

# Fordham Law Review

---

Volume 75 | Issue 3

Article 1

---

2006

## The Internal Point of View in Law and Ethics: Introduction

Benjamin C. Zipursky  
*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Benjamin C. Zipursky, *The Internal Point of View in Law and Ethics: Introduction*, 75 Fordham L. Rev. 1143 (2006).

Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss3/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## The Internal Point of View in Law and Ethics: Introduction

### Cover Page Footnote

Professor & James H. Quinn Chair in Legal Ethics, Fordham University School of Law. So many colleagues, students, and staff at Fordham have helped to put together this Symposium that it is hard to know where to begin in expressing my gratitude. Not too hard, however. My colleagues Bruce Green and Russell Pearce, with the Stein Center behind them, have constantly encouraged and supported the idea of this Symposium in every way, including this written volume, to which they have made their own outstanding contributions. Dean William Treanor and Associate Dean Matthew Diller have also provided support of every form for this idea, integrating it into our wonderful Centennial celebration at the law school. Christian Steriti, my assistant, as well as Helen Herman and Darin Neely, and their staff in the Office of Academic Programs as usual combined hard work and professionalism to make the event come off with great success. And as much as anyone (and probably more), the dedication, intelligence, and industry of the Fordham Law Review editors and staff have made this volume (and event) possible--special thanks go to Raymond Beauchamp, Evan Citron, Deana Kim El-Mallawany, Elizabeth Gallagher, Lindsay Goldstein, and Lauren Handelsman. Finally, thanks to our authors, and to my colleagues from Fordham and elsewhere who contributed their words, thoughts, and presence to the Symposium: Michael Baur, Jules Coleman, James Fleming, Caroline Gentile, Oona Hathaway, Benedict Kingsbury, Thomas Lee, Robin Lenhardt, Youngjae Lee, Catherine Powell, and Rebecca Roiphe.

**SYMPOSIUM**

**THE INTERNAL POINT OF VIEW IN LAW AND  
ETHICS**

**INTRODUCTION**

*Benjamin C. Zipursky\**

As part of its 100th anniversary celebration in 2005-06, Fordham University School of Law hosted a symposium entitled “The Internal Point of View in Law and Ethics.” The two-day event in February of 2006 brought together leading figures in jurisprudence, legal ethics, torts, corporate law, constitutional law, and international law. Building upon the enthusiastic support of the Stein Center for Law and Ethics, the Fordham Law Review, and the Fordham Law Annual Fund, the event proved to be illuminating for all those who participated. Happily, we now have a written product, which contains an outstanding—and unusually extensive—set of papers from our participants.

The conference idea stems from two famous and famously contrasting images of how laypersons might think about the law. The first derives from Oliver Wendell Holmes, Jr., and can be found in one of the best-known passages of American legal thought:

---

\* Professor & James H. Quinn Chair in Legal Ethics, Fordham University School of Law. So many colleagues, students, and staff at Fordham have helped to put together this Symposium that it is hard to know where to begin in expressing my gratitude. Not too hard, however. My colleagues Bruce Green and Russell Pearce, with the Stein Center behind them, have constantly encouraged and supported the idea of this Symposium in every way, including this written volume, to which they have made their own outstanding contributions. Dean William Treanor and Associate Dean Matthew Diller have also provided support of every form for this idea, integrating it into our wonderful Centennial celebration at the law school. Christian Steriti, my assistant, as well as Helen Herman and Darin Neely, and their staff in the Office of Academic Programs as usual combined hard work and professionalism to make the event come off with great success. And as much as anyone (and probably more), the dedication, intelligence, and industry of the Fordham Law Review editors and staff have made this volume (and event) possible—special thanks go to Raymond Beauchamp, Evan Citron, Deana Kim El-Mallawany, Elizabeth Gallagher, Lindsay Goldstein, and Lauren Handelsman. Finally, thanks to our authors, and to my colleagues from Fordham and elsewhere who contributed their words, thoughts, and presence to the Symposium: Michael Baur, Jules Coleman, James Fleming, Caroline Gentile, Oona Hathaway, Benedict Kingsbury, Thomas Lee, Robin Lenhardt, Youngjae Lee, Catherine Powell, and Rebecca Roiphe.

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.<sup>1</sup>

Like Plato's Thrasymachus, the bad man does not necessarily act badly; his disposition to resist illegal or immoral conduct depends entirely upon the expectation of negative sanctions.

By contrast, the great English philosopher H.L.A. Hart constructed a rather different kind of figure many decades later—a person who holds what Hart called “the internal point of view” on law. This sort of person, who Hart claimed “normally” was in the “majority of society,” does not merely take statements of law to be relevant to prediction of sanction. Such persons use legal rules, Hart wrote,

in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz., in all the familiar transactions of life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.<sup>2</sup>

More succinctly, for Hart's occupant of the internal point of view, law has its own distinctive form of obligatoriness or normativity; Holmes's bad man sees in legal statements nothing truly deserving the title of duty or obligation—simply probabilities of sanction attendant to certain conduct.

Hart's description of “the internal point of view” in *The Concept of Law* is part of what made him the most illustrious English legal philosopher of the twentieth century, and what made *The Concept of Law* the most important single work in twentieth-century jurisprudence. Indeed, this idea has stretched beyond jurisprudence, to the philosophy of social sciences, philosophy of language, and other areas in analytic and constitutional philosophy. Yet none of this fully captures the motivation for making the internal point of view central at our law and ethics conference at Fordham.

A specifically *interdisciplinary* goal was at the core of this Symposium. For the Holmesian bad man is a strikingly important idea within two different fields that too rarely speak to one another—jurisprudence and legal ethics. If the jurists ask, “What really are statements about legal duties—predictions of penalties or descriptions of obligations?” the legal ethicists ask, “What, really, should a lawyer be providing by way of counsel to a client—probabilities of sanctions or advice about obligations?” These two fundamental questions, and the literature surrounding each, are but a hair from one another, but frequently never touch.<sup>3</sup> Our goal has been

---

1. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

2. H.L.A. Hart, *The Concept of Law* 90 (2d ed. 1994).

3. There are, of course, exceptions: David Luban, *Lawyers and Justice: An Ethical Study* (1998); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 Yale L.J. 1545 (1995); Tanina Rostain, *Ethics*

to come together to reflect upon these questions as a group, and to encourage our respective disciplines to continue doing so.

At the broadest level, our aspiration was to use the dispute between Hart and Holmes as a prism through which to look at the relations between law and ethics. Holmes's bad man instantiates the sharpest law/ethics divide, of course. Hart invited a range of far more nuanced views, even while ultimately insisting on a separation between law and morality. The spectrum of law/ethics intersections is limitless, and the Hart/Holmes prism helps us both to see different intersections and to focus better upon those we see.

Within this broad aspiration, however, there are three somewhat different aspects of thought that together comprise the larger domain of papers. First, as to jurisprudence and general legal theory: Notwithstanding Hart's insistence on the existence of legal obligations and the rich picture he offers of the internal point of view, Hart was himself a legal positivist. For students of the philosophy of law, Hart's breakthrough with the internal point of view was in showing a way to retain the law/morality distinction of Holmes while not entirely jettisoning normativity. Of course, whether Hart actually succeeded in doing this remains an open question. So too are questions regarding what Hart meant by the "internal point of view," what roles it was meant to play within his jurisprudential framework, and what sorts of implications it has—if any—for the authority of law. More generally, an important strand of legal theory taking off from the Holmes/Hart dichotomy looks at whether law should be understood in terms of liability rules or prices, on the one hand, or as guidance rules or norms of conduct, on the other. From law and society to critical legal studies to the rule/standards debate to behavioral law and economics theory, the internal point of view is reflected and developed in a myriad of ways.

Second as to legal ethics and professional responsibility: The Holmes/Hart contrast is not only relevant to jurisprudence, it is highly relevant to understanding the role of the lawyer, and thus, to legal ethics more broadly. A Holmesian is inclined to think that a lawyer's counseling role is to provide prediction on what courts and other legal officials will do; a Hartian is unlikely to take such an instrumentalist view. While many legal thinkers have certainly addressed the Holmesian bad man in legal ethics, the place of the Hartian point of view within legal ethics has received far less attention. More specifically, legal ethics scholars have tended to be split between two perspectives—a conventional perspective, that roughly assumes the bad man, and a more progressive, morality-centered view, which puts far greater emphasis on a lawyer's role in preserving moral values within our society. The internal point of view

---

*Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. Cal. L. Rev. 1273 (1998), and W. Bradley Wendel, *Civil Obedience*, 104 Colum. L. Rev. 363 (2004), most notably.

suggests, perhaps, a middle ground: less sanction-oriented than the Holmesian, less moralized than the moralist.

Third, as to private law theory and public law theory: Holmes's effect on the direction of American legal theory has been enormous, not so much because of the discussion of his jurisprudential views, but because those views were influential almost as a matter of course. The result is that substantive legal theory, from torts and contracts through corporate law to constitutional law and public law more generally, has developed over the past century in the United States within an environment dominated by a perspective that is skeptical of rights and duties and roughly hewn to the bad man picture. Taking seriously the internal point of view opens questions in all of these fields; how would substantive, political, moral, and interpretive questions look if we took Hart's internal point of view as a genuine possibility? In all of these areas, scholars over the past twenty years have begun to explore more seriously the idea that law functions partly as guidance rules, and, consequently tried to reshape their understandings of a variety of areas.

The collection of papers before us crisscrosses these categories, but at least roughly falls into these three broad parts.

#### I. JURISPRUDENCE AND GENERAL LEGAL THEORY

Scott Shapiro offers an apt starting place to the entire volume, answering with great clarity, concision, and nuance the question his title poses, *What Is the Internal Point of View?* As a preeminent scholar of H.L.A. Hart, Shapiro ably and authoritatively explains both what Hart meant by the internal point of view and what theoretical roles he intended it to play within his framework. These roles include both appreciating the nature of some legal participants' mindset and, more broadly, understanding the possibility of law and the nature of legal thought and language within a naturalistic framework.

While Shapiro comes at Hart scholarship as a critical adherent of Hart's positivism, Stephen Perry is better described as an admiring critic. In his original and challenging essay, *Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View*, Perry challenges a key piece of Hart's jurisprudential framework: the idea that taking the internal point of view is a matter of having a certain *attitude*, not a matter of having a certain sort of belief. Hart's embrace of this philosophical stance helped him to retain a substantial and normatively rich jurisprudential position, without accepting the idea that normative statements were genuinely true or false. Perry explores the question of what a Hartian framework would look like if the internal point of view were understood in terms of true and false beliefs, not in terms of attitudes and practices. What emerges is an important contribution to the debate between positivism and natural law, founded in a close exploration of how to understand the adoption of the internal point of view.

Claire Finkelstein's *Hobbes and the Internal Point of View* is a careful and compelling essay on the granddaddy of English legal positivists, Thomas Hobbes. She offers a powerful argument that Hobbes's understanding of legal obligations fell closer to Hart's than to Holmes's. For while Hobbes of course saw the need for sanctions in a legal system (as, of course, have virtually all positivists as well as natural law thinkers), he did not in fact hold a sanction theory of legal obligations. Hobbes saw in the adherence to legal obligation a special kind of rationality quite fundamental, and quite different, from the prudential avoidance of sanction. Finkelstein makes a strong case for reading Hart's normatively rich form of legal positivism as, in at least this respect, a return to the Hobbesian starting point, rather than a rejection of it.

My own contribution to the jurisprudence panel, *Legal Obligations and the Internal Aspect of Rules*, draws from Hart a positivistic theory of what legal obligations are, one that captures what I believe Hart regarded as a common-sense attitude toward legal obligations. Capturing this common-sense attitude is vitally important for understanding the alleged duty to obey the law, understanding the sense in which it is the role of lawyers to inform their clients of their legal obligations (rather than treating law as prices or offering moral counsel), and understanding the sense in which a substantive theory of some domain of law (e.g., torts, contracts, or corporate law) can and should take seriously the notion of legal duties without being a moral theory.

In a remarkable synthesis of the newsworthy and the jurisprudential, Brian Tamanaha uses the distinction between the internal point of view and the external point of view to assess a pivotally important statement by Supreme Court Justice nominee then-Judge Samuel Alito. Tamanaha's point, in *A Socio-legal Methodology for the Internal/External Distinction: Jurisprudential Implications*, is that there really is such a thing as judging from a point of view that accepts the bindingness of legal norms on a decision procedure, and that many judges (including Alito), take seriously that role. Of course, Tamanaha is not naïve, and recognizes that both the identification and the application of the relevant rules may vary greatly with ideological predispositions, but he argues that anyone serious about jurisprudence must recognize the difference between an ideologically influenced rule-bound view, and a view of decision making that is simply political.

Robert Cooter's characteristically elegant contribution—*The Intrinsic Value of Obeying a Law: Economic Analysis of the Internal Viewpoint*—once again displays that economic and philosophical approaches to legal theory are more fruitfully treated as synergistic, rather than antagonistic. Cooter's pioneering efforts to understand, in economic terms, the variety of different ways that actors view legal norms, lead him here to suggest that the distinction between preferences and constraints can help to analyze the difference between the internal point of view and the external point of view. More generally, Cooter argues that it would be valuable to have a

framework for understanding in what sense some legal actors intrinsically value complying with the law. Economic theory—and in particular the notion of a preference curve that reflects a preference to obey the law—point in the direction of such a framework.

One of the broadest-ranging articles in recent years plugging the internal point of view into substantive legal theory was Dale Nance's 1997 article, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*.<sup>4</sup> That article transposed the Hart/Holmes debate onto Guido Calabresi and A. Douglas Melamed's classic *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*.<sup>5</sup> In the present volume, Nance synthesizes the guidance rule/liability rule debate with rules versus standards literature. The result—*Rules, Standards, and the Internal Point of View*—is an innovative argument in favor of the use of rules, rather than standards in a wide range of legal norms: The claim is that rules are better suited than standards to fostering the internal point of view among citizens, and to permitting laws to serve their guidance function.

## II. LEGAL ETHICS

The preeminent legal ethicists in our Symposium continue to reject the basic, frequently unreflective assumptions of the legal profession. As a leader of the movement that rejects a narrow professional role for lawyers leading to moral complacency, Deborah Rhode is equally skeptical that jurisprudential theories will provide answers for individual lawyers facing moral challenges. In *Moral Counseling*, Rhode directly argues that lawyers must accept responsibility for their role in providing moral advice that goes beyond the client's own interests. She candidly entertains a variety of typical objections to this view, and offers a sustained and integrated set of responses, in the end concluding that lawyers must escape their own tunnel vision and own up to the reality that we must exercise far greater moral oversight than we have done.

My colleagues Russell Pearce and Bruce Green are responsible both for the Stein Center's support of this program and for the constellation of legal ethics luminaries who chose to join them, and us, at this Symposium. Pearce's provocative contribution—*The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*—continues his important work chronicling the transformation of the legal profession in the United States over the past century. The jarring suggestion intimated by his title is that the legal profession has made the same mistake as those "Blue State" Democrats who have nearly peripheralized themselves: Both have clung dogmatically to an idea that moral values should be excluded from public discourse. Pearce traces the

---

4. Dale A. Nance, *Guidance Rules and Enforcement Rules: A Better View of the Cathedral*, 83 Va. L. Rev. 837 (1997).

5. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).



conception of the lawyers' commitment to the public good from its origins in antebellum legal and political thought to its decline following the shift to more empirical modes of jurisprudence in the post-Civil War period. He explains how the emergence of the hired gun ideal and its dominance after the 1960s reflects shifts in jurisprudential and political perspectives that redefine the lawyer's role to be largely technical and amoral. If lawyers are to regain the leadership role in society that, Pearce argues, they once enjoyed, and if legal ethics is to be de-marginalized as a subject, the legal profession must reconceive itself in such a manner as to permit and foster the reintegration of moral values within legal practice.

In yet a different twist on "points of view" within legal practice, Daniel Markovits offers a subtle and original defense of the adversarial system. His *Adversary Advocacy and the Authority of Adjudication* depicts a role for lawyers that permits clients to maintain a sense of the legitimacy of law's dispute resolution system. The client's respect for the legal system—and concomitantly, the authority of the system—come not despite their own perspective on the merits of their legal position, but because our system permits clients to see their own perspective represented in the terms of the law. The role of the advocate is to translate the client's conception of her legal position into terms that will permit it to mesh with other parties' positions, so that a resolution can be articulated in a common discourse. Markovits concludes, against the grain of many other legal profession scholars, but in conformity with the conventional view of the bar—that a client-centered, partisan conception of advocacy is critical to the authority of the legal system.

Tanina Rostain's comprehensive and challenging work, *The Emergence of "Law Consultants,"* belongs to a growing academic literature that looks at legal profession questions through a law and society lens. Like Tamanaha, Nance, and Cooter, however, she also sees the jurisprudential question of this Symposium through that lens. One of her questions, at a theoretical level, is what difference it makes to what a lawyer does in her work that she is acting as a *lawyer*, rather than in some other capacity; the implicit question is whether part of acting as a lawyer is that one takes an internal point of view toward the law. But Rostain's treatment of this question takes place, in part, on a practical level, for she is interested in the growing movement in which lawyers offer to provide services as consultants, opting out of the bar's regulatory framework. There is a larger question looming here—whether the distinction between the internal point of view and the bad man point of view even makes sense for the sorts of corporate compliance regimes that have motivated the development of law consultants.

Like Rostain, Bruce Green, in *Taking Cues: Inferring Legality from Others' Conduct*, seamlessly combines the broader jurisprudential and legal ethical issues of the Symposium with contemporary examples of importance in the legal profession—in this case, cross-jurisdictional practice. Green's general question is what relevance it should have, to a

lawyer counseling a client about the interpretation of an unclear authority, that many other individuals have chosen to interpret the authority to permit some particular course of conduct. Green offers a straightforward and powerful argument that such information is highly relevant in counseling, for a client may reasonably treat such information as probative in forming a good faith interpretation of what the authority means. He ironically justifies giving the advice that the Holmesian lawyer would want to give—"others do it and do not get in trouble"—but does so in a way that takes seriously a perspective that seeks to comply with legal obligations in a Hartian sense.

William Simon, like David Luban and Deborah Rhode, has been at the forefront of the intellectual enterprise of prying lawyers away from their rigid adherence to a partisan conception of a lawyer's professional responsibility.<sup>6</sup> His contribution to this Symposium—*After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*—begins by noting that in the Sarbanes-Oxley Act of 2002 we have a forceful assertion that the public wants more accountability and less partisanship in the legal profession. The positive enterprise of this important piece is the sketching of a realistic but ambitious conception of the legal profession. Business lawyers who are genuinely committed to law must eschew formalism in interpreting law, and must take seriously their loyalty to a corporation's shareholders, not (primarily) to the managers with whom they have more direct contact. Just as Hart builds the lawfulness of the citizen into the citizen's being a participant in the daily life of the legal system—rather than in his moral punctiliousness—so Simon builds the solution for business lawyers into adherence to the virtues of law, not into morality more abstractly conceived.

Finally, W. Bradley Wendel's *Lawyers, Citizens, and the Internal Point of View* offers an ambitious synthesis of many of the themes of this conference. Wendel expressly identifies his views with those of Hart and his positivist followers. He adds a moral argument, not obviously present in Hart's work, that citizens *ought* to take the internal point of view and accept the law as binding. And he builds upon both of these a picture of the role of lawyers, in particular with respect to legal counseling. Wendel argues that in a diverse and heterogeneous society, law plays a coordinative and stabilizing role. But the capacity for it to provide these social virtues depends upon citizens respecting its authority and taking seriously—not just formalistically—what the law says. Within this framework, it is critical that lawyers conscientiously provide intelligent, non-formalistic legal counsel that advises clients to understand their legal obligations in terms of the spirit of the law.

---

6. See William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (2000).

### III. SUBJECT-SPECIFIC ARTICLES ON THE INTERNAL POINT OF VIEW IN LEGAL THEORY

#### A. Torts

The Holmesian bad man has a special place in American tort theory for at least two reasons. First, and most obviously, Holmes as a legal theorist was above all a tort theorist, and his theoretical antipathy to robust conceptions of legal duty was most marked in connection with tort theory. Second, and of equal importance, the conception of law as liability rules or as “prices” has been most forcefully developed in contemporary legal theory by tort theorists—Guido Calabresi and Richard Posner, most famously. Several articles have countered the law-as-price view in torts, and, to a significant extent, the corrective justice movement in tort theory has been set against such views. However, the closest thing to a tort theory that embraces a Hartian notion of legal obligations is a series of articles co-authored by John Goldberg and myself, analyzing the concept of “duty” within Anglo-American negligence law. Goldberg and I have argued that tort scholars have too quickly capitulated to the fear that the concept of “duty” in tort law could become morally overblown, and have therefore too quickly offered reductive accounts of duty that do not really work in negligence law. In defense of duty, we have noted that one can be a positivist like Hart and still take legal duties seriously; more broadly, we have offered a fairly extensive (not particularly Hartian) theoretical framework for taking duties seriously within negligence law. The three contributions to this panel—that of Keith Hylton, Jane Stapleton, and Goldberg and Zipursky—all relate to duty in tort law.

Keith Hylton’s ingenious essay, *Duty in Tort Law: An Economic Approach*, rejects the philosophers’ and doctrinalists’ claim that law and economics cannot explain duty in tort law. Hylton offers a positive theory of duty doctrine that complements his well known work on strict liability. Just as strict liability doctrine in effect subsidizes victims by permitting them to recoup what in some sense should be regarded as their own costs, so too “no duty” doctrine in effect subsidizes certain defendants by closing off liability where it should, in some sense exist. In both cases, the costs are not borne by the party who in some sense has externalized these costs. And in both cases, it is because there are substantial economic reasons for subsidizing the non-liable parties.

Jane Stapleton, among the most eminent tort scholars in recent decades, flatteringly chose to devote her contribution to *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*. But the flattery ends at the title. While Stapleton addresses many aspects of the Goldberg/Zipursky view of tort law, she does indeed focus on a central claim of our view that is highly relevant to this Symposium: the claim that tort law should be interpreted as imposing genuine legal obligations, and that the norms of tort law should be understood as roughly “guidance” rules that set standards of conduct. Both

on matters of detail and on larger structural matters, Stapleton sets out numerous reasons for rejecting the Goldberg/Zipursky effort to see in tort law a relational, Hartian conception of legal duties. Above all, she is unpersuaded that either normative or descriptive goals of tort theory are furthered by understanding “duty” along the terms we have proposed. And she forcefully argues that a relational conception of duty risks sending a message to some potential plaintiffs—like Mrs. Palsgraf—that they are not entitled to the broad protections of the law.

In *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, Goldberg and I detail the linkage between Holmes’s positivistic jurisprudential commitments and his massive (and, we contend, unfortunate) reformulation of tort law. Ironically, the legacy of Holmes’s tort theory has endured—indeed has become dogma—within torts, even though the jurisprudential foundations have been demolished by Hart’s famous critique. Yet Hart shared many of Holmes’s positivistic instincts, while rejecting his jurisprudential framework. And so our aspiration in this piece is to use the more solid Hartian framework, which accepts a Holmesian divide between law and morality, to formulate a more nuanced framework for understanding duties in tort law.

### B. Corporate Law

All three corporate law scholars—Jill Fisch, Donald Langevoort, and Cynthia Williams—have woven together the jurisprudential and ethical issues raised by Hart and Holmes with important contemporary issues in corporate law. In *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, Jill Fisch commendably begins her discussion with a perspective on Holmes’s bad man that is underrepresented in this Symposium. Holmes, Fisch contends, was committed to understanding law as a vitally important means of social coordination that could succeed without relying on the vaguer notions of conscience. This conception is particularly apt for a corporation, explains Fisch, because lacking natural personhood, a corporation also lacks a moral compass. Her principal concern, however, rests on another significant difference between corporations and natural persons: Corporations more frequently seek and gain access to political influence that puts them in a law-shaping role. The question posed is how a lawyer for the Holmesian corporate client should conceive of her or his role in the lobbying and political influence realm. The short answer is this: Protect the client against a bias toward the short term perspective; make sure to identify the client correctly as the corporation, not the executives; implement procedures, such as means for greater disclosure, that enhance transparency.

Donald Langevoort’s *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering* offers a look at ethical issues in corporate lawyering that is at once theoretically sophisticated and down to earth. He begins by pointing out that it is beyond question that corporations must obey the law. The larger problems arise because corporate culture—

as Langevoort has explained in other work—tends to lead corporate actors to a point of view that cognitively distances them from recognizing what the law is saying they are required to do. Sometimes, this perspective leads actors to be begrudging and skeptical about the legitimacy of the laws and regulations that are applicable to them. Often, for example, a corporation will be subject to laws that its adversaries drafted and successfully shepherded through the political process. In this context, platitudes about being a law-abiding citizen or doing the right thing, morally, are of little use to corporate counsel. The recommendation for corporate lawyers that Langevoort offers here is to mine the connections between legality and legitimacy. Rational corporate decision makers must appreciate the need for their companies to be respected and trusted as legitimate actors in the marketplace, and maintaining this legitimacy requires finding a reasonable judgment about the legality of conduct. Lawyers, by maintaining professional independence from the corporate culture but nevertheless understanding the demands and realities of the corporate enterprise, should endeavor to locate the point where legitimacy and legality meet.

The starting point that Cynthia Williams set for herself in *A Tale of Two Trajectories* is ten years ago, when she worked on her article *Corporate Compliance with the Law in the Era of Efficiency*.<sup>7</sup> That piece, which influenced my shaping of this Symposium, noted that the efficiency-oriented Holmesian bad man perspective on corporate compliance, which dominated academic discussions in the 1980s and early 1990s, was a sharp departure from the dominant perspective of corporate lawyers and academics for most of the twentieth century—which was roughly a Hartian law-abiding citizen perspective. In the current volume, Williams charts two quite different developments in the past ten years: the burgeoning of the corporate social responsibility movement, on the one hand, and the distressing array of corporate scandals such as Enron and Worldcom, on the other. Although these trends tend to push in different directions—one reflecting great corporate adherence to moral standards, the other, less—both signal the public's appreciation of the enormous power that publicly held companies have in matters that go far beyond the financial, and the necessity for law and lawyers to attend to the exercise of that power.

### C. Constitutional Law

While most of this Symposium has focused on the internal point of view for citizens looking at the (primary) rules of law, our final contributions turn to a topic that was dear to Hart—the relevance of the internal point of view to legal officials. Abner Greene, Matthew Adler, and Jeremy Waldron, all consider judges, legislators, and executive officials who face threshold questions concerning whether constitutional conditions for law have been satisfied. An engagement with popular sovereignty and the

---

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

limits of judicial review runs through much of the current constitutional writings of Greene, Adler, and Waldron, and that theme should be borne in mind when reading their contributions to this volume. In their writings here, each of these theorists depicts an exquisitely difficult question in constitutional law that turns out to be a fundamental jurisprudential question: How are we to analyze the legal officials' putative obligation to conform to a conventional (rather than unconventional) interpretation of the constitutional conditions on law? If Scott Shapiro's opening essay was correct in its assertion that the internal point of view was most critical for Hart at the level of legal officials, then it is particularly fitting that our Symposium issue should end on this topic.

Abner Greene's *Against Interpretive Obligation (to the Supreme Court)* performs what is, in effect, a remarkable transformation of the rather basic questions about obligation that have dominated much of the Symposium—questions about the nature and necessity of a “law-abiding citizen” perspective. Greene rightly recognizes that there is a parallel debate about whether legal officials must regard Supreme Court decisions as authoritative on the question of what the Constitution means. He sees the latter as an issue of whether legal officials—other than judges—must behave, toward the Court's interpretation of controversial constitutional provisions roughly the way a law-abiding citizen treats the law more broadly. By probing the concept of a multiply divided set of governmental powers as the key to the framers' vision of a constitutional order, Greene explains why legal officials should not, generally, behave toward the Court's interpretation of the Constitution in a deferential or passive manner. Ironically, in the constitutional realm anyway, the absence of a disposition to comply with the relevant lawmakers' imperatives (judges) hardly reflects a Holmesian skepticism about values; it is the essence of nonjudicial officials taking normative judgments seriously. Greene's provocative argument aiming to dethrone the Court-deferential perspective on constitutional interpretation from the moral high ground is a taste of a much larger ongoing book project, *Against Obligation: A Theory of Permeable Sovereignty*.

With Matthew Adler's *Constitutional Fidelity, The Rule of Recognition, and the Communitarian Turn in Contemporary Positivism*, we come nearly full circle, back to the close and difficult Hart analysis with which this issue begins. Adler's topic is, in part, a nuanced Hart debate about the nature of the social practice that officials are part of, and that permit a rule of recognition to exist as a social rule. The question is what it really means for officials to have a *shared practice* of accepting certain criteria for the validity of laws: Is it sufficient that officials accept the same criteria, or must they accept these criteria *because they are mutually accepted by all the legal officials*? This is really a question about whether the internal point of view for officials is essentially conventional (more particularly, reflexive), whether *its content* is fundamentally rooted in community acceptance. What Adler disquietingly suggests in this subtle analysis is that

if the internal point of view on the rule of recognition must be conventional (which Adler believes Hart thought) then it is very hard to understand how the proponent of a brash and *unconventional* fidelity-based constitutional theory—such as originalism or textualism—could be holding a coherent legal position at all. And so the arresting conclusion is that there may be a contradiction between legal positivism and the very concept of a fidelity-based constitutional theory.

To close this issue on a high note, Jeremy Waldron predictably offers a model of historical erudition, philosophical depth, and moral acuity with his *Are Constitutional Norms Legal Norms?* Waldron, like Adler and Shapiro, takes seriously the claim that the existence of a legal system depends upon the existence of rules of recognition. More importantly, he accepts the Hartian claim that these rules of recognition must be accepted from the internal point of view. The problem is that if rules of recognition are the rules that officials tacitly accept, and in virtue of which the legal system can exist, the question arises whether rules of recognition so conceived are legal rules at all. The short answer, offers Waldron, is that the issue may not really matter. What matters is that we understand that the existence of a legal system depends on the existence of such accepted-in-practice norms. Hart's internal point of view was intended, in part, to eliminate the need for a infinite regress of rules with which putative norms would supposedly comply. There is a bottom or foundation of the valid rules; it is a foundation of an attitude of acceptance, not a further premise about legality.

Ironically, Waldron's characterization of the role of *practice* in solving a jurisprudential problem reminds us of an important respect in which Holmes's bad man perspective and Hart's internal point of view are fruitfully viewed together. Holmes's bad man is emblematic of a theoretical approach to understanding law (a version of legal realism) that Holmes anticipated and helped to create, which insisted that we examine *how legal actors use law*. At a distance of more than four decades from the publication of Hart's *The Concept of Law*, we can now see the internal point of view in a similar light: The internal point of view is emblematic of a theoretical point of view that Hart anticipated and helped to create, which recognizes informal social practices and shared social norms as critical to understanding law.

*Notes & Observations*