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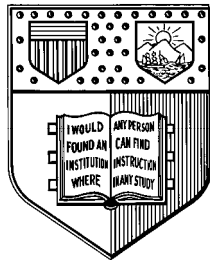
Lawyers, Citizens, and the Internal Point  
of View

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## **Lawyers, Citizens, and the Internal Point of View**

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**Lawyers, Citizens, and the Internal Point of View**  
W. Bradley Wendel\*

*I. Introduction.*

Imagine two citizens, who we will call “good” and “bad” for convenience. The good citizen looks to the law for guidance, and regards legal directives as reasons for action, apart from any consideration of whether he will be punished for failing to comply with the law. The bad citizen, by contrast, obeys the law only out of self-interest — because he or she would rather not suffer the sanctions that the state is prepared to dole out for flouting the law. The bad citizen’s concern with the law is no different from the reasons that she would have for giving money to a mugger. Perhaps the use of “bad” is misleading; it is enough that the bad man is “disinclined to obey stupid laws just because they are the law.”<sup>1</sup> In any event, the two citizens differ in respect of the *attitudes* they take toward the law. The good citizen regards the law as a source of reasons, while the bad citizen’s reasons are essentially unaltered by the law, except insofar as the law is another source of unpleasant consequences like being deprived of liberty or property.<sup>2</sup> In the jurisprudential terms pioneered by H.L.A. Hart in *The Concept of Law*, the

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<sup>1</sup> See Frederick Schauer, *Critical Notice*, 24 CAN. J. PHIL. 495, 500 (1994) (reviewing ROGER SHINER, NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT (1992)).

<sup>2</sup> The “bad” label is due to Oliver Wendell Holmes, Jr., who gave a definition of law in terms of a prediction about how legal officials might decide particular cases, as viewed by a citizen who is interested only in avoiding legal penalties that might attach to his conduct. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459-62 (1897).

good and bad citizens differ in regard to the perspective from which they view the law.<sup>3</sup> The bad citizen regards the law as a something like a force of nature, which can be studied and hopefully avoided, but which does not alter the citizen's practical reasoning. Our hypothetical bad citizen is already concerned with avoiding harm, and the law presents merely another kind of harm to be avoided. The practical reasoning of the good citizen, by contrast, is altered in a different way by the law, because she regards it as a reason for action that did not exist independently. From her "internal point of view," the good citizen accepts the law as creating new, justified demands.

Hart's great insight is that theories of law framed exclusively from the point of view of the bad citizen are inadequate to capture an essential feature of law — its normativity. Law creates reasons for action that are acknowledged by citizens using the language of obligation, such as "ought," "duty," "right," and "wrong."<sup>4</sup> The idea of the good citizen and the internal point of view is intended to personify the perspective of someone who follows the law for non-prudential reasons.<sup>5</sup> Hart not only demonstrates the possibility of the internal point of view, but shows that in order for there to be a legal system, it is conceptually necessary that certain officials (namely, judges) regard the law from the internal point of view when deliberating.<sup>6</sup> If judges did not acknowledge legal norms as legitimate reasons for action (indicating this by the use of words like "ought," "right," and so on), then there would be no way to differentiate an authoritative

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<sup>3</sup> H.L.A. HART, *THE CONCEPT OF LAW* 89 (2d ed. 1994) (distinguishing internal and external points of view).

<sup>4</sup> *Id.* at 57.

<sup>5</sup> See BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 51 (3d ed. 2004).

<sup>6</sup> HART, *supra* note \_\_\_\_, at 116.

legal command from the demand of a mugger. Significantly, however, in his focus on the perspective judges must take toward the law, Hart says relatively little about the perspective citizens must take. It is clear, on Hart's account, that citizens *may* take the internal point of view, but he does not argue that they *must*. Indeed, he admits that "private citizens . . . may obey each 'for his part only' and from any motive whatever."<sup>7</sup> A society in which only judges accepted the law from the internal point of view might be "deplorably sheeplike,"<sup>8</sup> but there is no *conceptual* reason why a society composed predominantly of bad citizens or passive, sheeplike subjects could not be said to have a legal system.

I think there may be more than Hart acknowledges to a conceptual argument for the necessity of citizens taking the internal perspective toward law. It is inherent in the concept of acting lawfully that one act for reasons that are general, and apply to all similarly situated citizens. If a person is concerned merely to act and to avoid sanctions, then she may adopt any attitude whatsoever toward the law, but she cannot claim to have acted lawfully without accepting the law from the internal perspective. Legality as an explanatory or justificatory concept simply drops out of the picture unless one regards the law from the internal point of view.<sup>9</sup> From a purely external, bad-person point of view, someone may say, "Gee, look at that — I managed to avoid being thrown in jail," but from that perspective it is incoherent to say, "I

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 117.

<sup>9</sup> See David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 648; see also Cynthia A. Williams, *Corporate Compliance with the Law in an Era of Efficiency*, 76 N.C. L. REV. 1265, 1268 & n.7 (1998) (citing Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984)).

acted lawfully.” The linchpin of the conceptual argument is the purpose for which a citizen engages with the law.<sup>10</sup> She may be interested only in describing and predicting certain patterns of behavior among fellow citizens, in which case it is perfectly appropriate to take an external perspective on the law. If she is interested in acting lawfully, however, her practical reasoning necessarily proceeds from the internal perspective.<sup>11</sup> The internal perspective is mandated by the conjunction of *action*, as opposed to observation (for which an external perspective would be adequate) and the evaluation that an action is *lawful*, as opposed to merely something that one can get away with. If this relationship holds, then acting under law while regarding the law from an external point of view would be on a par, normatively speaking, with robbing a bank and successfully asserting an alibi defense, or bribing a prosecutor to drop charges. The actor would have managed to avoid sanctions, but the evaluation of the action would be that it was wrong from the standpoint of a relevant normative framework. Indeed, part of my argument here is that the normativity of law is not distinctive, but is similar to the normativity of any other social practice which is constituted and regulated by rules or other standards internal to the practice.<sup>12</sup>

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<sup>10</sup> Here I follow Neil MacCormick, who would require citizens to regard the law from the internal point of view, at least for certain purposes:

The method of observation of conduct from that point of view, however useful it may be for certain scientific purposes, including at least some varieties of sociological inquiry, is inadequate to capture those concepts of lawyers *and of laymen* which are bound up with rules and standards of conduct.

NEIL MACCORMICK, H.L.A. HART 37 (1981) (emphasis added).

<sup>11</sup> See JOSEPH RAZ, THE AUTHORITY OF LAW 154 (1979) [hereinafter, “RAZ, AUTHORITY OF LAW”] (differentiating external statements about law, which are “statements about people’s practices and actions, attitudes and beliefs concerning the law,” from internal statements which are used “as a standard by which to evaluate, guide, or criticize behavior”).

<sup>12</sup> Lon Fuller makes a similar point, in defending his conception of the “inner morality of law,” where he notes that the natural law regulating “the enterprise of subjecting human conduct to the governance of rules” is really no different from the natural law of carpentry, as perceived by a carpenter who is interested in a building not falling

Whether that position succeeds as a conceptual matter, however, there are normative arguments that citizens ought to accept the law from the internal point of view, even if they could in theory refuse to do so. Perhaps a society of Holmesian bad man can exist, but it would be a lousy one, and one which we have good reason to hope will not be brought about. If everyone approached the law as a Holmesian bad man, it would be impossible to use the law to coordinate the activities of people who do not share substantive moral conceptions of the good, and to realize the benefits of cooperative social activity. Lawyers, in particular, have an obligation to maintain the integrity of the legal system and preserve its ability to secure the benefits of peace and the stability of mutual expectations.<sup>13</sup> These social goods depend to a large extent on people approaching the law as good citizens, and it is only a slight exaggeration to predict that “if people routinely start running red lights when they think no cop is watching (or hire lawyers to keep a lookout for the cops, and to exhaust the resources of traffic courts arguing the lights were green), the regime will collapse.”<sup>14</sup> The social good represented by law — its capacity to provide a framework for cooperative action despite deep and persistent disagreement — would be undermined if lawyers refused to regard the law as something worthy of being taken seriously, interpreted in good faith with due regard to its meaning, and not simply seen as an obstacle standing in the way of the client’s goals.<sup>15</sup>

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down. See LON L. FULLER, *THE MORALITY OF LAW* 96 (rev’d ed. 1964).

<sup>13</sup> See Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990).

<sup>14</sup> Robert W. Gordon, *A Collective Failure of Nerve: The Bar’s Response to Kaye Scholer*, 23 L. & SOC. INQUIRY 315 (1998).

<sup>15</sup> See W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1169 (2005) [hereinafter, “Wendel, *Interpretation*”].

For this reason, although it may be conceptually possible to imagine a profession of Holmesian bad men, it would not be the sort of profession that a pluralistic democracy would tolerate. One of the great achievements of law is its capacity to settle normative conflict by providing reasons for action that are accepted *as such*, without regard to whether they overlap with a citizen's first-order moral beliefs, and apart from the question of whether a violator will be caught and punished. My claim in this paper is therefore that there is a mutually reinforcing relationship between Hart's theory of the nature of law and a theory of legal ethics that emphasizes the role of lawyers as custodians of the law. The internal point of view is conceptually or normatively mandatory for lawyers and citizens when purporting to act lawfully; moreover, the internal point of view has implications for the interpretation of legal texts, and rules out certain kinds of manipulation by lawyers of legal norms solely for the benefit of their clients. In order to make these connections explicit, however, it is first necessary to look briefly at Hart's notion of the internal perspective.

## II. *Hart's Concept of the Internal Point of View.*

When one is acting as a scientific observer of a group, it may make sense for certain purposes (like making predictions) only to record regularities in behavior.<sup>16</sup> However, the observer will miss a crucial dimension to that behavior if she attempts to *explain* the behavior

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<sup>16</sup> See Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 311, 313 (Jules Coleman ed. 2001) [hereinafter, "Perry, *Methodological Positivism*"].

exclusively in terms of regularities.<sup>17</sup> In particular, the observer cannot give an explanation in terms of following rules or norms, or normative notions like duties and obligations.<sup>18</sup> That is, it is impossible to account for the first-person phenomenology of participating in a social practice. Of course, it may be the case that observed regularities are merely a happenstance, but it may be the case that people converge on certain actions because they believe that they ought to. The shared belief of participants in a practice that the regulative standards of a practice are obligatory differentiates mere behavioral regularities from rule-governed (or at least norm-governed) behavior. Deviation from a habit is a matter of indifference, but deviation from a norm is an occasion for criticism that is regarded as justified.<sup>19</sup> Hart's concept of the internal point of view is meant to capture the perspective of a participant in a practice to takes the practical attitude of acceptance toward the practice's norms.<sup>20</sup>

Significantly, criticism from the internal point of view need not be based in morality — norms of etiquette, religious observance, and the rules of games are all a basis for a negative evaluation, either by an observer or by the actor, in a self-critical stance. The unifying concept here is not morality, but normativity — to participate in certain social practices entails accepting the authority of regulative standards as guides to behavior, and accepting the legitimacy of

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<sup>17</sup> MACCORMICK, *supra* note \_\_\_\_, at 36.

<sup>18</sup> HART, *supra* note \_\_\_\_, at 89 (“If . . . the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty.”).

<sup>19</sup> HART, *supra* note \_\_\_\_, at 55-56, 84; MACCORMICK, *supra* note \_\_\_\_, at 31.

<sup>20</sup> See Scott J. Shapiro, *What is the Internal Point of View?*, manuscript.

criticism based on those standards. These regulative standards are not arbitrary, but have their origin in some ultimate state of affairs or value that is the aim of the social practice of which they a part.<sup>21</sup> Normativity is therefore explained in teleological terms, with the norms governing a social practice being justified in terms of the ends for which the practice is constituted.<sup>22</sup> Rules of a game are justified in terms of making the game challenging, fair, and interesting, rules of etiquette are intended to show respect, regulate social interaction, and so on. The end or purpose of a practice gives rise to what may be called the immanent rationality of some domain of intentional action.<sup>23</sup> The content of standards regulating the activities of practitioners is not arbitrary, but is given by the purpose shared by participants in the practice.<sup>24</sup>

The authority of those standards over practitioners is in turn justified by the volitional act of entering into the practice.<sup>25</sup> From the point of view of practitioners, it would be a conceptual

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<sup>21</sup> MACCORMICK, *supra* note \_\_\_\_, at 34 (citing JOHN M. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980)).

<sup>22</sup> See John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3 (1955) (defending practice conception of rules). In the Postscript to the Second Edition of *The Concept of Law*, Hart explains the internal/external distinction with reference to the practice theory of rules. See HART, *supra* note \_\_\_\_, at 254-55. This connection is unsurprising since Hart and Rawls worked together at Harvard and Oxford around the time when Rawls wrote this paper. See NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 169 (2004).

<sup>23</sup> See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 204-31 (1995) (arguing that interpretation ought to look to whatever rationality is immanent in a particular mode of ordering).

<sup>24</sup> It is an important feature of the Rawlsian practice theory of rules that the practice as a whole is justified on the basis of some end or value; otherwise it is vulnerable to Raz's argument that practices as such are not a reason for action. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 56-57 (1975) [hereinafter, "RAZ, *PRACTICAL REASON*"]. In the case of games and etiquette, the justification is not moral, but it is still teleological. Thus, the explanation of the normativity of the rules regulating these practices is that following the rules is necessary in order for people to jointly accomplish the ends of the practice.

<sup>25</sup> See ALASDAIR MACINTYRE, *AFTER VIRTUE* 190 (2d ed. 1984) ("To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them."); Michael E. Bratman, *Shared Cooperative Activity*, 101 *PHIL. REV.* 327, 329-31 (1992) (arguing that shared cooperative activity is possible only if the participants are committed to the joint activity).

error to regard the norms of a practice from a detached, quasi-scientific perspective, because to participate in a practice means to aim at the end for which the practice is constituted, and doing this requires conformity to the internal regulative standards of the practice. Imagine a person who claimed to be playing basketball, agreed that other players conformed to an apparent standard prohibiting double-dribbling, but refused for his own part to accept the authority of the double-dribble rule. That player would be regarded as making either an annoying joke or an argument that the game would be more interesting if double-dribbling were allowed.<sup>26</sup> In no event, however, would the player be engaging in the practice of playing basketball. The game of basketball can exist only if all of the players are respecting the standards that literally create the game and make it possible. If players regarded the rules as merely predictions of what other players would do, or as defeasible presumptions to be ignored when it was convenient, the “game” would collapse, leaving only an unstructured, meaningless spectacle of people running around a room throwing a ball. There are plenty of meaningless activities, but we expect to find participants in certain social practices acting out of some sense that what they are doing is meaningful, and guided by the overall sense or internal logic of the practice.<sup>27</sup> Otherwise their actions are literally unintelligible. Social practices exhibit what John Searle calls “collective intentionality” — it is possible for a person to do something only as part of a larger enterprise in

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<sup>26</sup> See Rawls, *supra* note \_\_\_\_, at 25-26 (arguing that it does not make sense to regard oneself as acting within a practice while at the same time refusing to accept the regulative standards of the practice).

<sup>27</sup> DWORKIN, *supra* note \_\_\_\_, at 47 (arguing that a participant in a social practice does not regard the practice and its constitutive rules as simply given, but assumes it has some value, in the sense of serving some interest or purpose); Bix, *supra* note \_\_\_\_, at 176 (“actions within social practices . . . are done with intention and purpose”).

which people act collectively, toward some common end.<sup>28</sup> In these practices, the very possibility of taking certain types of actions is created by rules which regulate conduct, which Searle calls “constitutive rules,” because they literally make up and create the possibility of a new form of activity.<sup>29</sup>

Searle gives the example of the social institution of money, which is created by a system of norms governing its use. Without understanding and accepting a rule recognizing that little green pieces of paper printed by the Bureau of Engraving and Printing constitute a medium of exchange, there would no way to make sense of even a very simple transaction, like buying a hamburger. The action could be described (“Person A hands Person B a little green piece of paper, and receives a hamburger in return”), but the description would miss all of the facts about the intentions of Person A and Person B that give meaning to the event. It follows from this conception of practices that a participant in a practice is subject to the justified criticism of others if she refuses to respect it as a purposive enterprise.<sup>30</sup> Thus, our hypothetical judge who approached judging as a game only, and refused to respect legal rules as legitimate, would be engaging in the same kind of bizarre behavior as a person who refused to believe that little green

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<sup>28</sup> JOHN SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 23 (1995).

<sup>29</sup> *Id.* at 27, 43-44.

<sup>30</sup> Compare the exchange between the experienced catcher Crash Davis and the young, wild pitcher Ebbie Calvin “Nuke” LaLoosh in *Bull Durham*:

Nuke: How come you don’t like me?

Crash: Because you don’t respect yourself, which is your problem. But you don’t respect the game, and that’s my problem.

*BULL DURHAM* (MGM Pictures 1988).

pieces of paper had value. Similarly, a hypothetical citizen who approached the law as a meaningless activity would simply not be participating in the practice. She would be like someone who handed red pieces of paper to the counter attendant and expected a hamburger in return. Acting *lawfully*, as opposed to acting *simpliciter*, means being oriented toward the law as a purposive, meaningful activity.

Participation in a meaningful social practice is also the key to Hart's distinction between acting out of obligation from acting because one feels obliged.<sup>31</sup> Giving up one's wallet at gunpoint reveals a sense of being obliged to act, for fear of experiencing the consequences of inaction. When someone acts out of obligation, by contrast, the explanation of the person's action makes reference to normative standards, not merely the desire to avoid harm. Although Hart does not rely solely on linguistic intuitions,<sup>32</sup> he does point out that we use the language of obligation, including terms like "must," "ought," and "right," to characterize the reasons we have for following the law. This usage indicates that people often believe themselves as acting under the guidance of legal norms. Having said this, Hart is careful not to say that facts about a person's beliefs and motivations are necessary to warrant the truth of a statement that the person had an obligation to do such-and-such. As he observes: "The internal aspect of rules is often misrepresented as a mere matter of 'feelings' in contrast to externally observable physical

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<sup>31</sup> HART, *supra* note \_\_\_\_, at 82-83, 88-89; Brian Bix, *H.L.A. Hart and the Hermeneutic Turn in Legal Theory*, 52 SMU L. REV. 167, 174-75 (1999) (explaining this distinction). See also Kevin Toh, *Hart's Expressivism and His Benthamite Project*, 11 LEGAL THEORY 75, 83 (2005) (interpreting Hart as arguing that "where a person makes a judgment that a law exists, he considers some action nonoptional or obligatory").

<sup>32</sup> For the influence on Hart of "the linguistic turn" in philosophy developed at Oxford (by Ryle, J.L. Austin, and others) and Cambridge (by Wittgenstein and his followers) in the mid-Twentieth Century, see MACCORMICK, *supra* note \_\_\_\_, at 13-18; LACEY, *supra* note \_\_\_\_, at 132-47.

behavior.”<sup>33</sup> A person may not in fact feel any compulsion whatsoever to act in accordance with a norm, but the norm is still obligatory. Its binding nature or normativity is not contingent upon what a particular agent actually believes, but is a function of what a person would believe if she were appropriately oriented toward the domain and its regulative standards.

This is a somewhat tricky position to maintain, and leads Hart into ambiguity.<sup>34</sup> For although he states that the internal attitude is not a matter of feelings, he insists that accepting a rule requires recognition that the rule states a standard to be followed by the relevant group as a whole:

What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgments that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of ‘ought,’ ‘must,’ and ‘should,’ ‘right’ and ‘wrong.’<sup>35</sup>

Hart seems to be saying that a critical reflective attitude is necessary for something to be a rule, but that any individual subject to the rule may not feel obliged to follow it.<sup>36</sup> As MacCormick understands this passage, Hart defines the internal point of view by reference to those who “have and act upon a wish or preference for conduct in accordance with a given pattern, both in their

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<sup>33</sup> HART, *supra* note \_\_\_\_, at 57. *See also id.* at 83 (“facts about beliefs and motives, are *not necessary* for the truth of a statement that a person had an obligation to do something”) (emphasis in original).

<sup>34</sup> *See* JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 148 n 3 (1970) (distinguishing three different sense of the concept of an internal point of view).

<sup>35</sup> HART, *supra* note \_\_\_\_, at 57.

<sup>36</sup> *See* SHINER, *supra* note \_\_\_\_, at 58-59.

own conduct and in relation to those others to whom they deem it applicable . . .”<sup>37</sup> This ambiguity between the conceptual necessity of a critical reflective attitude and the contingency of any given agent having that attitude will be important later in this paper, where we turn to the question of whether citizens and lawyers must accept legal rules as legitimate.

It may be helpful at this point to introduce the concept of “detached” normative statements in order to differentiate the cognitive and volitional aspects of the internal point of view.<sup>38</sup> The utterance of a detached normative statement does not commit the speaker to the normative force it expresses. Detached normative statements reveal that it is possible for an observer of a group to understand what it would be like to be a member of the group, without necessarily sharing in the commitments of the individual members. To do so, one would share the cognitive aspect of the internal point of view, and appreciate the volitional dimension, but not share or endorse the volitional dimension of preferring it as a standard for herself. MacCormick and Raz offer similar examples: a non-Catholic who says to his Catholic friend, “you ought to go to Mass today,” or a meat-eater who says to his vegetarian friend, “you shouldn’t eat that dish — it contains meat.”<sup>39</sup> These detached normative statements are made from what may be called the hermeneutic point of view,<sup>40</sup> the perspective of a sympathetic observer who is concerned with understanding behavior, but not participating in the practice under study.

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<sup>37</sup> MACCORMICK, *supra* note \_\_\_\_, at 34.

<sup>38</sup> See RAZ, PRACTICAL REASON, *supra* note \_\_\_\_, at 175-77; RAZ, AUTHORITY OF LAW, *supra* note \_\_\_\_, at 153-57; Perry, *Methodological Positivism*, *supra* note \_\_\_\_, at 327.

<sup>39</sup> MACCORMICK, *supra* note \_\_\_\_, at 38-39; RAZ, PRACTICAL REASON, *supra* note \_\_\_\_, at 175.

<sup>40</sup> MACCORMICK, *supra* note \_\_\_\_, at 38; SHINER, *supra* note \_\_\_\_, at 60, 65.

Raz suggests that lawyers and law professors characteristically take the hermeneutic point of view when they make statements about the law.<sup>41</sup> Crucially, this perspective enables observers to render morally neutral descriptions of what the law is — that is, to give a methodologically positivist theory of law.<sup>42</sup> A law professor elucidating the content of the law respecting such-and-such an activity need not commit herself to the view that the conduct required by the law ought to be brought about, as long as she does (cognitively) appreciate that a participant in the law-governed activity does accept the normativity of the applicable law. As Hart draws this distinction:

It is true that . . . the descriptive legal theorist must *understand* what it is to adopt the internal point of view and in that limited sense he must be able to put himself in the place of an insider; but this is not to accept the law or share or endorse the insider's internal point of view or in any other way to surrender his descriptive stance.<sup>43</sup>

Judges, on the other hand, must adopt the internal point of view at least toward *secondary* rules, particularly the rule of recognition.<sup>44</sup> This is necessary for a legal system to exist, as opposed to there being a merely fortuitous convergence of behavior by people who happen to be wearing black robes. Judges cannot take the detached point of view, but must adopt an attitude of

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<sup>41</sup> RAZ, *AUTHORITY OF LAW*, *supra* note \_\_\_\_, at 157.

<sup>42</sup> Perry, *Methodological Positivism*, *supra* note \_\_\_\_, at 326-27.

<sup>43</sup> HART, *supra* note \_\_\_\_, at 242.

<sup>44</sup> HART, *supra* note \_\_\_\_, at 116 (“if [the rule of recognition] is to exist at all, [it] must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only.”). *See also* MACCORMICK, *supra* note \_\_\_\_, at 21 (“for [the rule of recognition] itself to exist, it is necessary that the officials at least observe it as a binding social rule”); Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in COLEMAN, *supra* note \_\_\_\_, at 110-11; Bix, *supra* note \_\_\_\_, at 177 (“Hart does not claim that (all or most) citizens taking an internal perspective on the rules is a precondition to the existence of a legal system”).

commitment or acceptance of the rules imposing duties on them *qua* judges.

To see Hart's point about the systematicity of official decisions, imagine some kind of strange hypothetical society in which disputes are resolved by the whim of decision-makers, but as it happens the class of decision-makers is remarkably homogeneous, in terms of socioeconomic background, ideology, education and training, and other determinants of beliefs and preferences. If these decision-makers consistently favored certain litigants — say, prosecutors or big corporations — there would be an observable regularity in their decisions, but we would not call those decisions *lawful* unless they were justified by reasons that made reference to the sorts of values that should make a difference in how legal disputes are resolved.<sup>45</sup> The system would deserve the label “legal” only if the officials regarded themselves as duty-bound to make decisions on the basis of certain reasons and not others. We may disagree in some particulars over what criteria differentiate a lawful decision from one based on whim or partiality. At a minimum, a law-governed decision is one that is based on standards that are objective and impersonal in that they are generally applicable to similarly situated parties.<sup>46</sup> One may favor adding additional criteria, such as clarity, prospectivity, stability, and the capability of

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<sup>45</sup> Joseph Raz would call these “dependent” reasons. A dependent reason is one that is based on reasons that already apply to the subject of a directive. In Raz's example, if two people refer a dispute to an arbitrator, the arbitrator's decision is supposed to reflect and be based upon the reasons put forward by the disputing parties. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 41 (1986) [hereinafter, “RAZ, *MORALITY OF FREEDOM*”]; Joseph Raz, *Authority, Law, and Morality*, in *ETHICS IN THE PUBLIC DOMAIN* 212 (1994).

<sup>46</sup> See, e.g., E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 262 (1975) (“[P]eople are not as stupid as some structuralist philosophers suppose them to be. They will not be mystified by the first man who puts on a wig. It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equality.”).

subjects to comply with official directives,<sup>47</sup> or may favor even thicker standards, such as coherence with the community's political morality.<sup>48</sup> But in any event, if we are to speak intelligibly of legality and legitimacy, there must be some criteria for distinguishing between actions that respect a regime of law and those which are responsive to other sorts of concerns.<sup>49</sup> In Hart's jurisprudence, these criteria are provided by the system's rule of recognition.<sup>50</sup>

To say that judges must apply the criteria contained in the rule of recognition is to say that a judge manifests her commitment to abide by the norms of the social practice of law-governed decision-making. Again, however, it is important to be careful not to conflate this point about obligation with claims about the beliefs or motivations of judges. As Hart emphasizes, "facts about beliefs and motives[] are *not necessary* for the truth of a statement that a person had an obligation to do something."<sup>51</sup> A judge may be motivated by the desire to be promoted to a higher court, to win glory, or simply to continue in employment in a cushy job. Whatever specific motivations a judge may have, however, there must be something distinctive about law that provides a different sort of reason for action — otherwise there would be no such thing as a

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<sup>47</sup> See, e.g., FULLER, *supra* note \_\_\_\_, at 39-94. For an interesting observation about the relationship between Fuller's position and modern theorizing about the rule of law, see Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 852, 865 (2006) (reviewing LACEY, *supra* note \_\_\_\_).

<sup>48</sup> RONALD DWORKIN, *LAW'S EMPIRE* (1986).

<sup>49</sup> See RAZ, *AUTHORITY OF LAW*, *supra* note \_\_\_\_, at 79 (noting that talking in terms of a legal *system* requires that there be criteria for determining which laws are part of the system and which are not).

<sup>50</sup> HART, *supra* note \_\_\_\_, at 100-01.

<sup>51</sup> *Id.* at 83. A person's motivations may not track obligations for a variety of reasons, including weakness of will, conflicting desires, or apathy, but if it were not possible to conclude that someone has an obligation apart from her motivational state, then there would be no way to criticize a motivational state as inadequate. See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 102 (1993).

legal system as opposed to a fortuitous convergence of behavior by a bunch of people sitting on high benches wearing black robes.<sup>52</sup> As long as the law makes a practical difference to how a judge decides cases, in the sense that the judge accepts the legitimacy of measuring her own conduct against the standard of lawfulness articulated by the relevant community, the specific motivation a person has for being a judge is immaterial. The only important thing is that judges view their responsibilities from the internal perspective — that is, that they see themselves as participants in an institution resting on acceptance, not as gunmen writ large.<sup>53</sup>

### III. *The Internal Point of View for Citizens.*

In contrast to the situation of judges, Hart concludes that citizens need not take the internal point of view with respect to rules which create duties, obligations, or confer power to alter the legal landscape (such as rules governing contracts or wills).<sup>54</sup> Perhaps there can be a society in which there exist some good citizens and some bad ones, in the sense we have been using “good” and “bad,” and the society can still be one that is law-governed, as long as officials adopt the internal point of view when pronouncing on legal norms. Hart does state that citizens

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<sup>52</sup> HART, *supra* note \_\_\_\_, at 116.

<sup>53</sup> See Joseph Raz, *The Morality of Obedience*, 83 MICH. L. REV. 732, 736-37 (1985) (book review).

<sup>54</sup> HART, *supra* note \_\_\_\_, at 116 (“private citizens . . . may obey ‘each for his part only’ and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behavior and acknowledge an obligation to obey them”). See also Kenneth Einar Himma, *Law’s Claim of Legitimate Authority*, in COLEMAN, *supra* note \_\_\_\_, at 286 (Jules Coleman ed. 2001) (“While legal normativity requires that officials take the internal point of view towards the rule of recognition, it does not require that citizens do so.”); Stephen R. Perry, *Holmes Versus Hart: The Bad Man in Legal Theory*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 158, 169 (Steven J. Burton ed. 2000) [hereinafter, “Perry, *Holmes Versus Hart*”] (noting that Hart “maintains that the only persons who *must* be regarded as having adopted the [internal] point of view are judges” and calling this a “minor embarrassment” to his position).

may take the internal perspective on the law, and criticizes simple, Austinian positivist theories as well as American legal realism for not having the conceptual resources to account for the internal point of view.<sup>55</sup> It may be the case, however, that Hart stopped short of where his theory would logically end up, and that there are good reasons to *require* citizens to regard the law from the internal point of view, at least insofar as they seek to act lawfully. These reasons may be either conceptual or normative.

A. *Conceptual Arguments.*

Conceptual arguments trade on the nature of the practice in which people are engaged, when they claim to be asserting claims of legal entitlement. Daniel Markovits puts the point nicely in his contribution to this symposium: When citizens seek to “transform[] . . . brute demands into assertions of right,”<sup>56</sup> they are committed to a certain pattern of explanation and justification. As noted above, the hermeneutic point of view is available to observers of the legal system, who may seek to understand the content of law without thereby committing themselves to the attitude that the state of affairs commanded by law ought to be brought about.<sup>57</sup> But once one moves from the status of observer to participant, that is one who seeks to assert a claim of right rather than merely a brute demand, one is thereby committed to viewing the law from the

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<sup>55</sup> See HART, *supra* note \_\_\_\_, at 137-38 (“it cannot be doubted that . . . in relation to some spheres of conduct in a modern state individuals do exhibit the whole range of conduct and attitudes which we have called the internal point of view. . . . They . . . look upon [the law] as a legal standard of conduct, refer to it in criticizing others, or in justifying demands, and in admitting criticism and demands made by others.”).

<sup>56</sup> Daniel Markovits, *Adversary Advocacy and the Authority of Adjudication*, manuscript at p. 23.

<sup>57</sup> See *supra* notes \_\_\_\_ - \_\_\_\_, and accompanying text.

internal point of view. If the law is to make a difference *in virtue of its legality*, then citizens and officials alike must regard themselves as bound by the law.<sup>58</sup> The crucial volitional aspect of legal obligation is the act of willing one's behavior to be law-governed. By opting in to a social practice, an agent signifies her willingness to be guided by the regulative standards of that practice. The move from the hermeneutic point of view to the internal point of view accompanies the (metaphorical) act of putting on judge's robes, but it can also accompany the (again, metaphorical) act of a citizen consulting a statute book to see whether a proposed action is lawful.

There is an interesting metaethical point lurking here, namely whether Hart's theory of practical reasoning is an expressivist one, along the lines of noncognitivist ethical theories developed by Allan Gibbard, Simon Blackburn, and others.<sup>59</sup> An expressivist would maintain that making an evaluation within a particular domain necessarily commits the agent to having a reason to act according to the assessment.<sup>60</sup> These evaluations are not expressions of factual beliefs (hence the term "noncognitivism"); rather they express the agent's attitudes toward some state of affairs, that it is a good or bad thing, that it should be promoted or resisted, and so on. These attitudes are not purely subjective. An agent's attitude toward some state of affairs builds in normativity and the demand that others share this attitude by being subject to reflective

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<sup>58</sup> Coleman, *supra* note \_\_\_\_, at 122.

<sup>59</sup> See SIMON BLACKBURN, *RULING PASSIONS* (1998); ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* (1990); Stephen Darwall, et al., *Toward fin de Siècle Ethics: Some Trends*, 101 *PHIL. REV.* 115, 144-152 (1992) (providing a brief but cogent overview of noncognitivism and its shortcomings).

<sup>60</sup> See Toh, *supra* note \_\_\_\_, at 79.

consideration and the demand by others for justification. Attitudes must be warranted or justifiable, not merely asserted. As Blackburn puts it, our motivational structures have internalized the critical gaze of others.<sup>61</sup> Thus, when either an official or a citizen says “the law requires [or permits, or forbids] X,” the speaker has in effect said that she accepts the rule of recognition containing criteria picking out reasons that X is required, permitted, or forbidden, and that as a matter of fact the rule of recognition is accepted and followed by other members of the legal community.<sup>62</sup> In this way, the volitional act of appealing to the discourse of legality as an explanatory and justificatory practice binds the actor to the normativity of law.

To tie the conceptual arguments together, the possibility of a judge regarding the rule of recognition as non-obligatory is incoherent, in the same way that it would be impossible to imagine an actual basketball *player* who did not accept that the rule prohibiting double-dribbling imposed valid obligations on him. Actually participating in a meaningful, purposive social practice, as opposed to dressing up and pretending to participate in it, requires accepting as mandatory the standards that regulate the practice.<sup>63</sup> Although they participate in a different way,

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<sup>61</sup> BLACKBURN, *supra* note \_\_\_, at 207.

<sup>62</sup> See Toh, *supra* note \_\_\_, at 88 (reconstructing Hart’s analysis of legal statements in this way).

<sup>63</sup> Consider as an analogy here Saul Kripke’s “skeptical solution” to the problem that mental states do not determine the meaning of an utterance. See SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 101 (1982) (calling his approach a skeptical solution). We can say whether someone correctly followed a rule — such as a mathematical operation or a rule of grammar — only if we “widen our gaze from consideration of the rule follower alone and allow ourselves to consider him as interacting with a wider community.” *Id.* at 89. The community’s standards, in turn, are given in a teleological fashion as I have been suggesting. The conditions under which a community will say a member has correctly grasped a rule depends on “what role and utility in our lives can be ascribed to the practice of making this type of utterance under such conditions.” *Id.* at 92. Kripke’s point is that normativity is built into all practices, including those that seem to be reducible to private mental states alone. The implication for a theory of law is that a person cannot claim to be acting lawfully without regard to how members of the relevant community of law-interpreters would judge his behavior.

citizens and judges may both opt in to a framework of obligations that structures their activities as law-respecting. So, for a citizen, it is also incoherent to regard the rule of recognition (although she probably would not put it in these terms) as imposing no obligation, at least insofar as the citizen purports to be acting lawfully. A truly bad citizen — i.e. a criminal — may not care about the law, but the attitude of seeking to act lawfully necessarily entails acceptance of the normative standards that define lawful action, including the rule of recognition that differentiates between non-legal and legal sources of reasons for action. Similarly, we may not be able to argue someone into caring about the law or its purposes, but to the extent someone does care enough to invoke the explanatory discourse of law, she is thereby committed to regarding the law as a reason for action as such, and not merely as a useful heuristic for predicting when sanctions will be imposed. The sanction-avoiding, Holmesian bad man attitude does not differentiate between the law and any other exercise of power. Undoubtedly people care about avoiding the bads that can be inflicted on them by those in power, but it is impossible to identify a specific social practice of law-following if one has only the limited conceptual resources of sanction-avoidance to explain action.

A brief example will illustrate the distinction between obligation and motivation, and also the point that the reasons to take the internal point of view may not be moral reasons.<sup>64</sup> In his review of Roger Shiner's *Norm and Nature*, Fred Schauer offers a hypothetical of a jurisdiction's law containing an anachronistic prohibition on public dancing, which is enthusiastically

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<sup>64</sup> On the latter point, see Gerald J. Postema, *The Normativity of Law*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 81, 87-88 (Ruth Gavison ed. 1987).

supported by a highly vocal minority which vigorously lobbies against its repeal, and therefore cannot be said to have fallen into desuetude.<sup>65</sup> Modifying Schauer's hypothetical slightly, suppose a citizen wishes to hold an outdoor dance party, and consults a lawyer to see if there are any legal impediments to doing so. The citizen probably thought he would be required to satisfy some liquor-licensing or zoning requirement, and was surprised to be told by the lawyer about the anti-dancing statute. How does the statute affect the citizen's practical reasoning? A variety of motives potentially enters into his deliberation: The desire to avoid penalties or the hassle and burden of defending a criminal charge; the wish not to be thought by his neighbors as a scofflaw; the general disposition not to violate the law; or even a more complex cost-benefit calculation that takes into account the disutility associated with lawbreaking and the advantages of having the party. Moreover, as a matter of morality, the citizen thinks there is nothing at all wrong with dance parties, so he perceives no independent moral obligation to do what the law requires. Schauer insists that it is not a conceptual truth that the citizen and the lawyer must have internalized the law or concluded that there is a moral obligation not to hold the dance party.<sup>66</sup> But Hart's position is that the law creates *obligations*, not that it creates *moral* obligations. He clearly states that "there can be legal rights and duties which have no moral justification or force whatsoever."<sup>67</sup> The anti-dancing statute creates obligations, but in a different normative domain from that of morality. A citizen can quite reasonably believe that he has no moral obligation to refrain from public dancing, while acknowledging that he has other kinds of obligations,

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<sup>65</sup> Schauer, *supra* note \_\_\_\_, at 499-501.

<sup>66</sup> Schauer, *supra* note \_\_\_\_, at 505.

<sup>67</sup> HART, *supra* note \_\_\_\_, at 268.

including legal obligation.

*B. Normative Arguments.*

An interesting debate between Stephen Perry and Scott Shapiro suggests that the issue of whether the internal point of view is mandatory for citizens cannot be resolved by conceptual analysis alone.<sup>68</sup> The good citizen, who accepts that the law imposes obligations, and the bad citizen, who is concerned only with avoiding sanctions, both reason from *an* internal point of view — it is not the case, however, that there is only one perspective which can be called *the* internal point of view.<sup>69</sup> As Perry helpfully analyzes it, the distinction between external and internal perspectives maps onto the distinction between theoretical and practical reasoning.<sup>70</sup> The external perspective is that of an observer who is interested in formulating and testing behavioral generalizations; it belongs to the domain of theoretical reasoning. The internal perspective, by contrast, is that of someone who is deciding what to do, on the basis of both prudential and non-prudential reasons. In Perry's view, the distinction between prudential and non-prudential reasons is actually at the heart of the opposition between Hart and Holmes. A Holmesian bad man is engaged in practical reasoning, and regards the law as a source of reasons, but the only (law-created) reason he cares about is the self-interested consideration of avoiding penalties. The law is reason-giving for both the good and bad citizen; the only difference is that they respond to

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<sup>68</sup> See Perry, *Holmes v. Hart*, *supra* note \_\_\_\_,; Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in BURTON, *supra* note \_\_\_\_, at 197.

<sup>69</sup> Shapiro, *supra* note \_\_\_\_, at 198.

<sup>70</sup> Perry, *Holmes Versus Hart*, *supra* note \_\_\_\_, at 164-65.

different kinds of reasons.<sup>71</sup> If the bad citizen is also viewing the law from an internal point of view, albeit one which responds only to a subset of the reasons brought into existence by a legal system, then the conceptual connection between acting within the domain of law and viewing the law as legitimate is broken. There is no conceptual reason why a citizen may not regard the law only instrumentally, as a source of unpleasant consequences but not as imposing obligations that create non-prudential reasons for action.

Two different types of citizens — the bad man and the “puzzled” man (to use Hart’s term<sup>72</sup>) — both may view the law from an internal point of view. Perry’s important critique of Hart, which he has developed in a series of articles, is that any theory of law that turns on whether to privilege the perspective of the bad man or the puzzled man cannot, by nature, belong to the class of methodologically positivist legal theories, although they can be used to defend a substantive thesis about the relationship between law and morality.<sup>73</sup> Both the bad man and the puzzled man are engaged in genuine practical reasoning with reference to law; the only difference is that the bad man’s practical reason is affected only by the sanctions attached to the violation of law.<sup>74</sup> Unless Hart is claiming that there are so few bad men that they can be

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<sup>71</sup> *Id.* at 165-66.

<sup>72</sup> See HART, *supra* note \_\_\_\_, at 40 (“Why should not law be equally if not more concerned with the ‘puzzled man’ or ‘ignorant man’ who is willing to do what is required, if only he can be told what it is?”).

<sup>73</sup> See Perry, *Holmes Versus Hart*, *supra* note \_\_\_\_, at 169; Perry, *Methodological Positivism*, *supra* note \_\_\_\_; Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in LAW AND INTERPRETATION 97 (Andrei Marmor ed. 1995); Stephen R. Perry, *The Varieties of Legal Positivism*, 9 CAN. J. L. & JURIS. 361 (1996) (book review).

<sup>74</sup> Shapiro, *supra* note \_\_\_\_, at 201-02 (summarizing Perry’s critique); Schauer, *supra* note \_\_\_\_, at 500-01 (making a similar argument).

regarded as marginal to the theoretical enterprise, he appears to be grounding a theory of law on an empirically contingent attitude that citizens may take toward the law or a contestable theory of human nature.<sup>75</sup> It is not the case that, conceptually speaking, there is no such thing as a bad man or a bad man's internal point of view. Thus, Hart must be arguing that one *ought* to adopt the puzzled citizen's internal point of view because great social good would be made possible if most citizens did view the law from that perspective. It does not help to fall back on functional theories of the nature of law, such as Hart's claim that the role of law is to "provide guides to human conduct and standards of criticism of such conduct."<sup>76</sup> Functional arguments are contestable as well, and one who advances a functional theory is implicitly making a value judgment that a particular kind of rule-governed society would be a good thing.

In response, Shapiro observes that Hart did not claim that the law provided guidance *simpliciter* to human conduct — rather, he insisted that law is distinct from other forms of social control of behavior in that it provides guidance *through rules*.<sup>77</sup> (Or, one might say, through *law*, to avoid distractions like the rules/principles distinction pressed by Dworkin or the rules/standards dichotomy familiar in legal theory.) Recall that the internal aspect of rules is first introduced in the discussion of a population with a habit of obedience to a sovereign.<sup>78</sup> Habit alone does not make this behavior lawful, however, unless the population (or most of them, most

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<sup>75</sup> Perry, *Holmes Versus Hart*, *supra* note \_\_\_\_, at 169-74; Schauer, *supra* note \_\_\_\_, at 501-02.

<sup>76</sup> HART, *supra* note \_\_\_\_, at 249.

<sup>77</sup> Shapiro, *supra* note \_\_\_\_, at 206.

<sup>78</sup> HART, *supra* note \_\_\_\_, at 55.

of the time) regards their habit as normative, as establishing the basis for justified criticism of deviation.<sup>79</sup> Hart's criticism of the Holmesian bad man, predictive theory of law is that it cannot account for the perspective of the good or puzzled citizen. However, this argument is susceptible to Perry's rebuttal that Hart has established only that the good and the bad citizen are both conceptually compatible with Hart's theory of law. Nothing in Hart's theory eliminates the possible existence of bad citizens, and Hart would appear to beg the question against Holmes by privileging one type of citizen's practical reasoning over the other's.<sup>80</sup> As Shapiro points out, however, Hart's conception of guidance through rules is fairly thin.<sup>81</sup> He is not trying to smuggle in a motivational component, or to claim that the understanding of a legal obligation necessarily is accompanied by a motivation to conform to the law. This much is clear from the possibility of making detached normative statements about the law. And, as I argued previously in connection with the expressivist reading of Hart, citizens can commit themselves to viewing the law from the internal point of view to the extent they seek to justify their actions as having been law-respecting.

We are still one step short of establishing that the internal point of view is mandatory. I have argued that when one opts into a social practice, one necessarily accepts the authority of that practice's norms. But opting in is at best a hypothetical imperative. *If* one wishes to take

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<sup>79</sup> *Id.* at 55-57.

<sup>80</sup> Schauer, *supra* note \_\_\_\_, at 503 ("To *define* law as normative is thus question-begging in a way that defining law without reference to normativity, and then asking whether law *is* normative, is not."); Coleman, *supra* note \_\_\_\_, at 110-11 (emphasizing that Hart does not make a normative argument for privileging the good citizen's point of view).

<sup>81</sup> Shapiro, *supra* note \_\_\_\_, at 207.

advantage of a certain kind of justification for one's actions (i.e. "I followed the law"), *then* one is committed to viewing the law in a particular way. The last step in this argument is normative, and requires moral reasons for constructing a legal system in a society and for regarding the resulting system as authoritative over particular domains of practical activity. The question therefore becomes whether guiding conduct through rules is a worthy for the law to pursue,<sup>82</sup> and further whether this worth gives reasons that individual citizens ought to regard the law as legitimate. One possible response from a moral point of view, which I have defended elsewhere,<sup>83</sup> relies on the shared interest of citizens in living together with others, and realizing the benefits of shared cooperative activity, despite deep and persistent first-order moral disagreement. The normative force of the law is thus given in terms of its capacity to solve a practical problem facing people in the "circumstances of politics."<sup>84</sup> Hart hints at this approach when he says that the importance of legal rules is connected with the belief that they are "necessary to the maintenance of social life or some highly prized feature of it."<sup>85</sup> Jules Coleman's reading of Hart underscores the utility of the internal point of view in sustaining a public sense of reciprocity and a norm against free-riding on the compliance of others: "Stability, reciprocity, and mutuality of expectation are created and enhanced by the behavior

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<sup>82</sup> See Shapiro, *supra* note \_\_\_\_, at 199.

<sup>83</sup> W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363 (2004) [hereinafter, "Wendel, *Obedience*"].

<sup>84</sup> See William J. FitzPatrick, *The Practical Turn in Ethical Theory: Korsgaard's Constructivism, Realism, and the Nature of Normativity*, 115 ETHICS 651, 657-58 (2005). The term "circumstances of politics" is from Jeremy Waldron, and refers to the condition of coexisting with others with whom we do not share beliefs about the good, justice, or rights. See JEREMY WALDRON, *LAW AND DISAGREEMENT* 105 (1999).

<sup>85</sup> HART, *supra* note \_\_\_\_, at 87.

exhibited by those accepting a rule from the internal point of view.”<sup>86</sup>

The values associated with law are not only social goods, but appeal to the interests of individuals as well, who seek to live and work with others with whom they may have intractable moral disagreements. A person could deny that she has any interest in regulating her activities according to rules that are adopted in the name of society as a whole, but this would be a strikingly disrespectful attitude to adopt toward one’s fellow citizens.<sup>87</sup> One might also believe that normative disputes in the public domain are not in good faith, but are merely struggles for advantage and the realization of one’s interests. On the other hand, this may be a cynical exaggeration, ignoring the possibility that participation in politics may be motivated by more high-minded concerns.<sup>88</sup> Although the motives and attitudes shared by citizens is a contingent, empirical matter, I believe a theory of professional ethics can put these issues aside, just as Hart differentiated the questions of obligation and motivation. Although I have followed Waldron in talking about citizens having a “*felt need*, shared by the disputants, for common action in spite of such disagreement,”<sup>89</sup> it may be better to put the point in terms of the necessary existence of an interest in social settlement of normative conflict, merely by virtue of the nature of human beings as sociable, disputatious creatures.<sup>90</sup> Notably, this conception of the interest in settlement of

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<sup>86</sup> Coleman, *supra* note \_\_\_\_, at 120.

<sup>87</sup> See WALDRON, *supra* note \_\_\_\_, at 221-22.

<sup>88</sup> *Id.* at 230.

<sup>89</sup> *Id.* at 207 (emphasis added); see also Wendel, *Obedience*, *supra* note \_\_\_\_, at 376.

<sup>90</sup> I have called this postulate the “Grotian problematic,” picking up on J.B. Schneewind’s use of Hugo Grotius’ conception of human nature to organize his discussion of the history of modern moral philosophy. See J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* 70-72, and *passim* (1998).

normative conflict is compatible with a society full of either puzzled men or bad men. The normative reasons to take the internal perspective are the same under the assumption of either Holmes' exceedingly bleak view of human nature<sup>91</sup> or a conception that builds in the possibility of altruism.

I have defended an account of the authority of law, drawn from Waldron and Joseph Raz, which builds on the shared interest in reaching at least provisional agreement on a common course of action, even where there is persistent and deep moral disagreement.<sup>92</sup> Generalizing from one of Raz's illustrations, society can be likened to two merchants who have gotten into a dispute over some term in a contract, but who still desire to continue the mutually beneficial commercial relationship.<sup>93</sup> The parties decide to submit the dispute to an arbitrator and accept the arbitrator's decision as binding, regardless of its content, i.e. regardless of whether each party believes the arbitrator got it right. The parties share a reason, namely the desire for a continued relationship, for regarding the arbitrator's decision as an authoritative directive in their practical reasoning. This shared interest creates a second-order reason *not* to act on what would otherwise be reasons for the parties. Significantly, although the arbitrator's decision is based on reasons

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<sup>91</sup> See Perry, *Holmes Versus Hart*, *supra* note \_\_\_\_, at 172-76.

<sup>92</sup> See Wendel, *Obedience*, *supra* note \_\_; W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67 (2005). Although I have tended to talk about the coordination function of law in terms of settling normative conflict, the law has a role in coordinating activity even in the absence of normative disagreement. See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 11-15 (2001). For example, there may be general agreement that issuers of securities should disclose information relating to the issuer's financial condition, but in the absence of binding legal rules, the content and form of the disclosures would probably vary to a degree that would undermine the efficiency of the securities markets.

<sup>93</sup> See RAZ, *MORALITY OF FREEDOM*, *supra* note \_\_\_\_, at 41-42.

that would otherwise apply to the parties' situation (e.g. whether the contract had been adequately performed, whether delivered goods were conforming, and so on), the decision creates a content-independent reason for action.<sup>94</sup> After the decision is handed down, the merchants' practical reasoning will take the decision into account *because* it is the arbitrator's decision, not because it appears correct to them.

Using the arbitrator example as a metaphor, we can imagine citizens concluding that they would like to work together with their fellows to achieve various public goods — roads, parks, hospitals, schools, clean air, protection against crime, national defense, and so on — which would be impossible to realize without coordinated action. Moreover, in the course of cooperative activity, citizens realize that moral disputes may arise — should state-funded hospitals perform abortions, should young people be conscripted into military service, how much of a burden should be imposed on industry to reduce air pollution, and so on. Because deliberation, even in good faith, cannot finally resolve all of these issues, there is a shared need for a procedural mechanism to resolve and settle them. Legal norms are content-independent reasons for action, like the arbitrator's decision, in that citizens are obligated to respect the law regardless of whether they believe it is morally well founded.<sup>95</sup> If each citizen could reexamine

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<sup>94</sup> *Id.* at 35. In later work Hart also referred to the content-independence of legal norms as essential to the authority of law. See H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM* 243 (1982).

<sup>95</sup> Thus, I disagree with those who regard the authority of law as primarily epistemic — that is, seeing its function as providing better, more reliable guidance to what morally ought to be done. See, e.g., Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 357, 360 (Andrei Marmor ed. 1995). A great many normative controversies implicate conflicting values, conceptions of the good, virtues, or ideals which cannot always be reconciled in terms of some more general conception of the good or the *telos* for humans. See, e.g., RAZ, *MORALITY OF FREEDOM*, *supra* note \_\_\_, at 322-66 JOHN RAWLS, *POLITICAL LIBERALISM* 54-58 (1993); CHARLES LARMORE, *PATTERNS OF MORAL*

the moral basis for applicable legal norms, the law would be unable to perform its function of enabling cooperative action in a pluralistic society. This is the basis for the law's claim to legitimate authority, and its preclusive effect on the deliberation of citizens.

#### IV. *The Internal Point of View for Lawyers.*

The objectivity of law is just as important as a constraint on the deliberation of lawyers, who advise clients on the extent of their legal rights and duties and structure transactions within the law. One of the recurring theoretical problems in legal ethics is how to reconcile the moral agency of lawyers — who are of course human being, subject to moral demands even when acting in a professional capacity<sup>96</sup> — with the duty of lawyers to facilitate access by citizens to legal entitlements. In Steven Pepper's well known phrase, if lawyers based their advice on their own moral beliefs, the result would be an "oligarchy of lawyers," not a democracy.<sup>97</sup> In Hart's theory, secondary rules of change allow citizens to modify the law to adapt to changing

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COMPLEXITY (1987); W.D. ROSS, *THE RIGHT AND THE GOOD* 19-47 (1930); Isaiah Berlin, *The Pursuit of the Ideal*, in *THE CROOKED TIMBER OF HUMANITY* 1 (1990); Thomas Nagel, *The Fragmentation of Value*, in *MORTAL QUESTIONS* 128 (1979). Moral pluralism, not uncertainty, is the foundation of much of the disagreement that gives rise to the need for law. Of course, moral pluralism is not the whole story. Disagreement and the need for settlement may also be the result of empirical uncertainty, limited altruism, unreliable cognitive processes, and a host of other factors. Even in these cases, however, the shared interest of citizens is simply that the law provide some focal point to enable cooperation, not that the law get it right in first-order moral terms. A favorite maxim of Justice Brandeis' puts the point nicely: "It is almost as important that the law should be settled permanently, as that it should be settled correctly." See, e.g., *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (quoting *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724 (1865)).

<sup>96</sup> See, e.g., Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 NYU L. REV. 63 (1980); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

<sup>97</sup> See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM B. FOUND. RES. J. 613, 617.

circumstances,<sup>98</sup> and in a democracy, these secondary rules specify ways in which citizens may participate in the process of collective self-government. If the rules were modified by unelected officials or some other agents who function as intermediaries between citizens and their legal entitlements, the democratic nature of secondary rules of change would be undercut. This concern is reflected in the law governing lawyers, which permits lawyers to give non-legal advice,<sup>99</sup> but reserves to clients the right to determine the goals of the representation<sup>100</sup> and underscores that moral blame for the client's goals should not be ascribed to the lawyer.<sup>101</sup> As long as the client's purpose is lawful, the lawyer has a fiduciary duty to carry it out to the best of her ability, and although she is not precluded from having a "moral conversation" with the client, the client is permitted to insist that the lawyer pursue her lawful objectives.<sup>102</sup>

If the internal perspective on the rule of recognition is mandatory for judges because of considerations of objectivity and systematicity, it is equally mandatory for lawyers. A lawyer must treat the law as imposing obligations on the client, and because the lawyer's own duty is to represent the client faithfully within the law, the law imposes obligations on the lawyer as well.

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<sup>98</sup> HART, *supra* note \_\_\_\_, at 92-93.

<sup>99</sup> MODEL RULES OF PROFESSIONAL CONDUCT, R. 2.1 (2002) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.").

<sup>100</sup> *Id.*, R. 1.2(a).

<sup>101</sup> *Id.*, R. 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities.").

<sup>102</sup> *See id.*, R. 1.2, cmt. [1] ("Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations.").

The opposite of the internal point of view manifests itself in legal practice as the attitude that lawyers can, and should, treat the law instrumentally, as merely an impediment to their clients' goals, rather than as a source of obligation. This attitude valorizes "creative and aggressive" structuring of transactions, "zealous" advocacy, and an excessively private view of legal obligations that runs only to the client and does not include obligations to courts, third parties, or a general obligation to interpret legal texts in good faith. In other words, the distinction between the internal and external perspective in jurisprudence shows up in practice in the guise of controversies over interpretation.

Hart's theory of the *nature* of law focuses on the union of primary and secondary rules and the possibility of taking an internal perspective on these rules — that is, viewing them as intrinsically reason-giving. The theory of legal authority I have defended emphasizes the *function* of law, which is the settlement of normative conflict. One who desires to live peaceably alongside, and cooperate with one's fellow citizens has a reason to respect the settlement by law of the normative controversies that would otherwise make cooperation impossible, or at least too costly. Even in the absence of normative conflict one has an interest in coordinating activities with a minimum of inconvenience and cost. Therefore, one has a reason to opt into the social practice of lawful action, which necessitates adopting the internal point of view. As I have argued elsewhere, ethical constraints on the process of interpretation are necessary to enable law to fulfill its function of optimizing people's ability to work together to achieve common projects.<sup>103</sup> The law would fail at this end in one of two situations: (1) representative of clients

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<sup>103</sup> See Wendel, *Interpretation*, *supra* note \_\_\_\_, at 1193.

were unable to discern the content of the law, or (2) quasi-private legal interpreters, i.e. lawyers, were permitted to manipulate the formal expression of legal norms to make them mean anything at all.<sup>104</sup> “If enacted law is to settle at least some cases at the level of particularity at which they present themselves, a rule of recognition will need to provide a basis for specifying not only which proposal, but *which version* of a given proposal, has been enacted.”<sup>105</sup> As this framing of the issue shows, there is a three-way relationship between a theory of the nature of law, a theory of the basis for the law’s authority, and the interpretation of legal norms.<sup>106</sup> The task of this final substantive section of the paper is therefore to explore this relationship and attempt to derive principles regulating the interpretation of law from Hart’s theory of the nature of law and the theory I have defended of the authority of law.

Even among philosophers who emphasize the coordination and settlement function of the law as the foundation for its authority, there is considerable dispute over the implication for interpretation. Jeremy Waldron inclines toward textualism, emphasizing that legislatures who hash out and resolve normative disagreement consider and vote on the official language of a statute, not committee reports or floor debates.<sup>107</sup> He does not deny that the “plain meaning” of statutory language is often insufficient to resolve questions concerning the application of the

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<sup>104</sup> See ALEXANDER & SHERWIN, *supra* note \_\_\_\_, at 53 (“To perform their [settlement] function effectively, Lex’s rules must be determinate enough to avoid moral controversy in the process of their application and general enough to settle questions that Lex cannot attend to as they arise.”).

<sup>105</sup> WALDRON, *supra* note \_\_\_\_, at 39.

<sup>106</sup> See Alexander, *supra* note \_\_\_\_, at 358 (“Knowing how to interpret laws requires knowing what laws are. . . . [M]any issues that are currently considered part of a theory of legal interpretation are actually part of a theory of authority instead.”).

<sup>107</sup> WALDRON, *supra* note \_\_\_\_, at 80-81.

statute, but does stress that statutory interpretation at least places considerably more importance on the statutory text than common-law interpretation places on the language of judicial opinions.<sup>108</sup> Taking the need for interpreting language as given, Larry Alexander contends that the task of interpretation is primarily a matter of recovering the intent of the authors of legal texts.<sup>109</sup> In his view, intent is what makes utterances meaningful, as distinct from random collections of marks on the page. Lawmakers determine what actions are required, permitted, prohibited, etc., and then communicate those rules to citizens in the form of legal texts. When it comes time to interpret legal texts, citizens must be engaging in the process of recovering the authors' intentions, because the authors intended to communicate what ought to be done. Finally, Heidi Hurd argues, in opposition to Alexander, that it is *the law* which settles normative conflict, not the intentions of law-makers.<sup>110</sup> When the law-maker is a multi-member legislative body, it is practically a legal fiction to speak of a unitary intention underlying the resulting text.<sup>111</sup> Even if it were possible to recover a univocal intent of a legislature on a specific point,<sup>112</sup>

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<sup>108</sup> *Id.* at 79.

<sup>109</sup> See Alexander, *supra* note \_\_\_, at 361-63.

<sup>110</sup> See Heidi M. Hurd, *Interpreting Authorities*, in MARMOR, *supra* note \_\_\_, at 405.

<sup>111</sup> See Wendel, *Interpretation*, *supra* note \_\_\_, at 1189 n.68 (summarizing this criticism).

<sup>112</sup> In Alexander's version of the "no vehicles in the park" example, a three-member town council has the following intentions with respect to permitted vehicles: Member 1 (permit A and B), Member 2 (permit B and C), Member 3 (permit B and D). Since all of the members intended to permit B, an army truck sitting atop a war memorial, an intentionalist interpretation of the ordinance would deem the truck as not falling within the prohibition of vehicles in the park. See Alexander, *supra* note \_\_\_, at 357-58, 380-81. One obvious practical difficulty with even an unrealistically simple example like this one is that in a real case, the intentions of the council members must be ascertained at some temporal distance, probably in the course of litigation. The members may have forgotten entirely what they had intended with respect to war memorials, if they had thought about that issue at all, or the salience of the issue at the present time might cause them to remember incorrectly what they had intended in the past. Relying on contemporaneous notes to solve the problem of recollection introduces a different problem — namely, that of the manipulability and unreliability of these notes. See, e.g., Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 442 n.2 (1990) (citing numerous iterations of arguments against the use

however, it is not a necessary implication that the intent should be conclusive of the meaning of the resulting law.

The argument for the primacy of intent in interpretation seeks to generalize from the picture of a group of people who entrust the settlement of controversy to a wise elder — “Let Lex decide,” they resolve, believing that Lex’s decision will enable them to move beyond the controversy and cooperate productively.<sup>113</sup> In this way Alexander’s and Sherwin’s theory of the authority of law parallels Raz’s arbitrator example, considered previously.<sup>114</sup> Since Lex-the-human cannot actually resolve all the disputes that arise in a large-scale society, this is obviously a metaphor for Lex-the-law settling controversies by promulgating norms in the form of rules, which speak generally to whole classes of disputes, rather than settling them case-by-case.<sup>115</sup> But if Lex is only a metaphor, then he can have only metaphorical intents with respect to particular controversies. An intentionalist approach to interpretation would have to rely on counterfactual intents, hypothesized intents deduced from the language and apparent purpose of legislation, or something like the immanent rationality of the law.<sup>116</sup> These are all respectable theories of interpretation, but they are qualitatively different from the process of interpreting an utterance by ascertaining the intent of a human speaker.

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of legislative history materials).

<sup>113</sup> See ALEXANDER & SHERWIN, *supra* note \_\_\_\_, at 16.

<sup>114</sup> See *supra* notes \_\_\_\_ - \_\_\_\_, and accompanying text.

<sup>115</sup> ALEXANDER & SHERWIN, *supra* note \_\_\_\_, at 28-29.

<sup>116</sup> See, e.g., David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFF. 105 (1988).

The more fundamental distinction between my theory of legal authority and that advanced by Hurd, Alexander, and Sherwin, is that they all believe that the law has authority only insofar as it makes it more likely that citizens will comply with the requirements of morality. Alexander and Sherwin emphasize this point:

[W]e are interested in more than coordination. The controversies Lex addresses can be settled in better or worse ways, and one of the benefits the community seeks from his rules is avoidance of moral error through the application of Lex's superior expertise. Members of the community presumably have selected Lex because they have confidence in his moral expertise.<sup>117</sup>

In Hurd's view, the law has authority only to the extent it directs citizens to the action that is morally required: "[T]he intentions of lawmakers are, on this view, a heuristic guide to determining the content of the law, which is itself a heuristic guide to determining the content of morality".<sup>118</sup> Because the law has authority only when it enables citizens to conform their actions to the demands of morality, the law is relevant in practical reasoning only where it is clear enough to be helpful in pointing people in the right direction, morally speaking.

As a moral pluralist, I would reformulate this strong limitation on the authority of law,<sup>119</sup> but the linkage between authority and interpretation is the same. In my view, the law has authority when it enables citizens to conform their actions to what citizens, collectively and in the name of society, have agreed upon as the basis for cooperative action against a background of

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<sup>117</sup> ALEXANDER & SHERWIN, *supra* note \_\_\_\_, at 98-99.

<sup>118</sup> See Hurd, *supra* note \_\_\_\_, at 425.

<sup>119</sup> See Wendel, *Obedience*, *supra* note \_\_\_\_, at 381 n.80.

persistent normative disagreement, and with the recognition that even in the absence of disagreement there will be costs associated with individuals going their own way without the coordination of binding rules. Due to limitations inherent in the nature of language, however, it is unrealistic to expect that law will be able to provide a single answer — let alone one *morally right* answer — in cases that lie at the penumbra of a legal rule, cases that implicate competing legal norms, and unforeseen circumstances in application, perhaps resulting from changing technology or social norms.<sup>120</sup> The best we can expect from law is that it articulate and clarify our community's response to a certain category of disputes, and provide resources for lawyers and judges to use in achieving settlement of particular controversies. In any event, the crucial aspect of the law's claim to authority, given the background of normative disagreement that gives rise to the need for law, is that the law provide content-independent reasons for action. That means the interpretation of law cannot be a function of what citizens and lawyers think about the law, from a normative point of view. As Raz observes:

Different members and different sections of society may have different views as to which schemes of co-operation, co-ordination, or forbearance are appropriate. It is an essential part of the function of law in society to mark the point at which a private view of members of the society, or of influential sections or powerful groups in it, ceases to be their private view and becomes . . . a view binding on all members notwithstanding their disagreement with it.<sup>121</sup>

The fundamental flaw in the Holmesian bad man perspective on the law is that it impermissibly privileges the views of individual citizens on the question of what ought to be

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<sup>120</sup> See HART, *supra* note \_\_\_\_, at 125-36.

<sup>121</sup> See RAZ, *AUTHORITY OF LAW*, *supra* note \_\_\_\_, at 50-51.

done pursuant to law. For example, consider the view that corporate law and other legal restraints on self-interested behavior merely sets a price to engage in certain activities, in the form of sanctions for violating the law.<sup>122</sup> If corporate managers regarded law in this way, the social goods of stability, reciprocity, and coordinated action would be impossible to realize. Parties to contracts would defect whenever they believed it was in their subjective advantage to do so, and regulators would be unable to ensure compliance with mutually beneficial regulatory norms where the affected citizens considered it advantageous to breach and pay. The decision to buy one's way out of compliance would inevitably be less structured and predictable than compliance, because of the subjectivity of utility and willingness (and ability) to pay. It is of course an axiom of rational-choice theory that preferences are subjective,<sup>123</sup> so it is a reasonable assumption that BadCorp might be willing to pay a \$10,000 fine in order to continue polluting, while GoodCorp might have a different rank order of preferences that would determine the opposite outcome. But these subjective utility functions are irrelevant to the correct interpretation of the legal norms governing the activity in which the client wishes to engage. Thus, acting on the basis of subjective preferences runs directly counter to the settling and coordinating effect of the law.<sup>124</sup> Perhaps chaos would not result in a given case, but this

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<sup>122</sup> See Williams, *supra* note \_\_\_ (criticizing this conception of corporate law).

<sup>123</sup> See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 18 (3d ed. 2000).

<sup>124</sup> At the San Diego faculty workshop Michael Kelly raised an important and difficult question in discussion, namely whether it is impossible for a legal system to consist entirely of what Calabresi and Melamed would call liability rules. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). The point is quite well taken, that the Holmesian bad man attitude essentially identifies the law with liability rules, which is another way of making Stephen Perry's point that the bad citizen is a genuine practical reasoner, albeit one who cares only about the sanction-creating aspect of legal norms. Liability rules do not protect an entitlement absolutely; instead, they permit another to destroy the entitlement, provided he is willing to pay an objectively determined price in order to do so. See *id.* at 1092. It seems that I am arguing that the law, either conceptually *must* or normatively *ought to*, protect

argument is not an empirical conjecture about whether cooperation would, in fact, fall apart. Rather, it is a functional normative argument that the social goods which are the end of law provide a justification for regarding oneself as obligated by the law.<sup>125</sup>

When one is acting in the domain of law, it is essential that an interpretation of legal norms be grounded in materials (texts, principles that are fairly deemed to underlie and justify legal rules, interpretive practices, hermeneutic methods, and so on) that are properly regarded in the relevant community as appropriate reasons — what I have elsewhere called (somewhat confusingly in the context of this discussion of Hart) internal legal reasons.<sup>126</sup> The rule of lenity, the statute of limitations, the text of a regulation, legislative history documents, the *expressio unius* canon of statutory construction, the methodology of textualism, principles of analogical reasoning, and the facts of cases are all internal legal reasons, in that they are identified by the

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entitlements only with property rules or inalienability rules. As Calabresi and Melamed point out, there are good reasons to favor liability rules in some cases, such as where mutually beneficial exchanges would not occur if a transfer depended on the entitlement-holder's consent. *See id.* at 1106-07. Liability rules have efficiency and administrability advantages which make them useful in certain contexts. So it would be much too strong a position to claim that the law does not, and should not, make use of liability rules. Conversely, it would probably not be a good thing for the law to consist entirely of liability rules, for the reasons given by Calabresi and Melamed in favor of the other types of rules. *See, e.g., id.* at 1111-12 (suggesting that an entitlement may be made inalienable if its transfer creates externalities, or where there are moral reasons to prohibit certain transfers). Thus, although I suspect a legal system could not get by only with liability rules, this is a normative position and not a conceptual one — a legal system could have a rule of recognition that identified only liability rules as being within the domain of law.

<sup>125</sup> Even if utter systemic breakdown does not occur, there may be bad consequences associated with the Holmesian bad man point of view that should cut in favor of lawyers taking the internal attitude of acceptance of law. For example, the securities and corporate bar have complained vociferously about the high cost of regulation associated with the Sarbanes-Oxley statute — costs that fall on the regulated industry. But the Sarbanes-Oxley Act did not appear for no reason. It was a response to the failure by lawyers and accountants to ensure compliance by their clients with existing securities laws. The history of the accounting frauds at Enron, Global Crossing, WorldCom, and other companies, and the regulatory response by Congress and the SEC, suggests that there are reasons of long-term self-interest that should motivate lawyers to take the internal point of view. This picture of the motivational effect of law resembles Gauthier's account of the foundations of morality in "constrained maximization" by self-interested actors. *See* DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986).

<sup>126</sup> *See* Wendel, *Interpretation*, *supra* note \_\_\_, at 1197.

rule of recognition as reasons belonging to the law and not some wholly extra-legal domain such as morality. In most areas of at least modest complexity, there is a multitude of internal legal reasons that bear on any interesting interpretive question, and it is unlikely that there will be only one obviously right answer. For this reason, legal interpretation usually involves the exercise of judgment, or what some scholars of statutory interpretation refer to as practical reasoning.<sup>127</sup> Judgment is not a faculty of individual interpreters, and is certainly not a matter of punting the weighing or balancing of plural factors to the subjective discretion of the decision-maker. Rather judgment is fundamentally a community-bound virtue, in that it makes reference to intersubjective criteria for the exercise and regulation of judgment.<sup>128</sup> An interpreter's discretion is constrained by community norms that govern the understanding and application of legal texts to factual situations. The community's shared acceptance of certain reasons as relevant to legal decisions therefore delimits the boundary separating internal legal reasons from the considerations that are irrelevant to legal interpretation.

One may question whether this is enough for coordination and settlement, particularly if internal legal reasons can be plural and conflicting. There still seems to be a subjective element in interpretation if it is thrown back on judgment, which is a virtue or characteristic of a judge or lawyer, not a property of the law itself. Again, however, the response is to emphasize that a

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<sup>127</sup> See, e.g., Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); William N. Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

<sup>128</sup> See, e.g., Gerald Postema, "Protestant" Interpretation and Social Practices, 6 LAW & PHIL. 283 (1987); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

community of interpreters constrains the exercise of judgment and elaborates principles regulating interpretation. These communities do a pretty good job differentiating between good faith resolutions of competing legal norms and “creative and aggressive” manipulation of legal texts and the exploitation of loopholes. In the end, the persuasiveness of this position depends on whether it offers a plausible account of how communities actually do elaborate standards that constrain the interpretation of legal texts, and whether the constitutive and regulative rules of these practices further the ability of practitioners to realize the end or purpose of the practice. I have had more to say elsewhere about the problem of competing interpretive communities, specifically of the phenomenon of a “tax bar” and a “tax shelter bar,” with diametrically opposed interpretive attitudes toward the Internal Revenue Code.<sup>129</sup> There may be genuine, good-faith disagreement among practitioners about how to interpret legal norms. This is to be expected, and may even be a healthy way to ensure flexibility and equity within the legal system. But we should not infer from the potential diversity of good-faith interpretations that any community can come along and announce itself as a legitimate authority regulating interpretation. Some communities may not be committed to regarding the law as a public good and a social achievement that deserves to be maintained and respected, as opposed to struggled against. Thus, the broad normative implication of the internal point of view is that interpretive primacy should be vested in those communities of professionals who manifest an attitude of custodianship toward the law.

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<sup>129</sup> See Wendel, *Interpretation*, *supra* note \_\_\_\_, at 121 5-17.