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THE “BAD MAN” GOES TO WASHINGTON: THE EFFECT OF POLITICAL INFLUENCE ON CORPORATE DUTY

*Jill E. Fisch**

INTRODUCTION

The Holmesian “bad man” figure has generated extensive commentary.¹ Much of this commentary has been critical—berating Oliver Wendell Holmes for his consequentialist approach to the law and his implication that legal rules impart no normative content to conduct apart from the costs that they impose.² Some scholars have argued flatly that Holmes was wrong, while others have attempted to rework the bad man into a more sympathetic creature.

The critics’ central concern is Holmes’s rejection of an independent duty to obey the law based on moral or ethical principles. Scholars portray the bad man as exploiting the legal system for his own selfish ends. Ethics scholars in particular have resisted the implications of Holmes’s approach for the role of the lawyer, claiming it inappropriately justifies aggressive representation that stretches the limits of the law and conflicts with its spirit. Theorists question whether a set of rules can reasonably be called a legal system if it fails to create obligations to obey and instead merely sets costs or penalties for noncompliance.³

Perhaps somewhat striking is the absence of the bad man from academic commentary in corporate law. Although corporations and their executives

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1. The bad man figure appears in Oliver Wendell Holmes, *The Path of the Law*, 110 Harv. L. Rev. 991, 993 (1997). The figure and Holmes’s essay have been the subject of numerous articles, books, and symposia. See, e.g., *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (Steven J. Burton ed., 2000) [hereinafter *The Path of the Law and Its Influence*]; Symposium, *The Path of the Law 100 Years Later: Holmes’s Influence on Modern Jurisprudence*, 63 Brook. L. Rev. 1 (1997); Symposium, *The Path of the Law After One Hundred Years*, 110 Harv. L. Rev. 989 (1997); Symposium, *The Path of the Law Today*, 78 B.U. L. Rev. 691 (1998).

2. See, e.g., David J. Seipp, *Holmes’s Path*, 77 B.U. L. Rev. 515, 555-57 (1997) (describing various academic reactions to the “bad man”).

3. See Abner S. Greene, *Against Obligation: A Theory of Permeable Sovereignty* 6 (Jan. 12, 2006) (unpublished manuscript, on file with author and the Fordham Law Review) (describing conditions under which a set of rules constitutes a legal system).

have been heavily criticized for their lack of morality, their selfishness, and their consequentialist approach to regulation, scholars, for the most part, have not looked to Holmes for insights into corporate decision making.

The exception is scholars in progressive corporate law. These scholars identify the analogy between the bad man and the amoral corporation and then look to Holmes's normative characterization as a justification for advocating greater corporate social responsibility. Numerous examples of corporate conduct appear to justify this concern, as corporate actors—from Standard Oil and the railroads, to today's WorldCom and Enron—seem to personify immoral greed at the expense of moral and ethical values.

However, the quest for moral guidance jeopardizes the application of the bad man to the corporation. Holmes's bad man could become good if he acted unselfishly and incorporated the “vaguer sanctions of conscience” into his behavior.⁴ The corporation cannot; it lacks an authoritative source of moral reasoning, leaving it little alternative but to rely on legal rules as limits on its actions. Reliance on legal limits is problematic, however, in light of the corporation's substantial ability to modify these constraints through political activity. Holmes's bad man is detached from the legal system and takes the existing legal rules as fixed, external constraints. The corporation does not.

Given these differences and, in particular, the mutability of legal rules for the corporation, does Holmes's bad man have anything to say with respect to the appropriate role of the corporation in the political process and the lawyer who represents that corporation? Although this essay merely offers preliminary musings, it suggests that potential insights from Holmes have been overlooked, both in understanding the political process and in structuring the role of the corporation and its lawyer within that process.

Because there are numerous models and explanations of the Holmesian bad man, this essay begins in Part I with a brief exploration of the bad man figure and its applicability to the corporation. Part II considers the role of the bad man in progressive corporate scholarship and the basis by which the bad man analogy is used to advocate increased corporate social responsibility. Part III introduces the role of corporations in the political process, demonstrating how the corporation, unlike the Holmesian bad man, actively participates in and affects the creation of the law to which it is subject. Finally, Part IV considers the implications of the political bad man and explores how Holmes's insights can assist in understanding the role of the corporation and its lawyer in the political process.

I. THE HOLMESIAN BAD MAN

Any in-depth excursion into *The Path of the Law* and the Holmesian bad man is clearly beyond the scope of this essay. I am neither an expert on Holmes nor a legal philosopher, and those who have studied Holmes far

4. See *infra* note 7 and accompanying text.

more than I continue to argue about exactly what he meant. Nonetheless, because it remains subject to extensive debate, it is worth considering briefly who the bad man is and why he is bad.

Holmes described the bad man as someone "who cares only for the material consequences which such knowledge [of the law] enables him to predict."⁵ The bad man "cares nothing for an ethical rule which is believed and practised by his neighbors."⁶ In short, the bad man cares about the law because of the sanctions imposed for violating it. Holmes contrasts the bad man with the good man, "who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."⁷ This good man employs Hart's "internal point of view" and obeys the law out of a sense of obligation that is (at least partially) independent of the law's consequences.⁸

Why is the bad man bad? Holmes clearly could have engaged in the same task of distinguishing law from morals or ethics without the bad man figure. Moreover, the bad man label is strikingly normative. In part, it seems that Holmes uses the bad man to highlight the compulsory nature of regulation. Sanctions imposed by the threat of government force compel obedience both from good men, who follow the law out of a sense of social or moral obligation, and bad men, who follow the law simply because they want to avoid paying a penalty or going to jail. Additionally, the bad man does not respond to moral arguments—the fact that certain conduct is unethical or inconsistent with societal norms does not matter to him.⁹ Thus, in the context of advising future lawyers, Holmes instructs them that, for the bad client, their advice must be framed in terms of consequences rather than reasons.¹⁰ Finally, the bad man is selfish; he acts out of self interest, not out of regard for the greater community.¹¹ Importantly, however, the bad man is not a criminal.¹² Nor does he ignore the law—although Holmes

5. Holmes, *supra* note 1, at 993.

6. *Id.* at 992.

7. *Id.* at 993.

8. See generally H.L.A. Hart, *The Concept of the Law* (1961) (describing the internal point of view).

9. As Judge Richard Posner convincingly argues, although the law overlaps with moral principles, there is considerable difference between the two. The law does not enforce many moral principles, and, at the same time, "the law prohibits or attaches sanctions to a great deal of morally indifferent conduct." Richard A. Posner, *1997 Oliver Wendell Holmes Lectures: The Problematics of Moral and Legal Theory*, 111 Harv. L. Rev. 1637, 1695 (1998).

10. "[O]ur friend the bad man . . . does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact." Holmes, *supra* note 1, at 994.

11. William Twining suggests that the bad man employs a "user perspective." William Twining, *Other People's Power: The Bad Man and English Positivism, 1897-1997*, 63 Brook. L. Rev. 189, 212 (1997).

12. In describing the bad man's consequentialist analysis, Holmes explicitly "leav[es] the criminal law on one side." Holmes, *supra* note 1, at 994. Holmes later explains, "If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic

indicates that the bad man may view legal sanctions as the price to be paid for violating the law, he does not suggest that the bad man will fail to pay that price.¹³

Despite the calculated use of the term “bad,” Holmes seems not to have persuaded subsequent commentators, many of whom resist the characterization.¹⁴ David Luban considers “the bad man [as] a realistic picture of the usual corporate client of Holmes’s day.”¹⁵ Sandy Levinson and J.M. Balkin reformulate the bad man as the self-reliant man, who does not seem very bad at all.¹⁶ Catharine Peirce Wells describes the bad man as an outsider, “someone who does not share in the ideals that the law represents,” such as a “feminist,” a “gay activist,” or a “Moonie.”¹⁷ Law and economics scholars embrace the bad man as the rational economic actor.¹⁸ Still other commentators argue that the bad man is simply a heuristic, a tool for examining the law from a specific and limited perspective.¹⁹

I am not sure I agree with Holmes that the failure to second-guess legal limits by imposing extralegal moral scrutiny makes someone bad. In my view, the bad man can be understood as someone who lacks a moral compass.²⁰ In that case, the bad man must take the law as an independent and arguably complete set of rules that constrain his conduct. In the absence of an alternative moral viewpoint, the bad man uses morality

necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment.” *Id.* at 1002.

13. See, e.g., *id.* at 994 (“[T]he party taking another man’s property has to pay its fair value as assessed by a jury, and no more.”).

14. Other commentators, however, claim that the bad man is truly bad, wicked, or evil. See, e.g., Catharine Peirce Wells, *Oliver Wendell Holmes, Jr., and William James: The Bad Man and the Moral Life, in The Path of the Law and Its Influence*, *supra* note 1, at 211, 224 (describing David Siepp’s characterization of Holmes’s bad man as “a real evildoer”).

15. David Luban, *The Bad Man and the Good Lawyer, in The Path of the Law and Its Influence*, *supra* note 1, at 33, 43.

16. See Sanford Levinson & J.M. Balkin, *The “Bad Man,” the Good, and the Self-Reliant*, 78 B.U. L. Rev. 885, 899 (1998) (describing the “self-reliant man”).

17. Wells, *supra* note 14, at 225.

18. See, e.g., Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 Va. L. Rev. 1577, 1591 (2000) (describing the acceptance by law and economics scholars of the rational bad man as the decision maker in their analysis).

19. See, e.g., David Rosenberg, *The Hidden Holmes: His Theory of Torts in History* 48-49 (1995) (describing Holmes as “advocat[ing] the ‘bad man’ heuristic . . . to facilitate testing legal concepts and theories in the ‘dry light’ of experience”); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan. L. Rev. 787, 826-28 (1989) (describing Holmes’s “heuristic purpose” as defined by the legal perspective “of a private lawyer counseling a client”).

20. This terminology belongs to Jack Beermann. See Jack M. Beermann, *Holmes’s Good Man: A Comment on Levinson and Balkin*, 78 B.U. L. Rev. 937, 941 (1998) (describing the bad man’s lack of a “moral compass”). Alternatively, the bad man may have a moral compass, but reject it as an authoritative guide for his actions. Thus, the bad man may lack confidence in his ability to make moral judgments or may refuse to privilege his personal moral views above those of society as reflected explicitly in existing law.

neither to supplement legal constraints nor as a justification for ignoring them.

Moreover, it is unclear that a moral compass aids in legal compliance. Perhaps in a personal sense, we want people to be moral, but from a legal perspective, it is not clear that having people do an individual cost-benefit analysis is better than having them simply follow legal rules. Indeed, many have argued that the value of a legal system lies in its ability to settle, albeit not resolve, moral conflict. To the extent that morality enables one to continue to defy a controversial rule with which one disagrees, its role in the legal system is problematic, and commentators have struggled to defend a role for moral analysis on this issue that does not undercut the integrity of the legal system.²¹

An additional concern is the extent to which the bad man will be constrained by legal sanctions. Some commentators have worried that, in predicting the cost of disobeying the law, the bad man will not simply calculate the cost of legal sanctions, but will further consider the likelihood that those sanctions will be imposed.²² Robert Gordon terms this a "restate[ment] . . . [of the Holmesian] 'bad man's' view of legal rules as prices discounted by sanctions—or, to reduce it still further, by the probability of enforcement of sanctions."²³ Albert Altschuler has observed that, under a strict reading of Holmes, it would appear that unenforced law is not law at all.²⁴

Although this reading of Holmes is plausible, I do not read Holmes as incorporating the risk of nonenforcement into the bad man's calculation.²⁵ As Luban suggests, "There is no hint in *Path* or elsewhere that Holmes understood that risk-benefit analysis by a genuinely bad man 'who cares only for the material consequences' would consider enforcement probabilities as well as enforcement outcomes."²⁶ Indeed, Luban argues that such an interpretation would render Holmes's bad man thesis "preposterous."²⁷ I agree with Luban. As I read Holmes, the bad man is

21. Indeed, Mark DeWolfe Howe explains that the explicit reason for Holmes's effort to separate the law from morality was that "he wanted men to obey even those rules of law which they believed to be unjust." Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 Harv. L. Rev. 529, 532 (1951).

22. See Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. Rev. 1265, 1291 (1998).

23. Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 Conn. L. Rev. 1185, 1192 (2003).

24. Albert W. Altschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 Fla. L. Rev. 353, 368-69 (1997).

25. See also Stephen R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory, in The Path of the Law and Its Influence*, *supra* note 1, at 158, 179 (explaining that Holmes is predicting the law not from the bad man's point of view about the probability of enforcement, but from the perspective of courts and legislatures about the threat of legal liability).

26. David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's The Path of the Law*, 72 N.Y.U. L. Rev. 1547, 1571 (1997) (quoting Oliver Wendell Holmes, *The Path of the Law*, in *Collected Legal Papers* 167, 171 (Harold J. Laski ed., 1920)).

27. *Id.*

labeled “bad” because of his reasons for obeying the law, not his predicted failure to do so. Moreover, rather than describing the expected cost to the bad man of violating the law, Holmes describes legal liability as requiring that the bad man make “compulsory payment” of “fair value.”²⁸

In any event, law and economics tells us that the risk of nonenforcement could, from a deterrence perspective, be addressed through modifications to the sanction for noncompliance. If the bad man does factor in the likelihood that he can get away with violating legal rules, society only need increase the penalty for noncompliance to a sufficient level to compensate for the probability of nonenforcement.²⁹ Alternatively, society can impose extra-compensatory penalties, such as punitive damages, for deliberate violations of legal obligations.³⁰

An additional and related concern is the bad man’s view of legal liability as simply a price for noncompliance with the law. In his essay, Holmes argues that, for the bad man, legal rules impose costs on certain types of conduct but lack independent normative force. From the bad man’s point of view, “what is the difference between being fined and being taxed a certain sum for doing a certain thing?”³¹ Thus, a bad man may drive recklessly if he is willing to pay for the cost of an accident. A supplier may breach a contract if he can sell his product at a higher price, so long as he is willing to pay damages to the first buyer.

Cynthia Williams criticizes this law-as-price approach for understating the normative significance of the law and for implying that compliance with the law is purely voluntary.³² In part, I believe that the Holmesian bad man is designed to push our analysis on this issue. In the end, however, I think Williams’s characterization is an overstatement. Even if legal rules carry no normative force, the rational actor’s cost-benefit calculation is likely to be richer than Williams suggests and, in most cases, weighed heavily in favor of compliance. There are generalized effects to violating legal rules systematically—reputational penalties, loss of goodwill, increased visibility to potential regulators, and so forth. The potential contract breacher must consider not just the efficiency of his case-specific breach, but the effect on his future ability to enter into contracts with others. Although the bad man may not consider the consequences of his legal violations on “the social-

28. Holmes, *supra* note 1, at 994.

29. See, e.g., Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. Legal Stud. 319, 324 (1996) (arguing that appropriate levels of deterrence will be achieved by setting the penalty for misconduct equal to the social cost of that misconduct “adjusted for the probability of nondetection”); A. Mitchell Polinsky & Steven Shavell, *Enforcement Costs and the Optimal Magnitude and Probability of Fines*, 35 J.L. & Econ. 133, 133 (1992) (same).

30. See, e.g., Fischel & Sykes, *supra* note 29, at 348 (observing that punitive damages can serve as a mechanism for adjusting penalties to reflect the probability of nondetection).

31. Holmes, *supra* note 1, at 994.

32. Williams, *supra* note 22, at 1269 (criticizing the “voluntaristic approach to law” resulting from treating legal sanctions as prices).

structuring function of law,"³³ there is no reason for him to ignore the effect of those violations on his own future dealings.

Moreover, I do not read Holmes to be making this argument. Concededly, Holmes states that the significance of legal rules for the bad man is limited to their consequences. The bad man, in Holmes's view, does not care to evaluate his actions in terms of some moral theory; for him, the significance of legal rules is the disagreeable consequences associated with their violation. But it is important to remember that this description of the law is through the eyes of the bad man. Having defined the bad man as one lacking a moral compass, Holmes correctly observes that the association of a legal penalty with an action will not cause the bad man to condemn that action as morally corrupt. Holmes does not, and I think would not, make the broader claim that legal rules and sanctions have no independent moral force to anyone. His essay explicitly avoids the question of whether one can or should have an independent moral duty to obey the law, and the bad man is, after all, in his terms, "bad."

In addition to the question of whether and why the bad man is bad, commentators have debated the utility of the bad man metaphor and the validity of Holmes's philosophical approach to the law, as embodied in the bad man. Thus, for example, Henry Hart states that he is unable to see the value of the bad man metaphor, "unless to make us more effective counsellors of evil."³⁴ Stephen Perry, in contrast, argues that "the bad man captured something fundamental about human nature" and that "in an important sense people really are 'bad men.'"³⁵

Regardless of the broader debate about the bad man, which is too extensive to detail here, commentators have suggested that the bad man is of particular utility in understanding the corporation and its duty to obey the law. Of particular relevance is the fact that corporations, like the bad man, lack an internal moral compass. Because corporations are artificial entities, it is difficult to identify a source of their moral obligations.³⁶ As I have argued elsewhere, there is no reason to believe that corporations share the social, moral, or ethical obligations of natural persons.³⁷ Moreover, because corporations are composed of multiple constituencies with various claims, moral and otherwise, one cannot readily look to individual

33. *Id.* at 1277.

34. Henry M. Hart, Jr., *Holmes' Positivism—An Addendum*, 64 Harv. L. Rev. 929, 932 (1951).

35. Perry, *supra* note 25, at 167-68.

36. At the core, this difficulty may stem from the reification of the corporation, which leads to the conception of an independent entity with preferences and interests that may be distinct from those of the individual participants in the enterprise. *See, e.g.*, William A. Klein, *Business Organization and Finance: Legal and Economic Principles* 99 (1980) (warning that reification of the corporation can be dangerous because it may cause us to overlook the fact that "only individuals enjoy the benefits, or bear the burdens and the responsibilities, of actions affecting other individuals").

37. *See* Jill E. Fisch, *Questioning Philanthropy from a Corporate Governance Perspective*, 41 N.Y.L. Sch. L. Rev. 1091, 1099 (1997).

corporate stakeholders as a source of corporate morality. Whether or not human actors have ethical and moral obligations to obey the law, corporations are more easily understood as amoral. As Daniel Fischel explains,

A corporation . . . is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for their mutual benefit. Since it is a legal fiction, a corporation is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.³⁸

William Twining argues, “[I]s not the perspective of a large bureaucratic corporation whose sole or primary aim is maximization of profit very close to that of the ‘bad man’—amoral, rational, calculating, purposeful, pursuing its own agenda?”³⁹ Thus the bad man, with his nonexistent moral compass, offers us a mechanism for understanding the duties imposed on amoral corporations by the law.⁴⁰

There are, of course, limitations to the analogy. One significant difference between the corporation and the Holmesian bad man is the corporation’s participation in the political process by which legal rules are created, a subject that this essay will consider further in Parts III and IV. A second difference is the significant role of the market as a constraint on corporate decision making. The relationship between regulation and market forces as constraints on corporate conduct is complex and beyond the scope of this essay.⁴¹

II. THE OBJECTIVES OF THE CORPORATION AND CORPORATE SOCIAL RESPONSIBILITY

Despite the potential utility of the bad man metaphor for evaluating corporate decision making, it has received little attention in corporate law scholarship. The bad man has found his way into tort law, professional responsibility, contracts, and many other areas, but not corporate law. The exception is progressive corporate law scholarship.⁴²

38. Daniel R. Fischel, *The Corporate Governance Movement*, 35 Vand. L. Rev. 1259, 1273 (1982).

39. Twining, *supra* note 11, at 210.

40. It is tempting to extend the metaphor—identifying the recent misdeeds of corporate officials such as Kenneth Lay, Jeffrey Skilling, Bernard Ebbers, Dennis Kozlowski, and many more—as the acts of the Holmesian bad man corporation. The analogy is misplaced—the corporate misconduct involved was the misconduct of individual corporate actors who were acting both criminally and in opposition to the interests of the corporate entity.

41. See, e.g., David P. Baron, *Business and Its Environment* 133 (3d ed. 2000) (explaining the relationship between market and nonmarket activities, including regulation, and their effect on corporate behavior); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251 (1977) (describing various markets that constrain corporations).

42. See, e.g., Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*,

Progressive corporate law is characterized by its view that corporations have obligations to non-shareholder stakeholders and the public generally, and that these obligations include duties of fairness and morality that extend beyond legal and contractual rules.⁴³ Alternatively characterized as corporate social responsibility (CSR), the scholarship finds its roots in Merrick Dodd's 1932 claim that corporate managers "should concern themselves with the interests of employees, consumers, and the general public, as well as of the stockholders."⁴⁴ As *The Economist* has characterized it, the CSR literature is premised on a "perceived tension between private profit and public interest," a tension that is simply "regarded as self-evident."⁴⁵ Progressive scholars argue that corporations have a responsibility to society to act as good citizens, and that this responsibility should either be effectuated through voluntary ethical behavior that extends beyond the corporation's legal obligations⁴⁶ or through increased regulation.⁴⁷

87 Va. L. Rev. 1279, 1295-97 (2001) (criticizing the "bad man's calculus" in the context of noting "the difficulties inherent in establishing a coherent, persuasive, and workable theory of a corporation's duty to obey the law"); Kent Greenfield & John E. Nilsson, *Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) The Business Judgment Rule*, 63 Brook. L. Rev. 799, 850-51 (1997) (describing corporations as "bad men" for employing cost-benefit analysis); Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 Tex. L. Rev. 477, 512 (1995) (arguing that the bad man approach "has led to a very low required standard of behavior" in the context of corporate decision making).

43. See generally Progressive Corporate Law (Lawrence E. Mitchell ed., 1995) (series of essays by a number of progressive corporate law scholars). The "progressive" label overstates the commonality among the positions of these scholars. See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 Cornell L. Rev. 856, 887-89 (1997) (book review) (highlighting individual differences in approach).

44. E. Merrick Dodd, Jr., *For Whom are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145, 1156 (1932). Dodd's article was a response to Adolf Berle's article arguing that corporate managers were trustees with an obligation to run the corporation in the best interests of its shareholders. See A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev. 1049 1074 (1931). Ultimately, Dodd largely yielded to Berle's position. See E. Merrick Dodd, *Dimock and Hyde: Bureaucracy and Trusteeship in Large Corporations*, 9 U. Chi. L. Rev. 538, 547 (1942) (book review) (conceding that it was misleading to consider managers as trustees for non-shareholder stakeholders).

45. *The World According to CSR*, *The Good Company*, Jan. 22, 2005, at 10, *Economist*, Jan. 22-28, 2005.

46. See, e.g., David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 Iowa J. Corp. L. 41, 52 (1999) (defining corporate social responsibility to include "meeting society's expectations of proper business conduct that is not necessarily codified (i.e., ethical responsibilities)").

47. See, e.g., Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool*, 35 U.C. Davis L. Rev. 581, 599 (2002) ("Even if one assumes that a maximization of utility should be the end goal, government intervention is often necessary to repair market defects and thereby to maximize utility. Externalities, collective action problems, 'prisoners' dilemmas,' inadequate information, tragedies of the common, and natural monopolies may all result from market forces and can make it impossible to maximize social utility. Thus, government regulation of corporations is necessary even under a utilitarian social calculus.").

Progressive scholars, in particular, find the bad man metaphor a powerful tool in criticizing existing corporate conduct that, although technically legal, appears socially harmful. Corporations pollute the environment. Corporations pay their employees (at least nonexecutive employees) too little. Corporations manufacture dangerous products. These actions are attributed to the corporation's selfish objective of maximizing profit at the expense of net social welfare.⁴⁸

The attributed corporate greed is exacerbated by the fact that corporations rely extensively on cost-benefit analysis. As Kent Greenfield and John Nilsson explain, "[E]ven Oliver Wendell Holmes said that it was 'bad men' who made decisions based on cost-benefit analysis."⁴⁹ Perhaps the best known example of a corporation being vilified for the use of cost-benefit analysis is the Ford Pinto case, *Grimshaw v. Ford Motor Co.*⁵⁰ Thus, Marc Galanter and David Luban describe the jury's response upon learning of Ford's reliance on cost-benefit analysis as a desire to condemn "the particular kind of wickedness displayed in Ford's reluctance to recall the exploding Pintos: it was greed, allowing one's decision to be swayed by the sheer magnitude of money."⁵¹

The bad man offers some traction here. In part, the metaphor serves as a rhetorical device by labeling amoral corporate decisions as selfish and bad.⁵² It is precisely the absence of an independent moral constraint, and the mere "technical" legal compliance, that commentators view as problematic—the same characteristics that arguably render the bad man bad. Lawrence Mitchell argues that corporations are "morally irresponsible; they are able to deflect moral responsibility for their decisions to the command of law."⁵³ Joel Bakan criticizes corporations for their "pathological pursuit of profit and power."⁵⁴ Bradley Wendell states that Enron's abuse of special purpose entities was "abetted by the Holmesian bad man attitudes of lawyers and accountants, who in effect agreed with Fastow that if the rules do not explicitly prohibit an act, it is permissible."⁵⁵

In addition, if the corporation is a Holmesian bad man, it cannot be trusted to act responsibly. Thus, progressive scholars argue that the law

48. See, e.g., Mitchell, *supra* note 42, at 502 (explaining that corporations are "dumping pollutants, diluting baby food, or selling dangerous products" because corporate law defines the corporate objective as self-interested profit maximization).

49. Greenfield & Nilsson, *supra* note 42, at 850 n.207.

50. 174 Cal. Rptr. 348 (Ct. App. 1981).

51. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 Am. U. L. Rev. 1393, 1437 (1993).

52. Cf. Ernest L. Folk III, *The Model Act and the South Carolina Corporation Law*, 15 S.C. L. Rev. 275, 307 (1963) (arguing that because most enterprises appeal to high standards, "Holmes' 'bad man' theory of law properly has little application to corporation law").

53. Mitchell, *supra* note 42, at 505.

54. Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (2004).

55. W. Bradley Wendel, *Professionalism as Interpretation*, 99 Nw. U. L. Rev. 1167, 1224 (2005).

should respond by rejecting the free market approach in favor of more extensive regulation. If the corporation responds only to legal limits, those limits must be more restrictive. Concededly, scholars have moved away from a highly regulatory approach in favor of increased disclosure or broader definitions of the corporation's objectives. In the end, though, to the extent that these approaches displace market-based contractual solutions, they are still government-imposed restrictions on corporate decisions.⁵⁶

The bad man model operates as a double-edged sword, however, for progressive corporate law scholarship. Whether corporations are to increase their social responsibility voluntarily or on the basis of increased regulation, the progressive argument essentially asks that they limit their behavior in accordance with a set of additional social, moral, or ethical obligations extending beyond existing law. But where is this set of obligations to come from? Holmes highlights the distinction between moral and legal obligations, but a corporation as an entity lacks an internal point of view that can serve as a source of moral obligations.

The corporation cannot readily adopt the moral perspective of its individual constituents. Shareholders may define the corporation's objectives in broad terms⁵⁷—and indeed, they sometimes include social obligations within the corporate contract⁵⁸—but they do not have the legal authority to make operational decisions. As for officers and directors, those with the authority to make corporate decisions, there is little reason to believe their ethical views mirror those of society. Moreover, to the extent that corporate officials impose their personal moral views on the corporation, they abuse their fiduciary obligations as agents. Finally, various corporate stakeholders may have differing moral perspectives.⁵⁹ As William James observed, there is no methodology for incorporating pluralistic moral views into a single scale.⁶⁰

56. See, e.g., Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C. L. Rev. 1189, 1238 (1991) (characterizing free market proponents as "shar[ing] Holmes's bad man perception of the law with respect to legal rules that restrict people's ability to contract").

57. The appropriate definition of the corporation's objectives in terms of shareholder primacy or furthering the interests of multiple stakeholders is beyond the scope of this essay. For a more detailed consideration of the issue, see Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 Iowa J. Corp. L. 637 (2006) (advocating a broader measure of firm value than shareholder wealth).

58. Ben & Jerry's, for example, was well known for donating 7.5% of corporate profits, five times the business average, to philanthropy. See, e.g., Ramesh Ponnuru, *Two Dips: The Gospel According to Ben & Jerry: Is Feel Good Capitalism Good for Charity?*, *Philanthropy Mag.*, Oct. 1, 1997, <http://www.philanthropyroundtable.org/article.asp?article=1375&paper=0&cat=148> (describing the company's efforts to incorporate social values into business operations).

59. See, e.g., Fisch, *supra* note 57 (identifying varying interests and perspectives of different corporate stakeholders).

60. William James, *The Moral Philosopher and the Moral Life*, in *Essays in Pragmatism* 65, 77 (1948).

If the corporation cannot evaluate its conduct from an internal point of view, it has no basis for weighing the social costs and benefits of its actions. Accordingly, it has no choice but to view legal rules, which reflect societal values and which have been implemented through democratic principles, as the exclusive constraints on its decisions.

This then limits the scope of the progressive claim. If corporations have a responsibility to society, that responsibility must be reflected in the corporation's legal obligations. If society views corporate conduct as socially harmful, the solution is not to urge higher ethical standards, but to prohibit objectionable behavior through bans on toxic dumping, minimum wage laws, and consumer safety regulations. Similarly, corporate actions that distort the market can be addressed through regulatory mechanisms such as antitrust laws and truth-in-advertising requirements. Within legal limits, corporations have the right to act selfishly by maximizing firm value.

From a static perspective, this analysis makes sense. If the corporation, like the Holmesian bad man, is an outsider to the law, legal rules are the appropriate mechanism for ensuring that the corporation acts in accordance with societal values. Unlike the bad man, however, the corporation is not external to the lawmaking process. Society does not impose legal rules upon the corporation; corporations actively participate in the process of creating, molding, and modifying those rules. The next section briefly considers the nature and extent of corporate participation in the political process. The following section explores the implications of that participation in the context of the Holmesian bad man.

III. CORPORATE POLITICAL ACTIVITY

Despite the fact that they lack the power to vote, corporations have long been active participants in the political process. The role of corporations in politics dates back to the turn of the century⁶¹ and is likely due to at least four factors: (1) the increasing size and importance of corporations and business generally following the industrial revolution and liberalization of state corporate law; (2) the increasing role of regulation, which heightened the importance of law for business; (3) the growth in national political parties, which shifted and focused the process of political participation;⁶² and (4) the growing cost of political campaigns.

At the outset, corporate political activity consisted largely of money donations—political contributions and even bribes. Regulation was a response to revelations about the growing size and importance of these donations. For example, corporate contributions comprised more than

61. See, e.g., David A. Skeel, Jr., *Icarus and American Corporate Regulation*, 61 *Bus. Law.* 155, 158-59 (2005) (describing "American business history . . . as an ongoing cat-and-mouse game between regulators . . . and business leaders").

62. See Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 *U. Chi. L. Rev.* 1103, 1131-32 (2002) (describing the growth and effect of national political parties).

seventy percent of Franklin D. Roosevelt's 1904 campaign chest, including contributions of \$150,000 from J.P. Morgan Co. and \$125,000 from Standard Oil.⁶³ The press reported allegations of bribes and extortion, including, perhaps most famously, published letters from E.H. Harriman stating that he had acquired influence in Washington by raising \$200,000 for the Republican campaign.⁶⁴

As Congress responded by barring direct contributions,⁶⁵ corporations developed a variety of alternatives. Political action committees (PACs) allow corporations to make campaign contributions through funds that are collected from employees and stockholders and segregated from the corporate treasury. The formation and use of corporate PACs increased dramatically in the late 1970s and continues to be an important area of political spending. According to the Federal Election Commission, PAC spending during the 2003-2004 election totaled \$310.5 million.⁶⁶ Currently, approximately forty percent of all PACs are corporate PACs, although by most estimates, corporate PAC expenditures comprise only a small percentage of total campaign spending.⁶⁷

Soft money donations are donations made to the national political parties rather than to the candidates themselves. Corporate soft money donations, which were, for a time, unrestricted by regulation, exploded in the 1990s, growing from \$86 million in 1992 to \$495 million during the 2000 election campaign.⁶⁸ Subsequently, Congress banned corporate soft money donations in the Bipartisan Campaign Reform Act of 2002 (BCRA).⁶⁹

Although PAC expenditures and soft money donations have received the majority of the attention directed to corporate political activity, such expenditures are often dwarfed by lobbying expenses. Corporations spend millions of dollars annually seeking political influence through lobbying.

63. Robert E. Mutch, *Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law 3* (1988).

64. *Id.* at 9-10.

65. The first federal campaign finance law, the Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b (2000)), barred federally chartered corporations from making campaign contributions and barred all corporations from making contributions in connection with an election for federal office. In addition, disclosure regulations required political candidates and committees to report their expenditures and the sources of their funding. Because the disclosure regulations contained virtually no enforcement mechanism, and Congress did not require public disclosure of the reports until the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-456, there are reasons to question the extent of compliance with the rules. Mutch, *supra* note 63, at 26-27.

66. Press Release, Fed. Election Comm'n, PAC Activity Increases for 2004 Elections (Apr. 13, 2005), available at <http://www.fec.gov/press/press2005/20050412pac/PACFinal2004.html>.

67. *E.g.*, Jeffrey Milyo et al., *Corporate PAC Campaign Contributions in Perspective*, 2 Bus. & Pol. 75 (2000) (reporting that corporate political action committee (PAC) contributions account for about ten percent of congressional campaign spending).

68. Tom Hamburger, *Broad Legal Attack May Undo Reform of Political Fund Raising*, Wall St. J., Nov. 6, 2002, at A1.

69. Pub. L. No. 107-155, 116 Stat. 81 (to be codified primarily in scattered sections of 2 and 47 U.S.C.).

In 2004, for example, ExxonMobil reported PAC disbursements of \$861,000, but disclosed that it had spent \$7.7 million in the same year on lobbying.⁷⁰ Corporate lobbying has suddenly been highlighted by the recent scandal in which Jack Abramoff pled guilty to conspiracy to bribe public officials.⁷¹

Most recently, corporations have responded to the restrictions imposed by the BCRA by making contributions to independent political committees, known as “527 committees,” which in turn can make expenditures in support of specific political issues. The committees are regulated by the IRS as nonprofits and operate outside the scope of federal and state campaign finance laws. One of the largest, the Republican Governors Association, raised more than \$18 million in 2004 and more than \$9 million in 2005, largely from corporate donors.⁷²

Corporations also make direct expenditures in connection with issue advocacy. One of the best known examples is the Harry and Louise television advertisement created by the insurance industry, through the Coalition for Health Insurance Choices,⁷³ in an effort to defeat the Clinton Administration’s plan for health care reform.⁷⁴ Corporations also curry favor with public officials through a variety of mechanisms—from offering them transportation on corporate jets to sponsoring campaign dinners and fund-raisers. In response to the restrictions imposed by the BCRA, for example, many prominent corporate officials assisted the candidates in the 2004 election by “bundling” the contributions of individual donors.⁷⁵

Despite the extensive regulatory restrictions on corporate political activity that have existed for a century and that continue to expand, as the

70. ExxonMobil, 2004 Corporate Citizenship Report 45 (2004), available at http://www.exxonmobil.com/corporate/files/corporate/ccr04_fullreport.pdf.

71. See, e.g., Brody Mullins et al., *Capitol Offense: Guilty Plea by Lobbyist Raises Prospect of Wider Investigation*, Wall St. J., Jan. 4, 2006, at A1 (describing Jack Abramoff’s guilty plea and a government investigation into the possibility of more widespread lobbying corruption).

72. Ctr. for Pub. Integrity, *Silent Partners: Republican Governors Association*, <http://www.publicintegrity.org/527/profile.aspx?act=dir&sub=1&cycle=2006&id=479> (last visited Nov. 7, 2006).

73. SourceWatch, *Coalition for Health Insurance Choices*, http://www.sourcewatch.org/index.php?title=Coalition_for_Health_Insurance_Choices (last visited Nov. 7, 2006); see Gary D. Wekkin, *The “Blame Game”: What Went Wrong with Health Care Reform*, 5 *White House Stud.* 53, 53 (2005), available at http://www.findarticles.com/p/articles/mi_m0KVD/is_1_5/ai_n15927746 (stating that the health care industry spent \$30 million on the Harry and Louise advertising campaign).

74. The Bipartisan Campaign Reform Act (BCRA) also reduced corporate ability to engage in “issue advocacy” by broadening the definition of electioneering communications and prohibiting corporations from making such communications except through segregated funds.

75. See Tim Shorrock & Michael Scherer, *Bundles of Influence*, Mother Jones, May 1, 2004, http://www.motherjones.com/news/outfront/2004/05/04_405.html (describing fund-raising efforts and political influence wielded by top republican bundlers including Pfizer CEO Henry “Hank” McKinnell); see also Oliver Staley, *That’s a Bundle—I Ranger Can Deliver Many Checks*, Com. Appeal (Memphis), Aug. 27, 2004, at A1 (describing Republican Party rangers and pioneers).

summary above indicates, corporations persist in finding new ways to exert political influence. At base, the explanation for this is simple: Political activity is an integral component of a corporation's business strategy. Modern corporations operate in an environment pervaded by regulation. Shaping and responding to that regulation is an element of a corporation's operational strategy as much as marketplace competition.

Telecommunications companies, for example, such as Qwest, Global Crossing, and WorldCom, have been criticized for spending millions of dollars in politics during the late 1990s, at the same time that the companies' financial operations were unsustainable and they were engaged in widespread accounting frauds.⁷⁶ Regulation, however, is critical to the telecommunications industry.⁷⁷ Rate regulation, freedom of entry, and access to the internet are among the most significant issues affecting a company's business plan and the profitability of its operations.⁷⁸ The importance of regulation to the industry was borne out by the passage of the landmark 1996 federal telecommunications law.⁷⁹ Among other things, by reducing the scope of federal regulation, the statute opened the door to extensive state regulatory efforts—from 1993 through the first half of 2005, there were 5187 bills introduced in state legislatures relating to telecommunications issues.⁸⁰ A rewrite of the federal statute is pending, leaving open the extent and form of further deregulation.⁸¹

Moreover, corporate political participation is effective. Corporations are able to exert substantial influence on regulatory policy through their political activities and donations. Although widely criticized as special interest legislation, examples of statutory responses to corporate political pressure abound. Enron's political contributions are widely credited with enabling it to eliminate protected energy monopolies.⁸² The enactment of the Sonny Bono Copyright Term Extension Act,⁸³ sometimes called "the Mickey Mouse law," is attributed to extensive lobbying by the Walt Disney Company, which stood to lose copyright protection for Mickey Mouse in

76. Bruce F. Freed et al., Ctr. for Political Accountability, *The Green Canary: Alerting Shareholders and Protecting Their Investments* 11-13 (2005), available at www.politicalaccountability.net/files/GreenCanaryFinalA.pdf.

77. John Dunbar, *Former Bells Dial Up Big Numbers in Statehouses: SBC Is No. 1 in Both Lobbying and Contributions*, Ctr. for Pub. Integrity, Sept. 29, 2005, <http://www.publicintegrity.org/telecom/report.aspx?aid=744>.

78. *Id.*

79. *Id.*

80. *Id.* (basing this finding on "a search of the LexisNexis database of state legislative activity").

81. *Id.*

82. See William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 Tul. L. Rev. 1275, 1278-79 (2002) (describing Enron's extensive and successful political efforts to eliminate energy monopolies).

83. The Act extended copyright protection for an additional twenty years for works still protected in 1998. Sonny Bono Copyright Term Extension Act, 17 U.S.C. §§ 302-04 (2000).

2003.⁸⁴ Recent lobbying efforts by Hewlett-Packard Co. resulted in tax law changes that will save the company millions of dollars by reducing the tax on profits from the company's foreign subsidiaries.⁸⁵ Political heavyweights like FedEx have multi-decade histories of successfully influencing legislation.⁸⁶

Although the foregoing analysis is only a brief summary of the nature and effect of corporate political activity, it demonstrates that corporations cannot be viewed as outsiders to the legal system. Corporations are not simply constrained by society's legal rules; they play a substantial role in shaping the rules by which they are governed. What is the significance of this role for Holmesian analysis? How should the lack of moral accountability affect the conduct of the politically powerful bad man? The answers to these questions are explored below.

IV. IMPLICATIONS OF THE POLITICALLY POWERFUL BAD MAN

For the individual Holmesian bad man, existing legal constraints are externally imposed and largely immutable. Indeed, as Twining has observed, “[f]or Hart, as well as Holmes, for the purpose of detached description, it is useful to conceive of law in terms of other people's power.”⁸⁷ The bad man metaphor is based on the premise that law consists of a set of externally imposed consequences—this is the reason that law restricts the actions of the bad man. The law represents, for the bad man, the power behind the statute to impose sanctions upon those who violate it.⁸⁸

For corporations, however, the legal rules are themselves subject to change. How does this affect the bad man approach to understanding the law? And, in the context of *The Path of the Law*, how should lawyers counsel politically active corporations?

These questions can be answered in several ways. One possibility is that the bad man metaphor simply does not apply to corporations. Corporations are not outsiders, but insiders; the legal rules with which they must comply

84. William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. Chi. L. Rev. 471, 483 (2003).

85. Jeffrey H. Birnbaum, *The Road to Riches Is Called K Street*, Wash. Post, June 22, 2005, at A1.

86. See Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 Vand. L. Rev. 1495 (2005) (describing FedEx's political activities in connection with several legislative issues). For example, as a fledgling business struggling to survive in the late 1970s, FedEx embarked on an extensive political campaign and was so visibly instrumental in the effort to deregulate air cargo that Washington insiders termed the resulting statute “The Federal Express Act.” See, e.g., Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L.J. 235, 335 (2003) (describing the name as resulting from “the speed by which [the bill] flew through Capitol Hill and the identity of its principal sponsor”).

87. Twining, *supra* note 11, at 198.

88. See, e.g., Timothy S. Hall, *The Score as Contract: Private Law and the Historically Informed Performance Movement*, 20 Cardozo L. Rev. 1589, 1609 (1999) (explaining that under the positivist view as reflected in Holmes, “one obeys a statute because of the power behind the statute”).

are a product of their own actions. As such, corporations do not share the perspective of the bad man. Corporations do not necessarily view legal rules as the product of someone else's power; instead, the rules may be sources of power for the corporation itself. Indeed, legal rules can be a means by which one corporation constrains the activities of its competitors.⁸⁹

Although this interpretation of Holmes is plausible, there are reasons to reject it. First, this Symposium is about Holmes and the bad man, and it would be poor form to conclude that these themes are irrelevant to the study of corporate law. More importantly, the mutability of legal rules was well known to Holmes. Holmes explicitly observed, in *The Path of the Law*, how readily the law could be changed: "We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."⁹⁰ Corporations in the late 1800s, like corporations today, figured prominently in shaping and changing the law. As Gordon argues, Holmes was well aware that the corporate lawyer of his era was "an active shaper of [the law], a drafter of bills favoring his clients and a lobbyist to push them through legislatures."⁹¹ Indeed, Congress passed the first campaign finance law, the Tillman Act, in 1904, in an effort to reduce corporate political influence as a response to reported scandals at the turn of the century.⁹²

A second possibility is that the bad man metaphor demonstrates the problematic nature of corporate political influence. Because the corporation lacks an internal moral perspective, it, like the bad man, is constrained only through legal limits. Those legal limits define the corporation's objective function. Indeed, corporate law sets forth the corporation's purpose as the maximization of firm value subject to applicable legal rules. The corporation's effort to challenge legal limits may be seen as an illegitimate attempt to privilege the goal of profit maximization over those legal limits that qualify this very goal. As such, political activism is simply *ultra vires*, beyond the corporation's authority. This argument is strengthened by the bad man's normative status. If the bad man acts selfishly and without reference to societal interests, his influence on the political process may be destructive.

Robert Reich makes an argument along these lines. Reich argues that the very amorality that relieves a corporation from social responsibility

89. The *Noerr/Pennington* doctrine, for example, excludes a corporation's application for patent protection from challenge under the antitrust laws. See, e.g., James R. Atwood, *Securing and Enforcing Patents: The Role of Noerr/Pennington*, 83 J. Pat. & Trademark Off. Soc'y 651 (2001). The doctrine is based on the *Noerr* and *Pennington* cases, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

90. Holmes, *supra* note 1, at 998.

91. Robert W. Gordon, *Law as a Vocation: Holmes and the Lawyer's Path*, in *The Path of the Law and Its Influence*, *supra* note 1, at 7, 14.

92. See Adam Winkler, *The Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243, 1245-47 (1999) (describing the corporate role in politics in the late 1800s and early 1900s).

delegitimizes its role in politics. According to Reich, corporations cannot claim that legal compliance fully meets their social responsibilities while simultaneously seeking to modify the social policies reflected in current law. He concludes that, as a result, corporations have “a social responsibility to refrain from politics.”⁹³

Although Reich’s argument has some appeal, looking to Holmes as support for regulating corporate political activity is of limited value. Corporate political activity has been extensively regulated, starting with the Tillman Act and continuing most recently with the BCRA’s prohibition on soft money donations. Despite this regulation, corporations continue to participate actively in the lawmaking process, and the enactment of increased regulation simply generates innovative new approaches such that, while the methodology may change, corporations continue to participate. As I have argued elsewhere,⁹⁴ it is naive to believe that corporate political participation can be eliminated through regulation; regulation is simply too important to business. As a result, it is more productive to consider whether the bad man offers a basis for evaluating the corporation’s role in the political process and guidance for the lawyer representing a corporate client in that process.

Applying the bad man metaphor to corporate participation in the political process is, of course, a stretch. *The Path of the Law* is a court-centered approach to the law. In particular, *The Path of the Law* focuses on the role of lawyers in advising clients as to what courts will do. The choice presented by Holmes to the bad man, through the voice of his counsel, is to comply with the law or to violate the law and face the “disagreeable consequences.”⁹⁵

Political activity offers the bad man a third option—to attempt to change the law with which he does not wish to comply. Although legal change can be accomplished through litigation, it is more likely to occur through the legislative process, and legislation is quite different from adjudication. The lawyer’s role differs as well. As Thomas Grey observes, the bad man does not require a lawyer to deal with the legislature, he can hire a lobbyist who does not need a law license. Nonetheless, lawyers represent clients not just in understanding the law, but also in changing it.

A comprehensive assessment of the relevance of *The Path of the Law* in understanding legislation is beyond the scope of this essay, although it would certainly be worthwhile to extend Holmes’s insights beyond the common law realm. In the remainder of this essay, I sketch out a few ways in which the bad man figure and his purpose—to illuminate the distinction between law and morality—are of value in understanding the legislative process and the role of corporations in that process.

93. Robert B. Reich, *The New Meaning of Corporate Social Responsibility*, 40 Cal. Mgmt. Rev. 8, 10 (1998).

94. Fisch, *supra* note 86, at 1558-63.

95. Holmes, *supra* note 1, at 994.

Scholars offer a variety of models of the political process, but at opposite ends of the spectrum are civic republicanism and some form of public choice theory. Civic republicanism conceives of lawmakers as public-regarding, viewing "legislatures as forums for public deliberation and civic virtue."⁹⁶ As Jody Freeman explains, "[C]ivic republicanism portrays government as a moral force for the common good."⁹⁷ Public choice, in contrast, rejects the premise that the legislative process seeks to implement some concept of the public good.⁹⁸ According to public choice theory, interest groups use politics toward their selfish ends, and interest group factors such as size, cohesiveness, and stakes determine the extent of their political power.

Holmes's bad man fits within the framework of public choice. Public choice theory is based on the expectation that at least some of the participants in the political process will be bad men. Public choice accepts that political participants act largely to further their private objectives; selfishness characterizes interest group behavior. Holmes himself recognized the role of interest groups in the political process, acknowledging that "[t]he more powerful interests must be more or less reflected in legislation."⁹⁹ Moreover, public choice highlights Holmes's claim about the separation of law and morals. In Holmes's world, law does not reflect the common good.¹⁰⁰ Holmes warned that "it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time."¹⁰¹ Rather than serving the public good, Holmes describes the law as serving the "social end which the governing power of the community has made up its mind that it wants."¹⁰²

Of course, the normative status of the bad man may give us pause—do we really want bad men to be making the law? One response is that, even within a public choice framework, community values and the common good place limits on legislative power. Holmes explained that although the limits of legislative power were not coextensive with a system of morals, the law was at least limited by some principles of morality. There are some laws, according to Holmes, that a legislature "would not dare to enact . . . because

96. Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. Rev. 75, 98 (1996).

97. Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 562 (2000).

98. *Id.* at 561. The statement in the text is a simplification; the precise definition of public choice theory is a matter of some dispute. *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 12 (1991) (stating that the definition of public choice "is itself sharply disputed").

99. Oliver Wendell Holmes, *Summary of Events: Great Britain: The Gas-Stokers' Strike*, 7 Am. L. Rev. 582, 583 (1873).

100. *See* Holmes, *supra* note 1, at 997 (identifying the "fallacy . . . that the only force at work in the development of the law is logic").

101. *Id.* at 993.

102. Oliver Wendell Holmes, *Law in Science and Science in Law*, in *Collected Legal Papers*, *supra* note 26, at 210, 225.

the community would rise in rebellion and fight.”¹⁰³ A second argument is that just because the bad man acts selfishly does not mean that his objectives are inconsistent with the public good. Corporations reflect the interests of a variety of stakeholders who have an interest in regulation, including stakeholders whose views might not be conveyed to lawmakers on an individual basis.¹⁰⁴ To the extent that those interests are fairly represented, the corporation’s involvement may make the legislative process better informed and, in some sense, more democratic. The third and perhaps most powerful response is to recognize that Holmes was a positivist. His purpose in describing the separation of law and morals was to help us understand what the law is, not to argue for what it should be. And Holmes’s description offers powerful support that we cannot accurately understand the legislative process without incorporating the bad man perspective.

And what about the lawyer representing the politically active bad man and, in particular, the politically active corporation? What lessons should he take from Holmes? First, Holmes’s analysis of how to counsel the bad man applies with equal force to political activity. It is of little value to advise a corporation that it is immoral or unethical to engage in political activity, as demonstrated by corporate efforts to develop new strategies for political participation in light of increased regulatory restrictions. If market forces demand political activism, the corporation will respond. On the other hand, the bad man cares for the consequences of his actions and, with respect to political activity, the professional may assist the corporation in fully understanding the consequences of proposed regulatory changes.

In particular, corporate lawyers today face the challenge of counterbalancing the short term perspective that has the potential to bias corporate decisions. For example, when U.S. automakers lobbied in opposition to mandatory fuel efficiency regulations, corporate officials were acting out of an honest conviction that the continued manufacture of large cars was good for their companies.¹⁰⁵ In retrospect, the decision appears to have been misguided—limited resources would and did eventually lead customers to demand more fuel efficient vehicles regardless of the legal rules, and Ford and General Motors have consequently suffered in the marketplace.¹⁰⁶ Effective representation might have demonstrated to the

103. Holmes, *supra* note 1, at 993.

104. David Baron has described the mobilization by corporations of interested stakeholders such as employees and customers as “rent chains.” See Baron, *supra* note 41, at 223 (explaining the concept of “rent chains”).

105. Donald O. Mayer, *Corporate Governance in the Cause of Peace: An Environmental Perspective*, 35 Vand. J. Transnat’l L. 585, 622-25 (2002) (describing extensive lobbying by the U.S. auto industry against mandatory fuel efficiency regulation). Automakers believed that customers wanted larger vehicles and that the higher profit margins on these vehicles would benefit both shareholders and employees. *Id.* at 623-24 (explaining the rationale for auto company lobbying and highlighting social policy arguments against regulation).

106. See Barack Obama & Jay Inslee, Op-Ed., *Salvaging the Auto Industry*, Boston Globe, Feb. 8, 2006, at A13, available at

corporations that their legislative agenda was inconsistent with their long-term corporate interests. Similarly, ill-advised political activism can irreparably damage a corporation's reputation—an effect of which the corporation may be unaware.¹⁰⁷

A second lesson for the corporate lawyer is to identify his or her client correctly. As the recent corporate governance scandals illustrate, corporate officials may themselves be bad men who seek to further their selfish interests at the expense of the corporations of which they are fiduciaries.¹⁰⁸ Corporate lawyers who are hired by those bad men may come to identify with them and to defend their objectives rather than protecting the corporation's own selfish interests. Market pressures may lead corporate lawyers to be sycophants, unwilling to challenge the objectives of those executives responsible for retention decisions. But the lawyers who aid or accede to the misdeeds of corporate managers betray their clients as well as themselves. As Holmes observes at the end of *The Path of the Law*, happiness cannot be purchased simply by being a wealthy corporate lawyer.¹⁰⁹

Finally, the lawyer for the politically active corporation should facilitate the corporation's evaluation of the effects of its political role by increasing transparency and accountability both within and without the corporate structure. Gordon criticizes Holmes for urging lawyers to be "passive instruments [of their] clients' ends rather than active forces to help refigure and transform those ends."¹¹⁰ But too often corporate decisions break down because of failures in process—failures that counsel can address. With respect to corporate political activity, some critics have argued that corporations often take political positions that are internally inconsistent or obviously contrary to their long-term interests because of deficiencies in the manner in which political activism is disclosed and debated within the corporation.¹¹¹ Political contributions are generally not disclosed to the board or shareholders, nor are political expenditures generally subject to oversight as part of a corporation's internal controls. The lack of oversight makes it difficult for corporate decision makers and stakeholders to evaluate the costs and benefits of political activity. At a minimum, a lawyer can assist his or her client in implementing procedures to conduct an appropriate cost-benefit analysis.

A first step in the process is disclosure. Shareholders introduced a record number of proposals in the past proxy season calling for increased corporate

http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/02/08/salvaging_the_auto_industry/ (describing how U.S. companies are lagging behind their foreign competitors with respect to the manufacture of hybrid vehicles).

107. See Freed et al., *supra* note 76, at 7.

108. See generally Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 Yale L.J. 235 (1981) (identifying the risk that managers will pursue their political interests at the expense of the shareholders).

109. See Holmes, *supra* note 1, at 1009.

110. Robert W. Gordon, *The Path of the Lawyer*, 110 Harv. L. Rev. 1013, 1018 (1997).

111. See, e.g., Freed et al., *supra* note 76, at 4.

disclosure of political spending.¹¹² Unfortunately, campaign finance laws have often driven corporate political activity underground as corporations are forced to act through conduits such as trade associations, 527 committees, and so forth. As a result, corporate political activity is disguised both from corporate stakeholders and the general public. I have argued elsewhere that greater transparency serves both the interests of the corporation and of society.¹¹³ As Holmes explained, “When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength.”¹¹⁴

CONCLUSION

Although the Holmesian bad man may or may not be all that bad, many believe that the corporation is the quintessential bad man. The bad man’s lack of an internal point of view and his characterization of the law as a set of constraints limiting his pursuit of selfish objectives seem appropriately to describe the relationship between corporations and the legal system. Corporate decision making is largely focused on maximization of firm value or shareholder wealth within the constraints imposed by law, posing a challenge to those who counsel a greater role for ethical or moral considerations.

The challenge is increased by the active participation of corporations in the political process. For corporations, legal rules are not externally imposed constraints, but tools that can be modified. This leads to an apparent paradox in that corporations claim that legal compliance is the equivalent of social responsibility, yet, at the same time, they are able to control the legal constraints that define their obligations to society. Thus, the politically active bad man poses a challenge for Holmesian analysis.

Rather than frustrating the bad man analogy or offering a basis for condemning corporate political activity, Holmes’s ideas suggest that the politically active bad man fits comfortably within a public choice analysis of the political process. Accepting, as Holmes did, the role of the bad man in the legal system illuminates the legislative process and explains, in part, the gap between law and morality. Moreover, it is unclear that the selfish political activism of the bad man is more detrimental to societal interests than the activism of the good man who acts from an inner-directed sense of morality. The task for future scholarship, in incorporating Holmes into an analysis of the political process, is to come to grips with the bad man’s role and to consider more fully the implications of that role for his lawyer and for society.

112. Jim Cole, *This Year’s Proxy Issue: Political Contributions*, Am. Banker, Mar. 10, 2006, at 1.

113. Fisch, *supra* note 86, at 1563-65.

114. Holmes, *supra* note 1, at 1001.