2006

Legal Obligations and the Internal Aspect of Rules

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, Legal Obligations and the Internal Aspect of Rules, 75 Fordham L. Rev. 1229 (2006). Available at: https://ir.lawnet.fordham.edu/flr/vol75/iss3/5

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.
Legal Obligations and the Internal Aspect of Rules

Cover Page Footnote
Professor & James H. Quinn Chair in Legal Ethics, Fordham University School of Law. I am grateful to John Goldberg, Stephen Perry, Arthur Ripstein, Tanina Rostain, Tony Sebok, Scott Shapiro, and Daniel Sinclair for numerous discussions regarding this topic.

This article is available in Fordham Law Review: https://ir.lawnet.fordham.edu/flr/vol75/iss3/5
LEGAL OBLIGATIONS AND THE INTERNAL ASPECT OF RULES

Benjamin C. Zipursky*

INTRODUCTION

Some philosophers approach their project of philosophizing with aspirations to edify, to bring about social change, or to construct a grand theoretical synthesis. H.L.A. Hart’s aspirations, on first blush, were more modest. Like many of his British predecessors and contemporaries, he aimed to preserve common sense. Hart believed that there was a commonsensical approach to the law exemplified by citizens in a modern municipal legal system.1 On this approach, a citizen regards it as a contingent question whether, with regard to a proposed or possible piece of conduct, there is a valid and applicable legal rule that forbids, requires, or permits that conduct. If the citizen comes to believe there is a valid legal rule forbidding the conduct, then he regards himself as under a certain kind of obligation to refrain from the conduct. If the citizen comes to believe that there is a valid legal rule requiring that conduct, then she regards herself as under an obligation of a certain sort to engage in that conduct. To regard oneself as being under an obligation to engage in certain conduct is to see oneself as being enjoined, required, and expected to behave that way—as being held up to a standard of what one is really supposed to do.

The preservation of this basic idea of legal obligation in the face of jurisprudential theories mounted by many of Hart’s predecessors turned out to be extraordinarily challenging. Much of this essay is an effort to explain how Hart utilized the notion of the internal point of view—and, in particular, the notion of the internal aspect of rules—to preserve a philosophically tenable analysis of legal obligation that did not distort common sense. Ultimately, however, the Hart analysis in this essay is a vehicle for a larger goal: to begin to sketch a theory of legal obligation that can help to reorient questions about the alleged duty to obey the law, about lawyers’ roles in counseling their clients, and about a variety of matters within substantive legal theory.

---

* Professor & James H. Quinn Chair in Legal Ethics, Fordham University School of Law. I am grateful to John Goldberg, Stephen Perry, Arthur Ripstein, Tanina Rostain, Tony Sebok, Scott Shapiro, and Daniel Sinclair for numerous discussions regarding this topic.

I. CHALLENGES FOR A COMMONSENSICAL THEORY OF LEGAL OBLIGATIONS

The defense of this common sense approach was—and is—challenging at many different levels. First, it conflicts with all of Hart’s most esteemed predecessors within the positivistic tradition: Jeremy Bentham, John Austin, Oliver Wendell Holmes, and Hans Kelsen. Hart himself did not see this as an obstacle; on the contrary, the intuitive strength of the observations he offers was more of a reason to reject his predecessors’ views than a reason to reject his own. But at a broader level, it is fair to say that Hart faced the task of developing and defending this view in the face of a broad set of powerful views within his own positivistic tradition that did not view legal obligations in this manner. All of these figures, in one way or another, analyzed legal obligations in terms of threats, sanctions, liabilities, or other concrete potential consequences for subjects of a legal regime.

From at least the time of Hobbes, and almost certainly prior to Hobbes, it was essential to the tradition of legal theory that rejected Thomistic natural law to connect the very idea of legality and legal obligation with the power of the state to enforce its law with sanctions. John Austin’s “command” theory was one of Hart’s targets; equally important, in my view, were Oliver Wendell Holmes Jr.’s claims in The Path of the Law that “a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court” and his vivid image of the “bad man” as the prototype for understanding law. Spelling out a form of positivism that was equally antithetical to natural law, but conceived of legal obligation in a manner not essentially related to the state’s power to impose sanctions, was a tall order.

This brings us to the second level of challenge, which Hart himself took to be central. It is a distinctive feature of legal norms—as opposed to moral norms—that the existence of the norm does not itself imply anything about its moral status or justice. It is an entirely open possibility, according to positivists and in contrast to natural law theorists, that a legal norm purporting to be authoritative is in fact entirely unjust, and that a citizen would regard it simultaneously as law and as unjust. Moreover, the conduct that it directs may be, and may be perceived (correctly) as wrongful conduct that one ought not to engage in. This is entirely consistent with its being valid law. In what sense, then, does the ordinary citizen take the law to be enjoining, requiring, or expecting him to behave a certain way? The problem is particularly acute when combined with the prior problem, for the earlier positivists had an easy answer to the question of “in what sense” it

---

2. Id. at 38-42 (discussing “[d]istortion as the price of uniformity”).
3. Id. at 18-19.
5. Id.
6. Hart, supra note 1, at 210-11.
was required or enjoined: on pain of sanction. Having eliminated that answer and the idea that the obligation is essentially a moral one, Hart defined for himself—and for the protector of the common sense judgments of the ordinary citizen—an exquisitely difficult philosophical problem.

A third level of challenge is important both to the sophistication of Hart’s actual view and to its capacity to speak to lawyers and legal scholars in modern systems like our own. A citizen’s acquaintance with the laws that impose obligations upon her can come in more than one form. Citizens are intimately familiar with some obligations, having learned of them in some form for their whole lives: the obligation not to kill, the obligation not to steal, the obligation to pay taxes, the obligation to follow traffic rules, the obligation not to hit others or to cheat others out of money or to kidnap or lie under oath, and the obligation to pay debts, keep contracts, et cetera. As to these obligations, the sense of being morally required and the sense of being legally required and the sense of being required by social mores and social expectations tend to merge with one another, although intelligent adults are nevertheless aware of what it means to see gaps between these levels.

Yet there is another sort of contact with legal obligations: acquaintance with obligations that are discovered to exist as a matter of fact, either in contrast to what was believed or out of total ignorance. Thus, a citizen may learn that he is required to register his pet, to pay taxes for his babysitters, or to have his automobile refitted, or forbidden from keeping his children at home during a religious holiday, from wearing certain clothing, from having romantic liaisons with various persons at his workplace, from firing irritating employees, or from declining to rent an apartment to someone whose sexual preferences he dislikes. Such legal obligations are often either unrecognized entirely, prior to the person’s being officially “informed” of the obligation, or persistently perceived as either extraneous to, or in actual conflict with, what is morally required. To this extent, the classification of these as legal obligations tends to cut in favor of the more classical positivists and the sanction theorists. Yet, on a certain version of what “common sense judgments by the ordinary citizen” consist of,7 an ordinary citizen may regard these as legal obligations imposed by valid legal rules of which he had not previously been aware. And in thinking this, he does not necessarily think principally in terms of sanctions. He thinks of these, too, as obligations in the sense that the law or the legal system, as requiring, expecting, and enjoining this conduct.8 Explaining how the legal system imposes legal obligations in this sense for both the intimate and the unknown legal norms is an especially difficult task.

Finally, Hart believed that legal obligations—whatever they are—exist in two very different types of legal systems: those which have accepted and

7. Id. at 2-3 (describing ordinary citizens’ common sense knowledge of law).
8. See Hart’s reference to the “puzzled man” and the “ignorant man” in Hart, supra note 1, at 40.
crystallized secondary legal rules and those which do not have such rules. Moreover, he believed that an adequate jurisprudential theory should not rule out by dint of philosophical form, in light of the absence of legal officials who accept a governing rule of recognition, the possibility that international law exists and that legal obligations exist within international law. Because it appears that much of his apparatus for solving the prior problems in analyzing legal obligations depends upon his employment of secondary rules within sophisticated legal systems, his insistence on leaving conceptual space for legal obligations in international law ups the ante even further.

II. THE INTERNAL POINT OF VIEW AND THE THEORY OF LEGAL OBLIGATIONS

A. The Muddle on Legal Obligations and the Internal Point of View

Like other members of the Oxford philosophical community that constituted Hart’s intellectual home, Hart’s method was to adhere to what struck him as commonsensical and cogent and to use mighty forces of philosophical criticism to fend off the apparent reasons for rejecting this commonsensical view. In the end, like Austin, Gilbert Ryle, and Paul Grice, each in different ways, Hart did not resist the temptation to construct an entire system which would end up being its own grand theoretical edifice. And in the end, like them, he ended up using the methods of ordinary language philosophy and conceptual analysis to help him in both the negative and the constructive philosophical enterprises. This is far, however, from adopting an Archimedean perspective for the purpose of having the correct philosophical view of law from the god’s eye perspective. It remained, at the end of the day, an enterprise of preserving the commonsensical approach to law and legal obligation of the ordinary citizen, without falling into any traps or building any morally or metaphysically ostentatious framework.

Despite the clarity of Hart’s writing in The Concept of Law, it is not easy to assign one clear theory of legal obligation to Hart. In certain important


11. The analysis offered by MacCormick of Hart on legal obligations and Hart on the internal point of view is nuanced and critical, raising a number of the concerns indicated below. See MacCormick, supra note 10, at 33-40, 55-70. Similarly, Michael Martin’s analyses of legal obligations and of the internal point of view are very helpful in displaying several of the difficulties and apparent contradictions. See Michael Martin, The Legal Philosophy of H.L.A. Hart: A Critical Appraisal 15-39 (1987).
passages of *The Concept of Law*, Hart seems to suggest that one who is under a legal obligation must feel some kind of social pressure to comply with the obligation, and yet at other points he recognizes as a commonplace part of the social world a figure who is aware of what the rules of law impose upon him as legal requirements, but content to go about breaking the law where it suits his interests to do so. At some points he seems to suggest that legal obligations exist only where there are social rules that are generally complied with regarding the course of conduct to which there is a legal obligation, and are complied with because of a mutual self-consciousness of the importance of complying. On the other hand, there are key passages where Hart imagines a citizen who is under a legal obligation, but is not aware that he is. Indeed, it is arguable that on Hart’s view, the majority of people could be unaware of some legal obligation that applies to them.

Similarly, despite the excellent illustrations and simple but evocative images used by Hart to describe “the internal point of view,” that phrase has multiple and shifting meanings within Hart scholarship and, probably, within *The Concept of Law* itself. It sometimes appears to mean the perspective of a participant in a legal system, but then there is a description of a bad-man participant who is said to occupy the “external point of view.” This leads one to believe that the internal point of view must be not simply the participant perspective, but the perspective of a “law-abiding” citizen, as opposed to a Holmesian bad man. But then one finds Hart suggesting that the legal theorist is said to need a “descriptive” perspective that takes seriously the internal point of view, but does so only from the perspective of a theorist outside of the practice; here the internal point of view seems to be that which an external theorist takes seriously. When Hart discusses “internal statements” it is critical that they are statements made by someone who occupies the internal point of view, but here what is relevant is the acceptance of the rule of recognition as a social rule. This leaves it unclear to what extent acceptance of primary rules of conduct is necessary for the internal point of view. It might be tempting to suppose that occupying the internal point of view is relevant only to legal officials, but it is plain that Hart meant to talk about ordinary citizens who are planning their lives and being guided by the law.

At this stage, more than forty years after the publication of *The Concept of Law*, at least some of these misconceptions can be cleared away. Hart did not think being under a legal obligation necessarily required accepting a

---

13. Hart, *supra* note 1, at 90 (“The external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group . . . .”).
14. *Id.* at 240.
15. *Id.* at 102.
social rule. While he did believe that obligations are a classification applied to legal obligation in some part because they are, in form, accompanied by the imposition of pressure, he did not believe that every person who in fact had an obligation in fact felt pressure. Hart did not believe that legal obligations exist only where there are widely accepted or conventional social rules regarding the content of the obligation. More affirmatively, Hart thought that Austin’s and Holmes’s sanction-based theories of legal obligation were inadequate. He thought they were inadequate at least in part because they failed to capture the notion of legal obligation. The ability to understand the internal aspect of rules or law from the internal point of view, rather than from the external point of view of the bad man, would be critical to an adequate conception of legal obligation.

B. Perry Versus Shapiro on Hart Versus Holmes

In a sophisticated and powerful pair of articles on Hart versus Holmes, Stephen Perry and Scott Shapiro offer dueling interpretations of the role of the internal point of view in Hart’s critique of sanction-based views of legal obligation. Perry reconstructs Hart’s analysis of the sense in which law provides reasons for action, and then offers both a criticism and a sympathetic proposal for supplementation which calls for Hart to take a normative turn in his methodology. And in his response to Perry, Shapiro offers a quite different analysis, one that changes the emphasis on the internal point of view, and purports, in doing so, to resist Perry’s argument that Hart needed to supplement his analysis by taking a normative turn. I shall use this pair of articles, in what follows, to motivate a rejection of the conception of the internal point of view that Perry and Shapiro share.

Both Perry and Shapiro seize on the following language in Hart’s section “The Idea of Obligation”:

What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society. These are the officials, lawyers, or private persons who use them, 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.

16. Hart, supra note 1, at 256-57 (distinguishing enacted legal rules from judicial customary legal rules and stating that the practice theory is inapplicable to the former).
17. Id. at 88.
18. Id. at 257.
At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment. One of the difficulties facing any legal theory anxious to do justice to the complexity of the facts is to remember the presence of both these points of view and not to define one of them out of existence. Perhaps all our criticisms of the predictive theory of obligation may be best summarized as the accusation that this is what it does to the internal aspect of obligatory rules.20

Perry notes that Hart criticizes the predictive theory of obligation because it caters to the external point of view.21 Because an adequate jurisprudential theory needs to explain the practice from the point of view of the engaged participant, rather than one who stands outside the practice, the predictive theory of obligation fails. Hart’s theory of obligation, by countenancing the perspective of the ordinary participant, surmounts this problem and is therefore superior to Holmes’s predictive theory.22 So concludes the argument that Perry attributes to Hart.

The problem with the argument just rehearsed, according to Perry, is that it does not take seriously the idea that Holmes’s bad man perspective is itself a participant perspective.23 While in one respect it is “external”—it does not involve any sort of allegiance to the rule for its own sake—this does not make it external in the sense that a theorist’s perspective is external; it is, according to Hart, clearly one way that participants could and sometimes do look at the rules. As far as Hart’s rather informally put suggestion that the majority normally take a different perspective, it is too weak and undefended as an empirical claim to pick up the slack in Hart’s argument. Moreover, Perry argued that Holmes or a Holmesian jurisprudence can offer a broader picture of the role of law in providing reasons for action, all of which is consistent with the bad man perspective.24 Thus, it is not true that capturing the perspective of a participant forces one into a jurisprudence of a sort that interprets obligations as standards of conduct, rather than as predictions of sanctions. Perry’s next move is to argue that, if a Hartian jurisprudence is to be elevated over a Holmesian one, it is necessary for Hart to take a normative turn in his methodology that embraces the moral superiority of an account of law that understands it as a form of social control that emphasizes guidance, rather than coercion by

22. Id. at 164-65.
23. Id. at 165.
24. Id. at 165-76.
sanction.\textsuperscript{25} Perry thought that such a normative turn was already implicit in Hart’s work.

Shapiro argues cogently—particularly in light of the latter part of the passage quoted above—that Hart did not overlook the two different types of participant perspectives, and recognized that both were in one sense “internal” to practice.\textsuperscript{26} Hart’s critique of the sanction theory, according to Shapiro, was that it left no conceptual space whatsoever for the non-Holmesian perspective, which is (Shapiro contends) what Hart was referring to by “the internal point of view” (in connection with primary rules). The theory Hart himself advanced sees legal obligations as existing so long as valid primary rules within an extant system exist. It thereby cuts the conceptual tie to the prediction of sanction. But this does not mean that it \textit{forces} the conclusion that legal participants take the internal point of view of the law-abiding citizen. On the contrary, it deliberately leaves the question open with regard to ordinary citizens. There is other heavy lifting for “the internal point of view” to do within Hart’s theory, Shapiro argues, but this concerns the internal point of view of legal officials who accept the rule of recognition; Holmes’s omission of the rule-acceptance attitude condemned his view at the level of legal officials, not at the level of ordinary citizens.\textsuperscript{27} Hence, there is no need to see Hart as taking a normative turn, even conceding that Perry is right about the availability of a bad-man perspective of a participant. And there is no need for Hart to take a position on whether ordinary citizens more frequently or less frequently take a bad man perspective, although Hart himself expressed his not-so-cynical hunch that the majority did not take the bad man perspective.

In essence, Shapiro therefore concedes that Perry is right about at least the following: Without a normative turn,\textsuperscript{28} Hart does not have a sound argument that the internal point of view on legal obligations is jurisprudentially fundamental at the level of primary rules. Shapiro’s response is that it is a misconstrual of Hart’s goals to suppose that he aimed to make the internal point of view fundamental to legal obligations at the level of primary rules.

Although I cannot do justice to Shapiro’s position here, I believe that a fair reading of Hart’s discussion of “The Idea of Obligation” casts doubt on Shapiro’s effort to downplay the importance of the internal point of view to Hart’s understanding of the nature of legal obligations. At several different points, Hart makes it clear that an understanding of the concept of obligation in non-sanction based terms, as it applies to primary rules of conduct, is centrally important to the whole enterprise of jurisprudence. Here is one of the most powerful passages:

\textsuperscript{25} Id. at 191-92.
\textsuperscript{26} Shapiro, \textit{supra} note 19, at 203.
\textsuperscript{27} Id. at 208-09.
\textsuperscript{28} This sentence should not be read to suggest that Shapiro believes Perry’s normative turn would be helpful to Hart.
The difference may seem slight between the analysis of a statement of obligation as a prediction, or assessment of the chances, of hostile reaction to deviation, and our own contention that though this statement presupposes a background in which deviations from rules are generally met by hostile reactions, yet its characteristic use is not to predict this but to say that a person’s case falls under such a rule. In fact, however, this difference is not a slight one. Indeed, until its importance is grasped, we cannot properly understand the whole distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society.29

In his seminal essay on Hart’s internal point of view in this Symposium, Shapiro interprets this passage as a manifestation of Hart’s intention “to render the thoughts and discourse of legal actors comprehensible,” not to give an account of “the reason-giving nature of legal practice.” I do not read Hart’s stated aspiration to understand “the normative structure of society” so narrowly. Nor do I think Hart’s conception of rendering thoughts “comprehensible” was theoretically inert.30

We are left, then, in something of a bind. Hart did not think that all ordinary members of a legal community took the perspective of the law-abiding citizen who treats the law as a guide to conduct; he thought some did and some did not. And yet he seemed to think the perspective of legal rules as setting a standard of conduct, not merely as facilitating sanction prediction, was fundamental to understanding legal obligation. Notwithstanding various hints throughout his work that Hart was sometimes attracted to normative methodologies, Perry’s normative turn argument must ultimately be taken as a critique of Hart, not as an interpretation of what he aimed to do. It therefore appears that there is a substantial hole in the center of Hart’s account of legal obligation.

C. Legal Obligations and the Internal Aspect of Primary Rules

1. The Basic Idea

The solution to this problem begins with a recognition that the core of Hart’s argument is not so much about the experience of the citizen seeing the law as it is about the aspect of the law that is seen by citizens. In the philosophy of language and the theory of meaning, a parallel point would be that to understand meaning is to understand a property of pieces of language, not to understand what is in the head of the language-users. Capturing Hart’s theoretical work on the nature of legal obligation requires the same move. To push Hart’s terms a bit further than he himself may have, we can say that Hart’s analysis of legal obligations does not rest principally on the notion of the internal point of view as the perspective of a

29. Hart, supra note 1, at 88.
law-abiding citizen; it rests on the notion of the internal aspect of rules. Under
Understandably, Hart himself sometimes blurred these two ideas, and used
the phrase “the internal point of view” to refer to the perspective from
which the internal aspect of rules was seen. But what is critical is the
connection between the internal aspect of primary rules of conduct and the
idea of a legal obligation.

Primary legal rules, for Hart, are like the rules of a social club or a school
or a swimming facility. Their authority does not lie in their having been
issued by a person whose will is superior to that of a citizen. Their
authority lies in their being properly positioned as authoritative law. Their
syntactical form is indeed often imperatival, but that is not necessarily a
reflection of their embodiment of an enjoiner in a dyadic power relation
with the person empowered. An interrogative can exist on a page without a
questioner present. What matters—as in language and meaning generally—is that the rule exists within a context in which members of a community
regard the expression as properly interpreted and responded to in a certain
manner. The injunctive quality of legal directives is what Hart has in mind
when he calls them “duty-imposing rules.” Their content is such that they
purport to direct individuals to act or not to act in a certain manner.

Citizen C has a legal obligation to do A, according to Hart, if there is a
valid legal rule applicable to C that enjoins the performance of A: Do A. Here are some examples:

“It is a felony to carry a concealed weapon.”

“Every soldier shall carry his or her weapon and badge at all times.”

“No one may engage in electronic eavesdropping without the consent of
either party, unless he or she has a validly issued warrant.”

“No one is to interfere with another’s use and enjoyment of her property.”

Now one of the most difficult challenges of the foregoing model is what it
would mean to say that “members of a community regard the expression as
properly interpreted and responded to in a certain manner.” Here are the

31. Id. at 56-57 (introducing the “internal aspect of rules”).
32. Hart’s conflation of these closely related ideas is interestingly seen in a passage that
Shapiro quotes in his response to Perry:

One of the difficulties facing any legal theory anxious to do justice to the
complexity of the facts is to remember the presence of both these points of view
and not to define one of them out of existence. Perhaps all our criticisms of the
predictive theory of obligation may be best summarized as the accusation that this
is what it does to the internal aspect of obligatory rules.

Hart, supra note 1, at 91 (emphasis added). In the first of the two sentences quoted above,
Hart is referring to the “difficulty” (or challenge) of not defining “one of” these “points of
view” out of existence. He then concludes by suggesting that his critique of the predictive
theory is summarized by saying that “this is what it does,” presumably to “the internal point
of view.” However the noun phrase at the end of this passage is not “the internal point of
view” but “the internal aspect of obligatory rules.” Id.
33. Id. at 27.
beginnings of an answer: A legal norm of the form, "All persons shall refrain from X-ing" or "X-ing is prohibited" or "X is a crime" enjoins conduct if it is part of the meaning and force of the norm to direct its audience to act (or refrain from acting) in a certain way. This means, typically, that its force as a standing statement is imperatival and its content is directive in the sense mentioned. The possibility of its force being imperatival and its content directive depends, to a large extent, on the existence of conventional social practices of treating them as such within the community.

Now we come to a difficult theoretical juncture. It is possible that the words themselves have this meaning and the language itself conveys this force. More broadly, it is possible that there are linguistic rules whose content does not itself depend on a feature of the legal system, in virtue of which the meaning and force of the primary rule is as indicated. And it is possible that the set of practices that constitute this are linguistic practices. The alternative is that the set of rules, features, and practices in light of which it has this force is not wholly internal to the language. The most plausible development of this idea is that there are practices within our legal system according to which statements that appear in certain contexts are understood as having certain meaning and force.

A variety of social practices quite different from law exemplify the same sort of phenomenon, at least in very basic form. Thus, we learn how to respond to jokes, performances, and acts, both in terms of understanding when some course of conduct is part of a performance and in terms of how it is conventional to respond to the performance. We decide for ourselves, to at least some extent, whether the joke is funny, the performance compelling, and the concert entertaining, but we know how to smile, laugh (or not smile or not laugh), when to take the words seriously or as a performance, and when to clap (or boo). Similarly, one learns what the law is, and how one is expected to respond to it; one understands that the law aspires to do good or be just or fair or necessary in some way, but quite apart from whether one views it as hitting the mark, one knows how one is expected to respond. These bits of communication are in significant part linguistic, and one must have command of the language being used to understand the joke (or the dramatic performance). But the linguistic conventions are not the only ones in play; the conventions of humor or performance are also brought to bear.

Now, to be inside this practice is not simply a subset of being inside a linguistic practice, but it is analogous to that. One need not accept every assertion made in order to understand the assertion, but understanding the assertion involves grasping—as one hears the assertion—what it is one is intended to believe. Similarly, one need not obey the law to understand its content and to understand its content as law. But one must understand that it is enjoining, that it purports to direct action, and that it purports to do so in the special way that law does. A competent member of a legal system understands primary rules within the legal system as enjoining conduct.
The perspective from which the law is so perceived is what I shall call the “participant’s view" of the ordinary citizen who is a competent member of the legal/political community. It is also tempting to call this the “internal point of view" on law, and I will sometimes do so. I believe that this is the point of view from which one sees what Hart called the “internal aspect of rules," and to that extent it would fit with his idea of “the internal point of view.” I shall suggest later in this essay that this is probably not precisely what Hart meant by the “internal point of view.” Nevertheless, it is fair to read Hart as aiming to solve a variety of problems about the nature of legal obligation from within a framework that takes seriously the internal aspect of rules from an ordinary citizen’s perspective: What, in addition, he may have been trying to do with an even richer notion of “the internal point view” is something to be addressed below.

It is entirely possible to be a competent member of the legal community and to conduct oneself as the bad man does. Similarly, it is possible to conduct oneself as the law-abiding citizen that Hart captures in *The Concept of Law*. Imagine, by way of analogy, that a duo of sitcom producers might both understand the jokes in a show, and might be equally capable of selecting good writers or actors or editing in and out the right scenes, even if one of the producers spontaneously laughed in the right places, while the other saw the jokes, but was no longer moved to laugh himself. The general point is that to be socialized and habituated in such a manner that one recognizes and picks up on the conventional significance of a kind of act that has a certain force and meaning is not necessarily to be disposed to act in a manner that the force is designed to create. Hart is therefore at least prima facie correct when he states that it is an open question to what degree citizens must adopt a basically law-abiding stance and for what reasons they must do so. One might say, similarly, with regard to language, it is an open question how skeptical, humorous, or facetious language users may be and how many of them may be so.

Of course, in language there are perhaps limits on how much facetiousness there may be, and the limits are in a sense analytical and in a sense practical. At a certain point in time, for example, if enough people use “wicked" to mean good (and few enough people ever use it to mean anything else), it ceases to be facetious and it ceases to mean wicked—“wicked” comes to mean good. At a certain point the requirement to obey

34. See Joseph Raz, *The Authority of Law: Essays on Law and Morality* 153-57 (1979). Raz’s argument that Hart needs the notion of a detached statement is supportive of the general approach I am taking, but the notion of a detached statement does not capture what I am referring to, for it (quite expressly) presumes that the speaker is withholding commitment from the internal point of view. What we need here is what is in common between the detached statement and an internal statement. Removing oneself (as opposed to accepting) is a direction to take. Similarly, accepting an assertion and rejecting an assertion are two different responses, but understanding the assertion is common to both. Critical, from a hermeneutic point of view, is grasping that the (putative) legal norm is enjoining conduct and grasping what it is enjoining. The compliant and the manipulative, the good and the bad, and the detached all see this aspect of primary rules.
the speed limit of fifty-five may turn into a requirement to drive less than sixty-five, or it may turn into a liability rule or something that is neither a primary rule of conduct nor a liability rule.

The point of view from which one sees the internal aspect of rules is therefore the legally socialized point of view, the point of view of the citizen who is sufficiently trained and nurtured in our legal culture to have a sense of what legal rules are, what they mean, how they are to be identified, and so on. The conventionalist (and somewhat Wittgensteinian and J.L. Austin-like) hypothesis I am urging is that the positioned and contextualized directives that count as laws are conventionally treated by competent members of the legal community as specially positioned, general, standing injunctions to act a certain way. The attributes that make such a directive duty-imposing are those attributes that a conventionally sensitized member of the community is sensitized to perceive as exhortative and injunctive.

The upshot is that there are rules that specify what our legal duties are, and that these rules—these laws—structure practical questions about what to do by telling citizens what they may and may not do within the limits of the law. This does not necessarily dictate what should be done, prudentially, morally, or all told. But knowing that some course of conduct is a violation of one’s legal duties pushes one to the question of whether one may or ought to breach one’s legal duties in a certain situation, and if so, why.

Taking Hart in this direction responds to Perry’s claim that both the Holmesian self-interest calculator and the Hartian law-abiding citizen are cogent viewpoints, jurisprudentially, without concluding that Hart must turn to a normative methodology vis-à-vis the law’s function in order to rescue his claim that a non-sanction based conception of legal obligation is fundamental to understanding law. Nor must we sign on with a claim agreed to by both Shapiro and Perry that, because there is variation among citizens, there must be an empirical basis for any sweeping claim about how law is understood. The analysis of legal obligations does not flow from an account of how a certain kind of person responds to the law. It flows from an account of what the conventional significance and force of primary legal rules are, qua primary legal rules.

To the extent that the model presented above depends on an account of the meaning and force of primary legal rules, it makes even more conspicuous that the argument offered here is incomplete, because no such general theory has been provided. Three considerations ought to be mentioned, however. First, even beyond the reasons already mentioned, it is an advantage to cast the theory in this light, for it connects with an important literature on whether legal rules should be understood as liability-imposing, rights-conferring, duty-imposing, guidance-providing, or some combination of these. The most famous contribution to this literature in the past several decades is Guido Calabresi and A. Douglas Melamed’s *Property Rules, Liability Rules, and Inalienability: One View of the*
Cathedral, but some of the most important developments in this area, which have been critical of the Calabresi/Melamed framework, have expressly connected with Hartian conceptions of legal obligation. Second, Hart, following Austin, Bentham, Kelsen, and Holmes, within jurisprudence, and following J.L. Austin and Ryle within philosophical methodology more generally, appears to have been intending to offer an account that was analytical in the sense of being rooted in the structure of the language utilized in the structure of legal norms. Third, the conventionalistic and Wittgensteinian tilt toward social practices, which the account here gestures towards, is plainly consistent with the hermeneutic and practice-based aspirations of Hart’s enterprise. These observations are not intended to substitute for a more thorough semantical and practice-based model, but they are intended to provide reasons to believe that the idea of such a model is promising both in legal theory generally, and as to Hart scholarship in particular.

2. Initial Problems Revisited

Let us return to our initial question: Is it essential to legal obligations that their violation is attended by sanction? The answer, for Hart, was “no,” but a doubly qualified no. In the first instance, having a sanction attached to noncompliance is not part of what it is for there to be a legal obligation. The concept of legal obligation is cashed out by reference to the injunctive force of a valid primary rule of conduct. Such a rule does not depend for its existence on a sanction. On the other hand, part of the reasons the rules of law generate what we are willing to call “obligations,” as a general matter, is that the institution of law carries with it a variety of pressures and forces, including those of sanctions. So it is, at a general level, important to the species of injunctions characteristic of law that they are attended by sanctions, but that is not in fact essential to what it is to say that a legal obligation exists, or what it is to have a legal obligation. Secondly, modern municipal legal systems generally, and not coincidentally, have other rules that confer powers upon individuals and the state to enforce rules or seek redress for their violation. Hence, there is a systematic connection, normally, between obligations and sanctions. In this way, Hart has finessed the sanctions issue so that it does not go to the very nature of a legal obligation or to the force of a legal norm. The legal obligation exists as the complement of the injunctive primary rule of conduct. So it is an open

37. See Lacey, supra note 10; MacCormick, supra note 10.
possibility that sanctions are required, but the theory of obligations is
guidance- and injunction-based, not threat- or sanction-based.

Holmes’s critique of the notion of legal duties and his appeal to the bad
man make very little sense if we are thinking of reasonably well-drafted
statutory law that has a regulative aim. Here, Hart’s analysis fits perfectly.
When a client asks what his legal duties are with regard to PCP emissions,
the analytical framework for answering does not require resort to morality
or to the bad man or to the good man. The questions should be interpreted
as asking what the regulations and statutes regarding such emissions say
that a person in the client’s position must do or not do. The client may
appreciate or even ask for some soothsaying by the lawyer. But the real
question is what the law says she has to do.

Holmes was a common law scholar above all, and was speaking in The
Path of the Law to a group of graduates who had just departed from an
education in the common law for legal practice that had relatively little
regulation. And so the law contained few obvious directives specifying
what was or was not to be done. Rather, it contained cases deciding
whether or not to hold someone liable in a particular situation. The
problem of identifying a legal directive here has three components. The
first is that the court is ultimately deciding about liabilities of defendants to
plaintiffs, not about defendants’ required conduct. The second is that there
is no pronouncement by a legislative body of a rule of conduct. And the
third is that it is case-by-case ex post rulings by legal officials, not ex ante
injunctions of conduct.\textsuperscript{38}

The critical question is how—if not essentially sanction-based but rather
normative—the nature of legal obligations can be understood in a manner
that, in principle, keeps law as something distinct from morality. The
answer for Hart goes to the root of his positivism, and, in essence, is
conventionalistic. The answer is that the character of the legal directive
imposing the duty is injunctive and normative, but the criteria for what
counts as a legal norm are artificial and conventionalistic, and not
essentially moral. More broadly put, the directives of law do present
themselves as injunctive—they do exhort action as to-be-done, but our
shared social understanding of what makes some directives the binding
legal directives are not, essentially, value-based. Hence, from the discovery

\textsuperscript{38} Professor John Goldberg and I have elsewhere offered a Hartian, primary rule-
oriented response to the critique of duty in The Path of the Law. John C.P. Goldberg &
Benjamin C. Zipursky, Seeing Tort Law from the Internal Point of View: Holmes and Hart
on Legal Duties, 75 Fordham L. Rev. 1563 (2006). Here, I present just our basic story:
First, the nature of tort law is to predicate the imposition of liability upon the recognition of a
power in the plaintiff, and to predicate the power upon a finding of a breach of a duty of
conduct by the defendant. Hence, duties of conduct are critical. The second is that—as
Austin himself recognized and as Hart and Raz have both recognized—courts are
empowered to articulate law, including the articulation of primary rules of conduct. Third,
Hart’s rules of recognition render it coherent to suppose that primary rules exist within the
law by virtue of being identifiable according to secondary legal rules that courts articulate
and utilize.
perspective of the citizen, at least, the law says what may and may not be done, but it is the law speaking, not morality.

Turn now to the spectrum of primary rules from the intimate to the undiscovered. To be sure, there are many primary legal rules of which individuals are aware and with which they consciously comply. These may be widely believed to be moral duties (or not). In any case, the legal directive that imposes the duty is recognized as a member of the legal system applicable to the citizens. But a legal directive need not be recognized in order for it to be a member of the legal system and in order for it to be valid. Rules of recognition exist that determine which legal directives exist as part of the system and which are valid. A legal duty exists if the legal directive is valid according to an extant rule of recognition. Hence, a person could discover or learn of a legal directive that neither he—nor perhaps even others—had recognized. In this case, one would also be learning of one’s legal duties.

Let us briefly turn to international law. There are, to be sure, primary legal rules—legal directives—that purport to speak internationally. To the extent that such primary rules are valid law, they impose legal duties. Hart denies that having law requires having a full-fledged legal system as the union of primary and secondary rules, with a group of legal officials for whom the rule of recognition is a social rule. This denial is entirely plausible: There is no a priori reason why such law would not be possible.

Nevertheless, one wonders how competency in identifying and interpreting law is possible in the international domain; one wonders whether there is any reason to suppose that there are rules that are conventionally regarded as law, and how it is possible for there to be such rules. The short answer is that there are such pieces of international law, and that the question of how it is possible is difficult in the international arena but also difficult in the domestic arena, and the existence of secondary legal rules is not the answer to that question in the domestic arena, either.

III. THE PRACTICAL SIGNIFICANCE OF A COMMONSENSICAL VIEW OF LEGAL OBLIGATIONS

A. Is There a Moral Duty to Comply with One’s Legal Obligations?

Many legal thinkers, from Hobbes through contemporary positivists, take law to play a critical settlement function in the state. And some purport to deduce that citizens, recognizing a legal obligation, have a prima facie moral obligation to comply with that obligation. Because Hart’s occupant of the internal point of view is naturally conceived as a morally upstanding citizen (in opposition to Holmes’s bad man), one might then expect a proponent of the internal point of view to maintain that there is a moral duty to obey the law. However, the analysis that follows stops short of the conclusion that there is a prima facie moral obligation to obey the law,
leaving a fairly wide space for different political systems and different views of the most defensible stance to take toward the question of whether legal obligations command allegiance from a moral point of view, and if so, with what stringency (or defeasibility) and for what reasons. As explained below, this does not necessarily undercut the significance of a theory of law according to which law imposes a form of obligation.

The essence of the view put forward here is that legal norms impose obligations in the following respect: They enjoin conduct and are of a sort that is understood by socialized members of the legal community to be enjoining. This means that adequately socialized members understand it as demanded and expected of them as members of the community. To understand the laws as having this force is not necessarily to hold a moral or political evaluation of the legal system that would yield the conclusion that the system that creates or enforces these laws is, from a moral point of view, entitled to this allegiance. It is not even clear why it presupposes the view that the system is prima facie entitled to this allegiance, from a moral point of view.

A more difficult question is the following: If one believes that the legal and political systems are legitimate, and one recognizes the political system as imposing obligations or demanding conduct, does one have a prima facie moral obligation to obey the law? The short answer is that the notion of a “prima facie” or “defeasible” moral obligation to obey the law is probably much too crude to capture the broad domain of laws and citizens and contexts: Like being a “team player,” a loyal friend, or a gentle parent, being a law-abiding citizen is a morally commendable attribute in a very general way, for reasons that run quite deep. But the very idea touches off a cascade of counterexamples that will, in their own way, run very deep too. A whistleblower, a person with the integrity to stand up for what is right notwithstanding a painful rupture in personal relationships, a parent willing to set standards with a child—these, too, can be commendable figures in some contexts. The same is true of the citizen who does not obey the law, and it is far from clear that all such cases will be properly represented as involving the “outweighing” of a prima facie moral obligation to obey the law: Some teams do not deserve allegiance in the first place.

Of course, these efforts to constrict the moral significance of legal obligations pose the question of why it matters whether laws impose legal obligations of conduct. Why does it matter, if there is not even a prima facie moral obligation to comply with legal obligations?

The answer has at least three components. First, it is relevant to the practical question of what to do in a manner that does not relate solely to the probability of sanctions, even if it is not precisely correct that there is a moral obligation to obey the law. Explaining why will constitute the remainder of this section. Second, and of course quite relevant here, the conception of law as imposing a special kind of obligation fits with a certain picture of what a lawyer’s role is, especially in connection with
counseling. And third, there are significant implications for substantive legal theory in a number of areas.

**B. Why Does It Matter Whether the Law Imposes Legal Obligations and What They Are Like?**

The short answer is that it does matter because many members of society do, in fact, wish to comply with their legal obligations. The reasons they wish to do so vary. Clearly, many people (including Hart) believe that a certain course of conduct's being legally obligatory normally counts substantially in favor of its being morally obligatory. And again many people believe that a course of conduct's being legally obligatory counts heavily in favor of its being prudent. This is not only because of potential legal sanctions. It also relates to reputational concerns. And, as Hart would have been happy to point out, I think, remaining within one's legal obligations fosters an easier road to planning and to many kinds of joint undertakings and many other forms of empowerment: borrowing money, getting a job, starting a business, keeping a business afloat, having a bank account and credit card; these are only a few examples. But it is more than this. Keeping inside one's legal obligations—both for individuals and for companies—is part of coping and negotiating life in a society. It is, to borrow from Frederick Schauer, desirable in the same sense that people playing baseball want to know how to play by the rules.

Recall that this was the short answer. A longer answer would do several things. First, it would aim to provide evidence that members of society do, in fact, wish to comply with their legal obligations, rather than simply asserting it. Second, it would explain, in greater detail, why the obligatoriness of a course of conduct should weigh heavily both on the moral front and on the prudential front, and do so in a manner that did not succumb to a "prima facie moral duty to obey the law" view or to a sanctions-based view of legal obligations; telling the "negotiating the social world" story will be integral to these accounts. Third, it would offer a picture of the variety of different stances toward legal obligations that we find within society, both across different actors, and across different types of law, and it would do so within a framework that integrated the above-mentioned concerns. If these theoretical commitments were dispatched, the resulting theory would look quite different than one which simply asserted that obeying legal obligations was the moral or the prudent thing to do.

Additionally—and perhaps most importantly from the point of view of Hart scholarship—there is a hermeneutical account to be given on the role of legal obligations within society. Hart clearly believed that law was a particular kind of practice that effected a certain form of social control. A


part of doing so was the creation and sustenance of a set of rules—laws—membership which gave certain social norms a special sort of status. These norms claim the allegiance of citizens. Hart envisioned a figure whom we might call the law-abiding citizen—who treated valid primary rules as enjoining certain conduct. And Hart envisioned this citizen as respecting the authority of the law and therefore expecting himself and others to comply with the relevant primary rule. Just as the moral citizen is disposed to succumb to a norm that imposes moral pressure, so the law-abiding citizen is disposed to succumb to a legal norm that imposes legal pressure. Part of Hart’s explanation of law’s efficacy relates to the citizenry’s taking the legal point of view. The obligations of the law are not so much special cases of applied moral obligations. They are rather a parallel sort of obligation and speak to a different (although not necessarily inconsistent) disposition of the citizen.

Understood in this manner, legal obligations are their own kind of “ought.” By way of comparison, a person occupying the moral point of view might proceed through a pattern of reasoning that would lead her to the conclusion that a certain course of conduct is the one that she morally ought to do, and then might in effect see no further need for practical reasoning; she might simply act because she was disposed and motivated to do what was morally obligatory because of its being morally obligatory (and perhaps for other reasons too). A person occupying the legal point of view might similarly be motivated to comply with a certain form of conduct because it was legally obligatory. Its being a legal obligation might serve as reason enough to do it, for such a figure.

As just described, the internal point of view exists with respect to a legal system, not with respect to any particular rule. The point is that to discover a particular duty-imposing rule exists would itself motivate the actor to comply with the rule, because she would regard herself as under a (legal) obligation to do so. But it would be possible to occupy the internal point of view with respect to the legal system and to be ignorant of, or mistaken about, which legal obligations obtained.41 It is critical, for Hart, that legal officials occupy the internal point of view in this sense, at least with respect to secondary legal rules. But Hart seemed to believe that it was not essential that ordinary citizens in a modern municipal system occupy this point of view, although he thought many (perhaps the majority) did, and that this was probably a significant fact.

The analysis above returns us to a suggestion made at the onset of the affirmative reconstruction of Hart in this paper: There is slippage in Hart’s usage of the phrase “the internal point of view.” On the one hand, it can mean what I have called the participant’s perspective, that from which the participant recognizes the internal aspect of rules, from which she is equipped or sensitized to take primary rules as having a certain injunctive

---

41. See Hart, supra note 1, at 40 (discussing the “puzzled man” and the “ignorant man”).
force and pressure. On the other hand, it can mean the parallel, for law, of the moral point of view—what I will call the law-abiding citizen’s point of view, from which the recognition of the applicability of a legal obligation itself is treated as a special kind of reason to comply with the norm. The legal official, for Hart, occupies the internal point of view in both respects. And there may be ordinary citizens who do, too; in the passage quoted above, Hart—with a double qualification—suggested that “normally” the “majority” of society takes this point of view. But what is necessary in a legal system in order for the primary rules to be primary rules and to impose legal obligations, according to Hart, is that the ordinary citizens in general do see the internal aspect of the primary rules. In other words, the participant’s perspective is more fundamental to Hart’s account of the sense in which laws are primary rules that impose legal obligations.

IV. LEGAL OBLIGATIONS AND THE LAWYER AS COUNSELOR

The conception of legal obligations offered above is conducive to a moderate and attractive picture of the role of lawyers in counseling. When a client asks a lawyer for advice with regard to a potential course of conduct, part of what the client is typically asking about is whether there are legal obligations that the client should be aware of. After all, lawyers are knowledgeable about legal obligations, including what those obligations are, and how they are likely to be interpreted. More particularly, ascertaining legal obligations—identifying valid primary rules, interpreting those rules, and predicting what will be so identified—is the expertise uniquely possessed by lawyers. Clients like to know how the law binds their conduct; they want to know what conduct will remain within the law.

Note that the enterprise of saying what the legal obligations are is quite different from saying what the bad man wants to hear. It is not necessarily about what will likely get the client in trouble. It is about what the rules say the client is not supposed to do, regardless of whether the client is likely to be punished for doing it.

Similarly, the enterprise is quite different from saying what the client morally should do. What the client is getting from her lawyer, in the first instance, is knowledge of what the legal system enumerates as the relevant set of obligations: a list of what has to be done, according to the law. Of course, there are gray areas and uncertainties. And the client will often want to know what the lawyer thinks he or she should do, all considered. But one could analyze that question, at least in counseling, as a request for advice on how to make the best decision on compliance with legal

42. Id. at 90

43. This leaves open the claim, made most forcefully by Scott Shapiro, that the conception of the “internal point of view” which entails norm acceptance is fundamental to Hart’s treatment of legal officials, which is, in turn, fundamental to his entire explanation of how it is that a legal system could exist as the legal system of a community. Shapiro, supra note 30, at 1169-70.
obligations, which is ultimately the practical question for which the lawyer is consulted. While it may in some abstract sense strike clients and lawyers as more conducive to client autonomy to have the lawyer articulate all the relevant categories of applicable legal rules and obligations and leave the client to reach her own conclusions on what ought to be done, in law (as in medicine, for example), that is sometimes artificial; the lawyer’s judgment on what is the best path of conduct in light of the client’s goals and constraints, given the law, will often be easier to reach than the abstract legal conclusions. But this is, then, a practical conclusion made in light of the client’s legal obligations, not moral obligations.

Although an attractive feature of this view that the lawyer is neither a moralist nor tactician of self-interest, one might complain that the analysis overemphasizes the academic or informational role of the lawyer, characterizing legal advice as the imparting of knowledge of legal obligations and legal powers. But a second congenial characterization of the lawyer as counselor is more practical or action-oriented, and similarly strikes an appealing middle ground between two unfortunate caricatures. It is tempting to see lawyers as trapped between one paradigm where their job is to facilitate the client’s ability to reach her goals, the pure instrumentalist account, and another—the prophet or moral seer—in which their job is to shape the clients’ goals and guide her conduct toward what is right. The Hartian account suggests that the lawyer is there to enable her client to realize her goals in a manner that stays within the rules. Insofar as it is facilitating the realization of the client’s goals it is somewhat like the instrumentalist. But it is not entirely instrumental, because the lawyer speaks to an interest (for lack of a better term) in living up to her legal obligations, in playing by the rules. And the interest itself is probably not best characterized in purely instrumental terms, and, indeed, insofar as it comes from or takes seriously the legal point of view, has a complexion of normativity built into it.

V. LEGAL OBLIGATIONS AND SUBSTANTIVE LEGAL THEORY

Finally, this conception of legal obligations has many implications for substantive legal theory, which can only be touched upon here.

A. Avoiding Distortions

Ordinary language philosophy of the mid-twentieth century tended to characterize itself, probably somewhat disingenuously, as having quite modest aspirations. My favorite version of this modesty is the suggestion that the point of philosophy is to help thinkers and speakers avoid the distortions in our ways of speaking and thinking that come from taking reductive and unnuanced analytical approaches to difficult topics. Hart very clearly thought of “avoiding distortions” as one of his central tasks as a legal philosopher. By way of sideways reference, this is my own preferred reason for thinking that philosophical methodology is helpful in tort theory;
the common law of tort has been stretched and spun and smashed by thinkers who were unable to grasp the concepts without remaking them from their own relatively impoverished theoretical vantage point, thereby greatly distorting the law.44

Both sanctions-based views of legal obligations and natural law views of legal obligation have wrought great havoc on the attempt to understand various areas of law. Most obviously, Holmes created a mess in tort law and in contract law by his refusal to take seriously notions of legal right and legal duty. And he did this because, in part, he could not flesh out a way to think about legal obligations that was not rooted in a form of natural law thinking and Blackstonianism that he quite rightly rejected. Common law theory can restart itself if it finds a way to make room for legal obligations. Indeed, that is what post-Hartian philosophical theory of common law has, in significant part, been about. The work of tort law philosophers such as Stephen Perry, Jules Coleman, John Goldberg, and myself, has not primarily been—contra that of, for example, George Fletcher or Richard Epstein—about the fairness-based ideas that stand behind assignments of liability. It has been about the idea that tort law assigns liability in response to its judgment that a legal obligation to the plaintiff has been violated. Notwithstanding some differences in our jurisprudential outlooks, what is in common is essentially a post-Holmesian, but potentially positivistic methodology that says it is utterly cogent to think of legal obligations or duties existing in the common law in a manner that is neither question-begging nor natural law rooted. This has meant that the efforts to cleanse tort law of duty-ridden notions and represent it in utterly instrumentalist fashion were misguided and need not prevail.

Although it is currently unfashionable in Hart scholarship to say so, Hart also thought it a distortion of legal reality to deny the existence of international law. It is easy to read from Hart’s guarded language in Chapter X, combined with his warm embrace of the idea earlier in the book heralding the idea that legal systems should be analyzed as the union of primary and secondary rules, that Hart did not truly believe international law qualified as law. But I think this quite clearly is a mistake. *The Concept of Law* is very naturally read, in fact, as articulating a rich enough theory of legal obligation to permit one to retain the idea that international law is really a form of law. Primary rules exist that purport to impose obligations, and are recognized from the internal point of view as imposing obligations. One of the principal advantages of decoupling the notion of obligation from the existence of a centralized system of sanctions, is that it permits one to retain the view—widely shared by language and lawyers—that there is such a thing as international law.

B. Making Analytical Headway

The category of "making analytical headway" is in some ways the complement of the "avoiding distortions" category, for one of the problems with distorting the legal phenomena is that it leads to various artificial conundrums about law. Thus, for example, Holmes-inspired accounts of tort law that reject a substantive conception of legal obligations often find it impossible to explain the tort law's treatment of claims against landowners by trespassers. The courts have always held that an individual who is injured on land that the defendant negligently maintained in a dangerous condition cannot sue the landowner for failure to take care towards her, if the plaintiff herself was trespassing. The common law rule is based on the idea that a landowner is not obligated to take reasonable care to make her land safe for trespassers. Ordinary people, and undocctrinated first-year law students, find this rule entirely easy to grasp. In a post-Holmesian mindset, the bar on liability to trespassers becomes a conundrum. To the extent that a better understanding of legal obligations can make available again a more intuitive notion of legal obligations, it can clear away analytical problems. This is not to say that we must keep the trespasser rule, but only that if we reject it, this cannot be due to its being a basically incoherent idea.

The opportunity for progress can be stated in a more positive way. There are a variety of new problems, and there are indeed old problems that have always been theoretically challenging to those who take many different sorts of views of legal obligations. Understanding legal obligations in the manner suggested here will not simply return us to an earlier state of innocence, where all was clear, for there was no such state. It can help us to push forward by seeing with greater analytical clarity.

C. Modeling Conduct

At one level, Hart's work and that of analytical legal philosophers more generally is palpably underdeveloped, and even naïve, in its approach to the social scientific project of understanding how legal actors behave. It is almost entirely armchair theorizing; even if not a priori in the philosophers' sense, it is certainly not empirical in anybody else's sense. And so it might seem odd to suppose that a Hartian hermeneutical approach to legal actors could "help" in any way in answering questions about how legal actors behave. It simply assumes an answer to this question, as my "defense of common sense" introduction in effect conceded.

While this is clearly right at some level, it overlooks the incontrovertible point that many choices in empirical science, including social science, are choices of methodological framework that are presupposed by whatever empirical work is being done. This is not to say that such choices are not sensitive to empirical results, but that the reasons behind the selection of such methodological approaches are not largely empirical in the way that empirical legal scholars themselves most value. In short, social scientists of
legal action need to make essentially theoretical choices in framework, of course, and the choices they make bear importantly on how the field goes.

One of the (many) reasons that the rational self-interested actor model of legal actor’s conduct has played such a large role in legal scholarship is that we have been working in a post-Holmesian American legal academy that assumes that Holmes’s critique of legal duties and legal rights was analytically correct. And another is an equally nonempirical assumption that something like the “bad man” was a fairly safe way to model legal actors—not a bad picture of what people are really like. To the degree that Hart’s model of both legal duties and of an “ordinary citizen perspective” is philosophically defensible, it invites other bases for legal research.

At a second, and in some ways more obvious, level, philosophical theorizing about the nature of legal obligations and the internal point of view invites a range of empirical questions: How do most legal actors regard the law? Do they have a disposition to take the law’s existence as a good reason to behave a certain way? What sort of disincentive or incentive does the status of “illegality” create, apart from the risk of sanction? The fact that philosophical models of citizen attitudes could be significant even without empirical work on the actual nature of ordinary people’s outlooks, does not, of course, take away from the point that such empirical work would be extremely valuable.

D. Improving the Law

Part of the appeal of positivism, as Jeremy Waldron has emphasized in his article on Hart’s Postscript, is its invitation for criticism of the current law from a moral and political point of view. Although I am not a positivist, I share with both Hart and Holmes their passion for getting the dragon out of the cave in order to decide whether to tame him, slay him, or take some other step. To the extent that, as argued in Parts V.A and V.B, above, we need an understanding of the nature of obligations in order to grasp what the law is, an adequate theory of legal obligations affords us a greater opportunity to revise the law in light of broader moral and political values. Similarly, to the extent that we use the law to alter, direct, and influence conduct, and this conception of legal obligation helps in modeling conduct, again, the provision of an adequate theory of legal obligation permits greater expertise in evaluating and improving the law.

Finally, notwithstanding the need for empirical work on how various models of law influence conduct, I am inclined at least to conjecture that there are many benefits to a legal system that permits citizens to conceive of their legal obligations as not too discontinuous with their moral obligations, in at least two respects: (1) Their legal obligations do not, by their very

46. Holmes, supra note 4.
47. See supra Part V.C.
content, conflict with their moral obligations; and (2) many of their most pressing and general legal obligations are ones they are able to integrate within an overall conception of how they ought, morally and prudentially, to conduct themselves. The diminution of such discontinuities would reduce individual and political conflict, enhance the possibility of community and solidarity, and diminish the costs of legal education and enforcement. Of course, there would be many costs as well, and they might, at the end of the day, outweigh the benefits. The point here is simply to suggest that yet another implication for legal theory is that the integration of law, on the one hand, and widely held moral convictions, on the other, deserves substantial weight in our considerations about which of our laws to reject, how to revise those we choose to keep, and what sorts of law ought to be developed.

CONCLUSION

Many students of jurisprudence are more easily engrossed in Dworkin’s defense of the normative structure of legal rights than in Hart’s defense of the notion of legal obligations. And as Dworkin’s theory comes packaged with a preference for courts at work on an anti-majoritarian agenda, while Hart’s does not, it is no surprise that Hart’s work on legal obligation is often treated by nonphilosophical legal academics as a Talmudic or Jesuitical enterprise of the analytic legal philosopher. Dworkin has played a role in creating this impression, although the responsibility for this misimpression probably lies more with Hart himself, who often overplayed his moral, philosophical, and personal modesty.

Whatever the cause, the failure of legal thinkers and lawyers to embrace a robust notion of legal obligation is a matter of fundamental importance in politics, law, lawyering, and legal theory. The years of the Warren Court undoubtedly pushed jurisprudence scholars to conceive of legal rights in a richer manner, so that our most powerful governmental institutions could not fool themselves into tolerating, and even doing, what were essentially corrupt and illegal activities. Equally, however, the past fifty years, and increasingly every year, the failure of public and private actors to take their legal obligations seriously as standards of conduct presents a risk both to the integrity of our system and to the maintenance of our values.
Notes & Observations