Justice Oliver Wendell Holmes Junior (1841-1935)
American Legal Realist

“The life of the law has not been logic – it has been experience”

• He is often known as the intellectual father of Legal Realism
• Holmes was a lawyer for 15 years, a judge on the Supreme Court of Massachusetts for 20 years and an Associate Justice on the United States Supreme Court for 30 years
• In his famous book *The Common Law* (1881) he set out some of his views – he said that the only proper source of law was judicial decisions
• In this book he also tried to move the law away from legal formalism
• He said that judges decide cases based on the facts, and then present a rationale afterwards
• He argued that the real reason behind judge’s decision came from somewhere outside the law
• He gave a speech to law students, *The Path of the Law* (1897) in which he warned students to be aware of the difference between what the law is and what it ought to be. He thought that the law was what courts actually said it was
• In that speech he also developed his idea of “the bad man”.

Bad man theory – a short summary

Bad-man theory is a jurisprudential doctrine or belief, according to which a bad person’s view of the law represents the best test of what exactly the law is because that person shall carefully and precisely calculate what the rules allow and operate up to the rules’ limits. This theory is also known as prediction theory.

This theory was first adopted by Oliver Wendell Holmes who mentioned that a society’s legal system is defined by predicting how the law affects a person, as opposed to considering the ethics or morals underlying the law.

Under this theory, the prediction is done by viewing the law in accordance with a bad man’s point of view who is not bothered about morals. Such a person is unconcerned
with acting morally. Instead, such a person would be concerned about the degree of punishments certain acts will incur by the public force of law.

Holmes believed that the law should be defined as a prediction, most specifically, a prediction of how the courts behave. His rationale was based on an argument regarding the opinion of a "bad man." Bad men, Holmes argued in his paper *The Path of the Law,* care little for ethics or lofty conceptions of natural law; instead they care simply about staying out of jail and avoiding paying damages. In Holmes's mind, therefore, it was most useful to define "the law" as a prediction of what will bring punishment or other consequences from a court. The theory played a key role in influencing American Legal Realism.

Holmes wrote that "a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law". Nearly every man wants to avoid the disagreeable consequences of disobeying the law, but not all want to obey the law only to obey it.

This is an often quoted extract from Holmes' article *The Path of the Law:*

Take the fundamental question, What constitutes the law? You will find some text writers telling you that 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 the decisions. **But if we take the view of our friend the bad man we shall find that he 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. 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.** (emphasis added)

**Hart’s criticism of ‘bad man’ theory**

HLA Hart criticized Holmes’ theory in his book *The Concept of Law* (1961). He argued that (1) it ignores the internal point of view towards law, the sense shared by officials and law-abiding citizens that rules of law ‘ought’ to be obeyed; (2) it undervalues "the ways in which the law is used to control, to guide, and to plan life out of court." In other words, Holmes focused on law as it is used to solve disputes in court; (3) As for the ‘bad man’, Hart asks, "Why should not law be equally if not more concerned with the ‘puzzled man’ or an ‘ignorant man’ who is willing to do what is required, if only he can be told what it is? Or with the ‘man who wishes to arrange his affairs’ if only he can be told how to do it?"

**NOTE:** It is important to have an understanding of what the ‘bad man’ theory is all about. It’s also important to be able to criticize it – to say something about whether you agree with it.