it is an expression of life and the formation of community desire. As captured by Biddle, law for Holmes is

the act of a legislature or the decree of a sovereign, the intuition or prejudice of a Judge, written into an opinion...all laws rest on the exercise of force for its fulfillment<sup>7</sup>

Furthermore, for Holmes, the substance of the law corresponds with what is convenient. This involves constant change and there is no room for eternal order. By this view, he directly rejects the opposing view which holds that men do not make laws rather, they discover them. In his work, *The Path of the Law*, he reasons that it is a confusion of some sort to try to equate rights of man in moral sense as the same with the right of man in the sense of the constitution and law.<sup>8</sup> Thus, Holmes reasons that there is need to demarcate/separate law from morals. According to him, the confusion between law and morals is more manifest when we look into the law of contract for instance. In his view, what is known as primary rights and duties are laced with mystical significance beyond explanation in clear and distinct lines. Furthermore, he reasons that the duty to restrict a contract to common law is to make it predictable. That is, on a prediction that when one fails to obey a contract which one willingly enters into, one must pay corresponding damages as deemed fit by the law.

On the other hand, he continues; concerning law of tort, when one commits a tort, one is liable to pay a sort of compensatory sum.<sup>9</sup> Although according to him, the above postulate stinks in the nostrils of those who feel that morality should play a major role in law, that it remains the most viable option for law to be effective. Holmes, wishes that the issue of morals in law be confiscated and burnt if possible, in the order of David Hume's stance on metaphysics. Hence, he posits:

For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncoloured by anything outside the law.<sup>10</sup>

He argues for the need for the law to be predicable. Humans' interest towards the law should be with a view to predicting; discovering some regularity, rational explanation and some principles of growth which is laid down.<sup>11</sup> Accompanying his *predictability* principles, is another principle which he calls the *separability* principle. Legal subject, he believes, has two goals, to calibrate legal subject philosophically in order to make it all embracing and avoid tautology among interlocking concepts; the second aspect concerns the need for legal arrangement. According to Edward White, he reasons that;

a well arranged body of the law would not only train the mind of the student to a sound legal habit of thought, it would, by eliminating the necessity resorting discrete treatises with overlapping content, remove obstacles from (the) path of persons seeking to learn legal subjects.<sup>12</sup>

The essence of the call for arrangement according to Holmes, is to understand what is

duty and what is right. Accordingly, he believes that duties precede rights. When a law creates right directly, it in turn, imposes a duty on everybody. Consequently, the interest of Holmes here is to advance a legal subject which will be classified along different duties.<sup>13</sup>

By implication, he talks about duties originating from a sovereign power to another sovereign power. Within this category, he refers to international laws. On the other hand, he talks about duties without corresponding right. That is, duties from subject to the sovereign, for instance, on taxation. Furthermore, other duties include:

Duties from the entire world to all the world. (Civil tort actions such as assault and battery, libel, slander, false imprisonment and the like): and duties of all the world to persons in certain particular positions or relations (property owner-ship).<sup>14</sup>

Yet, one other duty which he emphasizes is the duty emanating from contract. In this case, he talks about the need for third party's noninterference in contractual relations. For him, parties for contract enjoy ownership rights and as such, any attempt for a third party to interfere will be actionable. The whole world owes a duty not to interfere with stipulates of a contract. In his words:

a legal duty so called is nothing but a prediction that if a man does or omits certain things, he will be made to suffer in this or that way by Judgment of the court: and so of a legal right.<sup>15</sup>

As earlier observed, Holmes' objective in drawing the difference between law and moral has a certain end. This end is that of learning and understanding the law. Hence, he believes that for one to master the law, one must approach it as a business which understanding will limit one from dogma. When one understands the law with such knowledge, one can predict the law not as one who adduces reason for one's conduct (the good man) but as one who is self-interested (the bad man).

### **Law and the Bad Man**

Consequent upon the preceding discussion, Holmes' entry into jurisprudence is aimed at separating law from all other free floating doctrines of law. He argues that after this is done, it will now be safe for him to institute his own legal theory. According to him, when one asks the question what constitutes the law, often times, answers such as:

it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not which may or may not coincide with decision,<sup>16</sup>

are given. Holmes disagrees with the foregoing notions of the law. Thus, Holmes is convinced that he has a better notion of what law is. He calls the attention of all to accompany him while he reveals what the law is and whose mouth the definition of law is a finality. Surprisingly enough, Holmes leads his audience to someone who does not listen to conscience but rather, one who considers cost and material benefit of the law before choosing the course of obedience. According to him,

but if we take the view of our friend the bad man we shall find that he does not care two straws the axioms or deductions but that he does want to know what the Massachusetts or English courts are

likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law.<sup>17</sup>

It is very clear that Holmes does not only reveal the mind of the bad man towards what law is but also, he concurs with the bad man by adopting it as equally his own view of the law. Holmes' interest is how to help lawyers, Jurists and academicians in viewing the law not as the good man/reasonable man who finds internal reasons for his behavior but rather, as a bad man who interprets the law in its material consequences. The bad man's major interest is how to quickly predict what the ruling of the court would be in a particular case. In his eyes, morality or Justice only exists within or intuitively. Holmes recommends that laws should be viewed as the bad man would have it viewed, not as one who is mindful of the internal order and universal connectivity of all humans, not as one who understands the spirit of a particular law, nor as a morally driven good man, who can justify the motive for his action. But as one who is only self-interested.

The interest of the bad man for obeying or breaking the law is for gains or losses as the case may be. He first considers the consequences of breaking a law in terms of cost benefit analysis of what the court will do to him. In other words, he obeys the law only to avoid material loss, and when he feels it convenient to break it, he does that believing that the action of the court would not be harsh on him. The bad man looks at the law with a view to finding what is stipulated as crime even if such thing is morally reprehensible in the eyes of the good man. For instance, the bad man can afford to break traffic light if he observes that nobody is watching him. He caresless whether the action will affect his fellow road user, or whether such action conflicts with the dictate of right reason or not.

Now, what does duty mean to the bad man? Holmes answers: it is mainly and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money.<sup>18</sup>

The picture which Holmes seems to paint of the bad man is that whether an action is praise-worthy or blame-worthy, in the eyes of the law, what matters is the monetary sanctions placed on such action. In other words, as concerning the rightness or wrongness of an action, neither of them matters. In so far he can offset the given consequences of the court's demand; the bad man gives no damn for any other consideration.

### **The Implication of Holmes's Bad Man on Laws**

At this juncture, it is pertinent we examine the implication of such attitudinal stance of the bad man towards contract, tort and punitive laws.

If you want to know the law and nothing else, Holmes had said , you must look only for its material consequences, which you can predict like a “bad man” who cares only for results not like a good one, who finds his reason for conduct in the vaquer sanction of his conscience.<sup>19</sup>

The bad man considers material cost for breaking the law. In the same vein, he studies the law with a view to understanding or predicting the material implication of it. In contradistinction to such motive, the good man goes beyond what the law prescribes to

the level of listening to his conscience. In other words, taking conscience to be the arbiter of right or wrong actions is a disposition which flows from moral consideration. A good man in the view of Holmes is one who relies on his instinct and reason to do certain things. He does it not because it will be illegal to do the contrary but simply because it is the right thing to do. Accordingly, he does not look at the penalty which he will pay for violating the law; rather he focuses on the right and wrongness of an action. He does not mind disobeying an unjust law and face the legal consequences. However, for the bad man moral consideration does not exist in his thinking.

### **Contract**

In the light of the foregoing, one would ask: what are the implications of such mindset towards the institution of promise keeping (contract), using the bad man's viewing lens? For instance, since the bad man cares-less about the rightness or morality of an action, it follows that he would not care a dime as to whether or not he should honour a promise freely made. This means that he can afford to break a contract which he willingly enters into whenever he feels that breaking it would be more advantageous than fulfilling it. This, if sustained, will run contrary to the common belief that an individual is duty bound to fulfill a promise, and in the long will ruin trust and promise-keeping institutions.

In like manner, this backdrop compels someone like Michael Dorf to warn that it is capable of breeding a culture of impunity and disrespect to law. Thus, he reasons that this theory appears to encourage the public to act like the bad man, who understands law as imposing an obligation not to get caught, whereas a good man encourages individuals to uphold an obligation to custom to a norm.<sup>20</sup> Arising from this, unlike the bad man, in the good man, there is something inherently despicable when one decides not to keep one's promises. By the good man's action, he wishes that such should serve as a principle governing institution of promise keeping, and also as legal principle governing contract. However, according to Holmes, such attitude of the good man, will amount to confusing legal issues for moral issues. On that ground, Holmes invites his audience to view contract with the mindset of a bad man. The case of contract for a bad man only provides an option whether to obey the terms of the contract or breach it and pay. This could be interpreted as saying that one who makes a promise in time of contractual agreement is not bound by any principle to obey such promise. In other words, he can decide not to adhere to its terms, and in effect, he pays damages for defaulting and nothing more. In a simple form, it simply means that the only obligation which a bad man has towards a contract is just liability to pay damages in effect of its breach. Consequently, this has led to the view observed by Charles Goetz and Robert Scott concerning the modern contract law. In this view, Jimenez writes that:

the modern law of contract damages is based on the premise that contractual obligation is not necessary an obligation to perform but rather an obligation to chose between performance and compensatory damages.<sup>21</sup>

Therefore, in a way of recapitulation and emphasis, Holmes believes that the confusion of legal and moral ideas is more manifest when one comes to the law of contract. He feels that the so called primary duties and rights are laced with mystical colouration beyond

practical explanation. Hence, he thinks that the duty to keep contract at common law simply means a predication that you must pay damages if you do not keep it and nothing more.

### **Tort**

Tort, in itself, is a wrongdoing perpetrated by one against another. As a result of this wrongdoing, the injured decides to take a legal action seeking for remedy from the other party. It is a form of civil wrong as against criminal wrong, that is, one suffering loss as a result of another's action. It is often between plaintiffs versus a defendant. In jurisprudence, it has to do with the questions of right versus duties. In the eyes of a bad man, he approaches the law seeking how to avert or evade the punishment of a court in a case of being found wanting by tort. In other words, he will not consider the rightness or otherwise of an action by relying on other consideration except what the law would say. Duty for him simply means; if he does certain things he is liable to disagreeable consequences in form of severe punishment/imprisonment or being compelled to pay some monetary compensation.<sup>22</sup> In other words, the same rule that applies in a contract equally applies to tort. Put differently, Holmes argues that humans should jettison internal consideration which has conscience as its final judge. Only by doing this, Holmes feels, will duties be properly understood. In both contract and tort laws, the bad man's view upholds that humans hold to one another the same external consideration. He thinks that the duty imposed on humans by law is to pay compensation in the case whereby human duty to one another is breached. In essence, what Holmes' theory implies is that law is not the principle of justice. Rather, law is all about prophecies of what the court will say in practical terms, no more, no less.

In this sense, it is understood from material sanction perspective. What Holmes repeatedly defends is that it is this material attachment that motivates the bad man to eschew vices, not ethical principle whose enforcement is predicted on vaguer sanction of conscience.

### **Punitive Damage**

Punitive damage is meant for deterrence and thus serves as punishment against present and future offenders. But in the perspective of the bad man, he looks at the law with a view to discovering loopholes via which he can predict with far degree of accuracy how a court would rule. This, he believes would provide him with external guidance regarding appropriate actions and precautions to take. For Holmes, the bad man's understanding and perception of the law is not in terms of right or wrong statements. Rather, what is of utmost concern for him is the material penalties which such knowledge enables him to predict. He does not obey the law just for him to be seen as good citizen. He obeys the law to avert punishment and whenever he feels it will be advantageous for him, he breaks it. Another way of saying the same thing is that the bad man's concern when confronted with illegal action is whether he will be caught or not. In the face of a crime for instance, he becomes scared of being sighted and reported to the law enforcers. And, in the event whereby he predicts rightly of not being caught by law enforcement agents, he proceeds to embark on the illegal act. In fact, in all his dealings, he keeps predicting and weighing the consequences.

If arrested, he is worried about the chance of being charged with an offence, and wants to know about the prosecutor who may prosecute him...and he also wants to know the consequences attached to each of these events. He also wants to know whether the penalty will be prison term or monetary fine. He will want to know the warder in charge of his prison, the guards who will oversee his activities, and the other prisoners who he may be locked up with and so on and on and on.<sup>23</sup>

At every stage of his action, he is concerned with the probability of a cost. He moves to act out of fear of external sanction. He can only behave justly out of fear of external condemnation unlike the good man who acts for duties' sake.

### **Re-reading Holmes from the other Perspectives**

This segment is aimed at reinterpreting some misconception about Holmes' theory, most especially his view on morality. It is a truism that Holmes set out to dispel confusion between law and morals. In that regard, he says a bad man careless for ethical prescription or moral codes since they have no back-up force for their execution. And to that effect, one who does not care about the ethical rule which one's neighbour practices, will do all that is within his power to "avoid being made to pay money, and will want to keep out of jail if he can".<sup>24</sup> It is equally a truism that Holmes explicitly stated his reason for addressing the difference which lies between law and morals. The sole reason he says, is for the learning understanding of the law.<sup>24</sup> Therefore, if the above claims are through, it will be a falsity as expressed among the critics of Holmes that his stance is completely against moral validity in the question of law.

To be sure, Holmes's venture into jurisprudence is meant to make one understand what constitutes the law. As such, law for him is the reflection of man's life on earth and the story of the experience of his race. This is what he exactly means when he says that:

the law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, inspite of popular jests, tends to make good citizens and good man.<sup>25</sup>

Rather than the view that Holmes is against moral consideration (or like Hume would want books on morality destroyed), what Holmes seeks for, is how to uphold the state given law as supreme over any other source of law. As one of the pioneers of American positivism, what he means to condemn is "the suggestion that there is a higher law giving power than the state".<sup>26</sup> His major argument against moral theories is that they cannot be enforced. The chief difference between Holmes's legal positivism and John Austin's is that, while Austin simply conceives law as a command of the sovereign, Holmes argues that such theory is deficient. Such rejection is based on the fact that it is not enforceable. Hence,

he then stresses the enforcement dimension of law, concluding that it was doubted whether law...possessed any other common attribute than of being enforced by the procedure of the courts, and therefore of political importance to lawyers.<sup>27</sup>

He contends that it is not the wish of the sovereign that makes law law, although such

could include the sources of law. What makes law; he continues, is the will of the Judge. Judges he believes, have motives for their decisions. They are more interested in making the law predictable. What Holmes's theory succeeds in doing is the transference of law from the whims and caprices of the sovereign to judicial enforcement. In other words, rather than speaking of law as will of the sovereign, it is better conceived as prophecies of the court and nothing more.

It is deducible from the foregoing discussion that Holmes's major aim is to strengthen the positive laws which are practical and enforceable contrary to moral laws whose execution is left for individual conscience. In other words, in the real sense of reading Holmes, he is not against morally informing law. In fact, he understands very well that the validity of law itself, derives its onus on public morality. On the contrary,

...the now widely accepted view that Holmes's bad man theory of law stands for the principle that lawyers, judges and law makers should not concern themselves at all with matters of morality when advising clients, interpreting statute or enacting new legislation<sup>28</sup>

amounts to a misconception of what Holmes really intends. In the thinking of Holmes, the law is not expected to go against the dictate of moral principles, and in a situation where such arises, the people will be obliged to revolt against it. Although he realizes that

Simple and extreme cases can be put of imaginable laws which the status-making power would not dare to enact even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight: and that gives some plausibility to the proposition that law, if not a part of morality, is limited by it.<sup>29</sup>

This citation by Holmes debunks all other previously quoted statement of him as not accepting moral consideration in the approach to law. In fact, what he is saying is that since the law emanates from the community's collective morality, there should not be any other moral consideration outside the recognized law of the state. Furthermore, he believes that the state given-law has already taken care of all moral considerations and, in an area where the law defaults in recognising public morality, the community/people reserve the right to revolt against such law. Holmes makes an allusion to the view of a German professor, Agassiz, who once said that "a German populations would rise if you added two cents to the price of a glass of beer".<sup>30</sup> Under this situation, any law against it would be void not because the former was wrong but because it is not enforced. Holmes insists that the law is the witness and external deposit of our moral life. Indeed, what Holmes finds repugnant to practical thinking is the infusion of morality into positive laws. He holds the view that the law, when it was first promulgated, stems from moral dictates. In other words, norms, culture and tradition e.t.c., combine to form what is conceived as law. And as such, the law by itself is an external deposit of the community's aggregate morality. Hence, it is needless referring to any other moral sentiment in the face of the legal precepts. In some sense, this same law is limited by public morality. This is the reason Holmes's bad man has his interest only in the law made by the state reasoning that it is the best law on hand owing to its predictability and enforceability.

## Conclusion

In spite of this paper's efforts in trying to shield Justice Holmes from further deadly attacks of the moralists and naturalists alike, his external view of the law makes it difficult to completely escape the hamers. Some have accused him of being antagonistic to the good man's approach to law which by itself, reveals Holmes's own moral challenge. Therefore, his externalist interpretation of law raises a worrisome concern. Should we not seek the law with the attitude of the good man who understands that by one's action, one automatically wishes others do same, and should others behave as the good man would do, it becomes a general norm by which an orderly society is organized. In other words, a good man situates his reason for obeying the law on the principles of universality and internal cohesion, which engender respect, peace and social tranquility. To that end, the study insists that the question of having an internal view of law cannot be wished away as Holmes had tried doing. Man made laws, over time, have shown some irregularities with the natural order, hence makes it a necessity that there be some measuring parameter to know when law wanders away. This measuring parameter cannot be left at the disposal of individualistic interpretation, neither should obedience to the law be made a merchandise affair, nor should the principle of convenience be allowed to dictate the fidelity to law. Inasmuch as this research believes that state given laws need to be strengthened with total adherence so as to create a society of constitutionalism, it is equally our position that in order to attain justice, there are some underlying principles, which are intandem with natural order of existence, which ought be made the navigating compass for positive laws, in the absence of which the society falls short of its ideals.

## Endnotes

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26. Holmes, *op.cit.*, p. 6
27. Biddle, *op.cit.*, p 44
28. White, *op.cit.*, p.119
29. Jimenez, *op.cit.*, p. 2078
30. Holmes, *op.cit.*, p. 8