

THE INTERNAL POINT OF VIEW IN PRIVATE LAW

Paul B. Miller and Jeffrey A. Pojanowski*

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ABSTRACT

Many leading private law theorists claim to analyze private law from an internal point of view; a vantage point within which private law doctrine, institutions and procedure enjoy pride of place. Private law theory of a generation ago distinguished the internal from external points of view, valorizing the former and criticizing the latter for ignoring the normativity of private law or for mistaking private law for public law or regulation. The New Private Law, by contrast, asserts the complementarity of internal and external points of view, partly by emphasizing the value of functionalist analyses of legal form. In this article, we canvas leading accounts of the internal point of view in private law (provided by corrective justice and civil recourse theorists, respectively) and identify their shortcomings: notably, their inability to ground assertions about the normative and explanatory priority of the internal point of view, and about its relationship (whether of exclusivity or complementarity) to external points of view. We offer an alternative, and we think better, rendering of the internal point of view, drawing on the work of John Finnis. Amongst other things, our account vindicates the New Private Law's alluring but elusive promise of perspectival integration, showing how private law may be understood as an interlocking set of practices of public practical deliberation equally concerned with reasoned compliance *and* behavioral conformity with practically reasonable laws.

* Professor of Law and Associate Dean for International and Graduate Programs, Notre Dame Law School; Professor of Law, Notre Dame Law School. We are grateful for comments and criticism from Eric Claeys, Sharon Dolovich, Blake Emerson, John Goldberg, Jim Gordley, Adam MacLeod, Jim Stoner, Andrew Verstein, Ben Zipursky, our co-participants at the conference at Notre Dame London honoring the legacy of John Finnis, as well as audience members at a Faculty Workshop at the UCLA School of Law and a Distinguished Global Faculty Lecture at the Peking University School of Law.

INTRODUCTION

For much of the last century, American private law theory has trod along a path blazed by Oliver Wendell Holmes.¹ Holmes's thought is complex, and sometimes conflicting, but two general, interrelated views have informed legal realist and law-and-economics scholarship prominent in private law theory. First is that we should understand private law doctrine from the perspective of the person who seeks to avoid sanctions or to collect liability bounties. This is in contrast with the view of one who seeks to understand and comply with law as a matter of moral and/or legal obligation.² Second is the notion that private law's primary goal is to serve extrinsic public purposes.³ Whether it be deterrence of antisocial behavior, encouragement of efficient transactions, reallocation as a matter of distributive justice, or some combination, primary aims of private law extend beyond resolution of issues in dispute between the parties to a civil suit and may even be concealed by the apparently narrow, technical, and insular ambitions of blackletter law.

These views represent two sides of a coin. From the perspective of officials, private law is a regulatory scheme designed to encourage socially desirable behavior and to penalize undesirable behavior. From the perspective of regulated parties, private law is a bunch of carrots and sticks that influence otherwise-autonomous practical reasoning. What unites the perspectives is that they represent complementary *external* vantagepoints on private law doctrine. For the official, what matters is not so much what doctrine *says* but rather what it *does* in view of extrinsic

¹ See John C.P. Goldberg, Pragmatism and Private Law 125 Harv. L. Rev. 1640, 1642–43 (2012).

² Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 459 (1897) (“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.”)

³ Holmes, *supra* n.2, at 466 (“You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy...”); cf. Leon Green, Tort Law Public Law in Disguise, 38 Tex. L. Rev. 1 (1938).

goals.⁴ For regulated subjects, doctrine does not provide reasons for action rooted in norms or enabling structures constitutive of private law. At most, it guides the application of an external force – state-sanctioned coercion – that steers people’s judgments about how to achieve their own, law-independent plans.

An efflorescence of private law scholarship in the past three decades has pushed back against Holmesian externalism and used those criticisms as a springboard for the development of theories that claim an *internal* point of view on private law. Important early work detailed at length why external perspectives cannot make sense of private law in its own terms.⁵ It argued that a perspective that takes private law doctrine, institutions, and procedure seriously is more illuminating and perspicacious than are those that assume that private law pursues extrinsic aims indirectly or surreptitiously.

The rejection of Holmesian externalism in private law strikes us as sound. The internal turn, however, presents its own problems. First, the character of the “internal point of view” remains unsettled amongst those who claim fidelity to it. Second, the internal point of view, even when fully theorized, affords a partial and therefore incomplete vantagepoint on law. The emergence of the “New Private Law” suggests as much. This nascent movement, which builds on the work of earlier internalists, seeks also to accommodate externalist perspectives and methods.⁶ This creates a third problem: whether and how to achieve principled integration of “external” and “internal” vantagepoints on private law. It is telling that the stage-setting methodological chapter for the *Oxford Handbook of the New Private Law*

⁴ And to the extent blackletter law departs from or disguises private law’s goals, doctrinal reform should bring the law’s stated purpose closer to its goals. In 20th Century tort law, examples along this line include the reduction of duty in negligence into policy balancing and the attempt to transform breach into marginal cost-benefit analysis. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) (duty); Richard A. Posner, *A Theory of Negligence*, 1 J. Leg. Stud. 29 (1972).

⁵ See Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (2001); Ernest Weinrib, *The Idea of Private Law* (1995).

⁶ Andrew Gold, *Internal and External Perspectives: On the New Private Law Methodology*, in *The Oxford Handbook of the New Private Law* (Gold, Goldberg, Kelly, Sherwin, and Smith, eds. 2021) at 4 (“A thread that runs throughout New Private Law theory is an interest in the internal point of view that is combined with an interest in empirical research, functional analysis, or the practical effects of legal doctrine.”)

dedicates itself to that question; it may be even more telling that the chapter describes various approaches without resolution. These problems are related: without a settled understanding of the internal point of view it is difficult to imagine, let alone achieve, perspectival integration. Further, and more provocatively, we believe that deficiencies in leading renditions of the “internal point of view” present an obstacle to a more complete, satisfactory approach to understanding private law and its aims.

Part I of this article will canvas leading accounts of the internal point of view in private law and identify their shortcomings. Part II will offer an alternative that draws on John Finnis’s richer conception of the internal point of view. And Part III will explain its implications. In particular, it will suggest that it can lend aid in realizing the New Private Law’s alluring but elusive promise of perspectival integration, resulting in an approach that understands private law as an interlocking set of practices of public practical reasoning that are equally concerned with reasoned compliance *and* behavioral conformity with practically reasonable laws.

I. MODELS OF THE INTERNAL POINT OF VIEW IN PRIVATE LAW

Embrace of “the internal point of view” is a central theme in recent private law scholarship. As Andrew Gold argues, internalist revivalists take “legal concepts and reasoning to be central to the law rather than epiphenomenal.”⁷ Legal concepts, including primary and secondary rules arrayed across procedural, substantive, and remedial law, are things one must take seriously on their own terms if one is to understand private law. We agree and think internalists have done private law a great service.

Yet questions and problems remain. The notion that one should attend to legal concepts on their own terms leaves unresolved precisely *how* one should do so. Second, and relatedly, we need to explain *why* it is important to attend to the internal point of view. One can theorize social practices from multiple angles and for multiple purposes. What is it about the internal point of view that makes it central to sound

⁷ Gold, *id.*, at 4.

work of private law theory, why (if it all) is it superior to external perspectives, can it account for all salient features of pertinent practices, and how does it relate to external vantagepoints? As we will explain, there is silence on or unresolved uncertainty about these questions in the literature, reflecting shortcomings of leading models of the internal point of view in private law.

A. The Internalist State of the Art

Ernest Weinrib offers perhaps the most ambitious and influential account of the internal point of view and defense of its centrality in private law theory. Private law, Weinrib contends, can “be grasped only from within” such that if “we *must* express [its] intelligibility in in terms of purpose, the only thing to be said is that the purpose of private law is to be private law.”⁸ Theory, then, seeks to disclose the immanent rationality of law by attending to central “institutional and conceptual features”; features like the bilaterality of pleadings, litigation, and adjudication, the correlative deontic logic of jural relationships, and the centrality of causation of wrongful injury in establishing defendants’ remedial liability to plaintiffs.⁹ The internal point of view takes these features at face value and regards them as intelligible on their terms. Private law is not a thing frozen in amber, but the “dynamism” of its practices press it toward its “own coherence,” inasmuch as adjudication aspires to “realize a self-adjusting harmony of [juristic] principles, rules, and standards.”¹⁰ Thus, the core task of private law theory is one of “attending to the legal practice, eliciting its inner structure, and enquiring into that structure’s normative presuppositions.”¹¹

For Weinrib, the form of rationality immanent in private law is that of corrective justice, whose “normative force derives from Kant’s concept of right as the

⁸ Weinrib, *Idea of Private Law*, at 5.

⁹ *Id.* at 9–10.

¹⁰ *Id.* at 12.

¹¹ Ernest Weinrib, *Corrective Justice* 313 (2012); see also *id.* at 323 (identifying the internal perspective with understanding law on its own terms, focusing on coherence, and making sense of how private law’s various components compose “an integrated justificatory structure”).

governing idea for relationships between free beings.”¹² The internal point of view of private law, then, is informed (in the classical sense) by the immanent, robustly coherent, and normatively monistic rationality of Kant’s philosophy of right. This logic of private law, manifested as noted above, is justified and explained not by a plurality of reasons rooted in a plurality of goods, but singularly by reasons reflecting the value of equal freedom. Of course, this cannot be the case simply because Weinrib thinks that corrective justice and equal freedom are morally valuable independently of private law. Otherwise, he would fall prey to the instrumentalism he critiques in others.¹³ Weinrib rejects *all* theories that “base their appeal on some conception of human welfare that is considered desirable independently of the law,” including natural law theories that understand law as existing to promote and preserve basic human goods.¹⁴

While it is not easy to classify Weinrib’s approach in conventional general jurisprudential terms, internalists John Goldberg and Benjamin Zipursky don the mantle of H.L.A. Hart’s legal positivism. For them, too, one must reject Holmesian externalism if one is to properly understand and productively theorize tort law. However, they reassure that one needn’t embrace the baroque metaphysics of Kant, Blackstone, or Aquinas to appreciate that and how private law must be understood from an internal point of view. Hartian legal positivism, with its emphasis on the internal aspect of rules, offers a pragmatic *via media* between Holmesian reductivism and more moralistic approaches.

Goldberg and Zipursky offer a summary of this argument, elaborated in earlier work, in their recent book *Recognizing Wrongs*.¹⁵ Following Hart, they first contend that a predictive theory of legal obligation, and Austin’s related command theory, fail to capture important features of legal language and experience. We can

¹² Weinrib, *Idea of Private Law*, at 19.

¹³ Weinrib, *Corrective Justice*, at 302–06 (critiquing the law and economics approach to tort law).

¹⁴ *Id.* at 307 and n. 20 (rejecting John Finnis’s theory of basic human goods as grounds for tort law).

¹⁵ *Recognizing Wrongs* (2020); see also John C.P. Goldberg and Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *Fordham L. Rev.* 1563 (2006); Benjamin C. Zipursky, *Legal Obligation and the Internal Aspect of Rules*, 75 *Fordham L. Rev.* 1229 (2006).

understand being subject to a legal obligation despite even where the likelihood of sanction for breach is remote or nonexistent; predictive theories of legal obligation cannot account for judicial language; and we intuit the distinction between an obligation to abide by a legal norm and “being obliged” by a gunman.¹⁶ These observations chime with the language and practice of private law. It is not paradoxical to understand one has breached a duty of reasonable care even if one enjoys a clear immunity defense, or that one has breached a duty to perform even though contractual damages are likely to be zero. Similarly, we take in stride cases where a party is found liable for a breach of duty that was unknown to them at the time, and whose existence and implications may even be uncertain or unknown to the particular judge beforehand. Finally, we grasp the difference between having to pay damages after a full and fair adjudication pursuant to established doctrine and having to pay a bookie’s enforcer who threatens to break your legs.

These intuitions are significant, Goldberg and Zipursky argue, because they point toward the larger truth that private law and associated practices are best understood from the inside. Again drawing on Hart, they highlight three features of the kind of social rules that comprise law. These rules are “conceived and spoken of” as imposing obligations and are backed by ambient social pressure; they are “believed to be necessary to the maintenance of social life”; and it is “generally recognized” that they are constraining in that they sometimes conflict with what one otherwise might want to do.¹⁷ Rule validity does not turn on the credible threat of forceful response to non-conformity, but rather by participants’ internalized sense that conformity is warranted by virtue of their acceptance of the rule. This perspective also renders coherent judicial language and our understanding of legal obligation as something sensible independently of threats of sanction. It is not suggested that everyone does or must see the law in this way in order for it to be recognizable as law. Rather, what is crucial is that legal rules have an “internal aspect”; that is, that there is a “way of

¹⁶ Recognizing Wrongs 86–88 (citing HLA Hart, *The Concept of Law* 82–84 (2d ed. 1994)).

¹⁷ Recognizing Wrongs at 88–89 (quoting Hart at 87).

seeing them as the generally law-abiding citizen does” and that in a well-functioning legal system, officials like judges *will* view legal rules in this way.¹⁸

For this reason, Goldberg and Zipursky say, any “effort to theorize a subject [ought] to work with, rather than dismiss as empty, the ways those acting within the practice make sense of it.”¹⁹ And participants in practices associated with private law do not treat it as a mere system of sanctions but rather as assemblage of legal “rights, duties, and wrongs.”²⁰ This understanding of the internal aspect of legal rules, Goldberg and Zipursky are quick to insist, does not involve any conflation of moral and legal duty of the sort that Holmes warned against. Nor does it commit adherents to contestable metaphysical or epistemological claims about morality and its bearing upon law. Hard-headed pragmatists need not get off the bus.²¹

Goldberg and Zipursky argue, approvingly, that Hart sought to capture “what is distinctive about legal-oughtness as opposed to moral-oughtness.”²² Hart’s rule of recognition—the master rule, or practice, that decides which other rules are part of a legal system—turns on facts about the beliefs and behavior of participants in the system, not whether their sense of obligation is morally motivated or justified.²³ The internal aspect of private law rules, then, does not assume employ any substantive, content-based criteria of validity. What is important is recognition and acceptance as a matter of social fact.

For Goldberg and Zipursky, Hart’s account of the internal aspect of legal rules can explain why a person can have a sense of obligation in virtue of being subject to private law duties that is “both seriously under-inclusive and seriously over-inclusive relative to standard notions of morality and moral duties.”²⁴ Private law is a law of

¹⁸ Recognizing Wrongs at 91. See also Zipursky, Legal Obligation, at 1237 (contending, against Scott Shapiro, that Hart’s theorization of the internal aspect of rules intended to give “an account of ‘the reason-giving nature of legal practice’”) (quoting Scott Shapiro, What is the Internal Point of View? 75 Fordham L. Rev. 1157, 1166 (2006)).

¹⁹ Goldberg & Zipursky, Seeing Tort Law, at 1577.

²⁰ Id.

²¹ Id. (noting the “legitimate concerns” that “duty-accepting theories of tort law” leads to a “conception of law that is soft-minded or too moralistic”).

²² Id. at 1579.

²³ See HLA Hart, Concept of Law 101–110 (3d ed. 2012).

²⁴ Goldberg and Zipursky, Seeing Tort Law, at 1585–86.

rights, duties, and wrongs, but it does not follow that moral criteria *necessarily* determine which norms private law recognizes nor how it defines and invokes them in achieving legal order.²⁵ There can be substantial overlap in the identity and content of legal and moral norms, but the two may (and, per Goldberg and Zipursky, sometimes *should*) diverge.²⁶ A judge's duty is to "accurately identify and apply the *legal* norms she is interpreting and ... not simply assume that she has been delegated" power to appeal to her conception of morality.²⁷

B. Flaws in the Models

Holmesian externalism has two characteristics relevant for present purposes. First, in its view, doctrine—including rules, standards, principles and other apparent norms—does not supply genuinely normative reasons for action. People can internalize doctrine and might treat it as genuinely normative, but it is a mistake to read genuine normativity into private law's moralized language of rights, duties, and wrongs. Second, and relatedly, it supposes that what is most important about private law is whether, how, and when courts impose remedies. What matters in private law, in short, is soundly judging where the ax of the law will fall.

Weinrib and Goldberg and Zipursky's approaches are different in many crucial respects from each other and the Holmesian tradition. Nevertheless, and surprisingly, they share flaws that recapitulate key features of Holmesian externalism. First, like Hart, and notwithstanding their rejection of Holmes, they do not (and cannot) fully commit to the internal point of view because they fail to see that it implies recognizing that the law aims to supply real or genuinely normative (moral) reasons for action, and succeeds as law only to the extent that it meets that aim. Second, like Holmes, their accounts are overly focused on private law's remedial

²⁵ Id. at 1586–87 (observing that tort law will often overlap with moral norms).

²⁶ Id. at 1586 (“[T]here are sometimes reasons that favor recognition of legal norms that do not have counterparts in morality.”).

²⁷ Id. at 1587 (emphasis in original).

aspects.²⁸ In further irony, these two features are afterimages of the legal realist and law-and-economics views Weinrib, Goldberg and Zipursky critique.

1. Reasons for Action

First, the failure to construe law such that it provides participants with genuinely normative reasons for action. Weinrib, for his part, would likely admit the charge but argue that it is brought without jurisdiction. If the purpose of private law is to be private law, the purpose of engaging in the practice of private law is to engage in the practice of private law; demanding anything more, reaching to reasons grounded independently of law in morality, would be to solicit the separate offense of externalist instrumentalism.

We are not the first to find it odd to think of a practical enterprise like law as existing for its own sake.²⁹ Robert Cover observed that legal interpretation takes place on a field of pain and death.³⁰ Private law, at least, takes place on a field of damages and injunctions. It is counterintuitive to view practices that bring the sheriff to one's door—and that summon the sheriff in defense of one's rights—as an

²⁸ Which is not to say that they are exclusively focused on remedies. Goldberg and Zipursky are best known for arguing that tort law is a law of *wrongs* (rather than a catalogue of prices for socially undesirable behavior) and a law that enables *recourse* for completed wrongs. However, they have also called attention to tort's guidance function, noting that tort law also outlines relational norms that indicate how we ought to treat one another. One who abides such guidance will not commit a tort and so will have no occasion for entanglement in its remedial apparatus. See generally John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. Pa. L. Rev. 1733 (1998); and John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 Md. L. Rev. 364 (2005). See also *Recognizing Wrongs*, 82-110.

Note, however, that Goldberg & Zipursky have emphasized that tort's guidance is *legal* in nature, and is thus supplied in contemplation of liability and associated remedial responses to same. Again, in their view, tort's guidance does not necessarily replicate or instantiate moral guidance. See, John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 Cornell L. Rev. 1123, 1127 (2007) ("Tort ... instantiates a distinctively legal conception of wrongdoing as opposed to a purely moral one. And it does so for a very particular purpose, namely, to empower victims of certain legal wrongs to respond to their wrongdoers through legal action.") and at nt 11 and 1164-1174 (suggesting, and then explaining, how one might consider "the legal wrongs of tort ... close cousins of moral wrongs" but without identifying implications of a loose filiation for our understanding of tort law's contributions to background morality).

²⁹ See Robert L. Rabin, *Law for Law's Sake*, 105 Yale L.J. 2261 (1996) ("Weinrib's notable intellectual accomplishment in fashioning a doctrinal universe to fit his philosophical principles is undermined both by its highly conceptual normative character and by its insistent indifference to functional concerns about the impact of tort law on society.")

³⁰ Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1986).

enterprise of legal thought working itself pure as a highly circumscribed morality that the asserts for itself. We care about private law to the extent that we care about the rights and obligations it recognizes and the human interests it protects, and even if we do not care about private law, it shows concern for our actions and relationships. One need not be a legal realist or a legal economist to think that law exists for human purposes that motivate its formulation and orient its structure and content.³¹ Put in Aristotelian terms, Weinrib's attention to private's law formal cause is incomplete without a notion of final causality. In his understandable desire to rescue private law from the cynicism of Holmesian externalism, Weinrib refuses to offer reasons for preferring his alternative, seemingly believing that the ultimate moral value of equal freedom will be self-evident or will become evident through exegetical presentation of Kant's practical philosophy.

Even if one decides to follow along, it is not clear that the immanent rationality that Weinrib discerns in private law can orient the practically reasonable person. Set aside, for the moment, interpretive problems with the thesis that private law embodies, without remainder, a form of corrective justice that protects equal freedom.³² Set aside, also, problems about how to sand the edges of the thesis—or to decide what counts as a rough edge needing sanding, as opposed to one of plural purposive branches—without appealing to overarching purposes the value of which are independent of private law.³³ Even if private law largely operates so as to realize equal freedom, this observation falls short of uncovering decisive normative reasons for action. Although it soundly rejects the anti-rationalism of Hume's sentimentalism, Kantian philosophy is unwilling and perhaps unable “to give any fundamental account of which ends it is intelligent and reasonable to commit oneself to.”³⁴ A theory

³¹ Thomas Aquinas, *Summa Theologica* I-II, Q. 90, art. 4 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947) (defining law as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated”).

³² See, e.g., Scott Hershovitz, *The Search for A Grand Unified Theory of Tort Law*, 130 *Harv. L. Rev.* 942, 957 (2017) (concluding “that Ripstein’s principle—no one is in charge of their neighbor—does not explain the details of tort doctrine”); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *Geo L.J.* 695, 709–733 (2003) (offering an interpretive critique of corrective justice theories).

³³ See Part II, *infra*.

³⁴ John M. Finnis, *Practical Reason's Foundations*, in *Collected Essays*, Vol. 1, at 26.

of practical reason that holds that free choice is valuable independently of the ends chosen purchases autonomy at the expense of robust normative guidance. When embedded in legal norms, the best it can offer are side constraints—a list of imperatives whose violation triggers the operation of corrective justice—to unguided autonomous reasoners. The remedial—one might say sanction-focused—picture of private law thus reemerges in Kantian private law theory despite its clear rejection of Holmesian externalism.

Goldberg and Zipursky’s alternative avoids the linked problems of monism and unremitting coherentism. Its pragmatism, moreover, reassures those skeptical of an internal point of view that surprises with a one-way trip to Kantian practical philosophy and ignores or papers over the textured contingency of doctrine. Yet their rendition suffers similar shortcomings of normative motivation. And, unlike Weinrib, who is happy for private law to be private law, confession and avoidance here are not live options for reply and rebuttal. For Zipursky at least, the internal aspect of rules is intended to give explain “the reason-giving nature of legal practice.”³⁵

The problem we identify is a perennial, though we believe fundamentally sound, worry about grounding normativity in a Hartian conception of the internal point of view. Hart, whose approach Goldberg and Zipursky embrace, rejects the notion that the acceptance of rules is linked to moral appraisal. Hart thus denies that the presumptive obligatoriness of legal obligation implies that legal obligations are presumptive moral obligations or are otherwise grounded morally. For Hart, participants who accept legal rules may do so “based on many different considerations: calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do.”³⁶

As we will discuss below, there are serious objections to the notion that a non-moralized understanding of the internal point of view is tenable.³⁷ Even if that kind of game were possible, however, the question would arise: why play it? Tort law, for

³⁵ Zipursky, *Legal Obligation*, at 1237.

³⁶ Hart, *Concept of Law* (3d. ed), at 203.

³⁷ Section II, *infra*.

example, may be a collection of wrongs and remedies that bespeak duties that officials and some citizens treat as obligatory as a matter of fact, but that gives no one person any reason to follow suit. Practices and conventions come and go, many departing unmourned. If private law is no more than a set of practices and conventions, and if its seeming normativity is unreal or noncommittal, why should it be any different? If that is all there is to private law, it's open to me to prefer the destruction of private law to the scratching of my finger. Further, it is not clear why, absent articulation of goods that ground the value of private law's practices, one ought to privilege (in theorizing) or adopt (in situ) an internal perspective on practice qua practice. Perhaps taking the external perspective on the practices of the American Contract Bridge League deprives me of the some of the joy of bridge for bridge's sake or instrumentally limits my ability to win tricks. But that is no argument if I am an insurance agent who wants to win friends and influence bridge players.

Goldberg and Zipursky have a practice-for-practice's sake problem cognate to Weinrib's law-for-law's sake conundrum. There are two ways to confront it. The first is the Holmesian tack of recognizing that private law is different because the American Contract Bridge League cannot summon the sheriff. It is a practice with the coercive power of the state behind it, so it is in your interest to learn its ways and perhaps the internal point of view is useful for prediction. A second is to recognize that private law is normative in a way that bridge and fashion are not,³⁸ and that the orienting anchor of the internal point of view toward its practice is that of a practically reasonable person who grasps and endorses its norms and the goods that render its purposes intelligible as moral purposes. Hart's, and Goldberg and Zipursky's, less demanding version of the internal point of view requires only a kind of normative method acting.³⁹ It is an exercise that, while immersive for the player

³⁸ To the extent bridge and law are similar, it is because normative reasons also supervene upon the former. Bridge's practices implicate higher order norms against cheating, violence, and the like. Similarly, games, like law, can promote human flourishing, albeit advancing goods such as leisure and friendship. While bridge is one of many possible, and optional, ways of advancing the goods of leisure and friendship, we would argue that developing and sustaining a reasonably just legal system is a requirement of practical reason.

³⁹ See Konstantin Stanislavski, *An Actor Prepares* (1936).

on stage and convincing to the audience, is a derivative simulacrum of the true character of the practice in play.⁴⁰

2. Remedialism

Internalist private law theory, as exemplified by the work of Weinrib and Goldberg and Zipursky, also remains caught up in the current of remedialism set in motion by Holmes. Preoccupation with its remedial aspects leads to distorted or incomplete theorization of private law.⁴¹ With leading philosophical accounts prescinding from the ex ante normative guidance supplied by private law and questions about its all-things-considered practical reasonableness, their richly detailed remedialism stands in sharp relief to their treatment of substantive norms as cipherlike variables on the less-important side of an equation.

Externalist theories command attention to outcomes and other readily observable features of the civil litigation process, and thus privilege the ex-post perspective of resolving disputes relating to norms that operate prospectively. Law-

⁴⁰ That said, method actors sometimes find themselves identifying with their characters to such an extent that it risks their self-identity. This offers a theatrical analogue for jurisprudential arguments about the instability of detached internal points of view. The instability can, and arguably has been, overlooked by Goldberg and Zipursky. In treating torts as “cousins” of moral wrongs (*supra* note 28), Goldberg and Zipursky suggest that there is *some* relationship of more-or-less-distant filiation between tort law and morality: a relationship sufficient to ground an inference that tort law is *prima facie* morally justifiable. See chapter four of *Recognizing Wrongs* and John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *Tex. L. Rev.* 917, 974 (“Part of the state’s treating individuals with respect and respecting their equality with others consists of its being committed to empowering them to act against others who have wronged them.”).

Notice, however, that suggestive language is invariably hedged by statements emphasizing the distinctively legal nature of tort’s conception of wrongful conduct and underscoring the contingency of the relationship between law and morality. What’s more, if one descends from generalities about tort to questions of ‘ground level’ moral significance, the views of Goldberg and Zipursky on the morality of particular nominate torts is hard to make out. In our view, addressing the latter convincingly would require Goldberg and Zipursky to be more committal than they have yet been on the moral salience of specific interests protected by specific torts as reflected in the ex ante guidance that they supply.

⁴¹ Gregory C. Keating, *The Priority of Respect over Repair*, 18 *Legal Theory* 293, 297 (2012) (“These remedial accounts of tort law put the cart before the horse.”); *id.* at 312 (observing that “contract, property, and restitution also enforce rights by empowering those whose rights have been violated to seek redress”). But see *supra* note 28: Goldberg and Zipursky emphasize the sense in which torts are genuine (if distinctively legal) wrongs and underscore the significance of powers of recourse, but they have also commented at length on the ex ante guidance function of tort law. In our view, their emphasis on tort’s remedial aspects (wrongs and remedies) has overshadowed what they have written about its guidance function, but in response to Keating they might reply that they interpret tort as a body of law in which obligations of respect *and* repair lie on an equal footing.

and-economics scholars, for example, care most about remedies and their incentive effects. Concomitant to this, and consistent with the outsized influence of Holmes on American private law scholarship, is the assumption that people are rationally self-interested Holmesian bad actors, such that remedies must be calibrated to incentivize conformity not with norms *as such* but rather with desired outcomes. The existence, content and reasonableness of norms are considerations subservient to those relating to the external effects that induced conformity is expected to produce.⁴²

The internalists' pushback against externalism points beyond remedies to constructs that are fully cognizable only from an internal point of view, namely primary rights and duties and an assemblage of power-conferring rules.⁴³ However, internalists' theories remain mostly caught within the ex-post frame. This is evident in their presentation as theories of "corrective justice" or "civil recourse." Private law is characterized as primarily concerned with remedying commutative imbalances (of some kind) or redressing private wrongs (however defined). As is suggested by the parentheticals in the previous sentence, for corrective justice and civil recourse theorists, the content and moral sensibility of primary norms receives less notice than does the broader structure of repair.⁴⁴

To be sure, litigation and redress are important. Private law, after all, does more than provide guidance on how to treat others and to live well. But the prospect of redress is important only in seeing how law addresses the recalcitrant, indifferent or malicious. What is missing is sustained attention to how the law addresses the practically reasonable person inclined to take seriously the law's image of itself as a morally authoritative—the person who, while alert to evidence otherwise, adopts the default supposition that legal obligations are genuine obligations, whether because they are moral obligations or because they are backed by other decisive moral reasons for compliance.

⁴² Cf. Keating at 330 (arguing that, for economic theories "[v]alue resides in an end state of affairs, and the claims of persons...are merely incidental to the production of that state of affairs").

⁴³ *Supra* note 28. See also chapters 4 and 5 in Weinrib, *The Idea of Private Law*.

⁴⁴ Some salutary exceptions are Keating, *supra* note 41, and Steven Schaus, *A Simple Model of Tort and Moral Wrongs*, *Notre Dame L. Rev.* (forthcoming) (draft on file with authors).

The perspective of the practically reasonable person is relevant to remedies in that they – and we – have reason to be concerned with how the law anticipates and protects them from the behavior of the recalcitrant, indifferent and malicious. But their perspective is not *exhausted* by their appreciation that the law provides protection and relief. These participants invoke and rely on law not, usually, out of fear or in anticipation of breach, but rather with mind toward the good(s) that are at stake in law, and thus in compliance and conformity with it. Power-conferring and other enabling rules that facilitate coordination and cooperation illustrate this well. The practically reasonable person who willingly associates with others in reliance on these rules typically does so in the trusting expectation that they, too, are good people; Holmesian bad actors are simply people they have reason to avoid, if they can, or to bring to the law if they cannot.

II. CONCEPTIONS OF THE INTERNAL POINT OF VIEW IN GENERAL JURISPRUDENCE

The writings of Weinrib and of Goldberg and Zipursky, respectively, best exemplify the turn toward the internal point of view in private law theory. They present the most influential accounts of what it might mean to understand private law from within and have contributed importantly to criticism of external perspectives that ignore or occlude the internal point of view. Their influence has been felt in a wider generational shift toward self-conscious adoption of an internal vantagepoint in scholarship associated with the New Private Law. Nevertheless, there remain important and unresolved questions - and differences between Weinrib, Goldberg and Zipursky and others - on what the internal point of view consists in and why it is primary or basic normatively and/or as a matter of interpretive methodology. Furthermore, with the notable exception of Goldberg and Zipursky, most of those advocating the internal point of view have done so without deep engagement with the general jurisprudential literature. That is surprising but also unfortunate for, as we shall explain, careful attention to the arc of the literature enables one to evaluate and arbitrate between competing renditions of internal and external points of view in private law theory. Indeed, as we will explain in Part III, it enables one to see specific

flaws in the accounts of Weinrib and Goldberg and Zipursky, respectively, and to move beyond them to an improved conception of the internal point of view; one that deliberately situates private law relative to the wider guidance function of all law, and dispenses with stylized contrastive representations of internal and external vantagepoints in favor of examination of their latent complementarity.

Theorization of the internal point of view is a useful demarcation line in general jurisprudence, partly because it disassembles conventional opinion on what divides scholars in the field, and partly because it has allowed those scholars to arrive at—and, increasingly, to recognize—common ground. And finding common ground is significant: efforts to define the internal point of view and to differentiate it from external vantagepoints inevitably draw one into broader questions about the nature and normativity of law. Indeed, H.L.A. Hart made his rendition of the internal point of view in *The Concept of Law* a cornerstone of both his criticism of command-based conceptions of legal authority found in earlier positivist thought and his development of an alternative social-practice-based conception of law as a system of primary and secondary rules. In turn, John Finnis' reconceptualization of the internal point of view is refracted in the rest of his *Natural Law and Natural Rights*.

As we will explain, Finnis corrected Hart's missteps by reframing the internal point of view in a way that takes seriously law's "practical point," and thus, in turn, its practical authority and normativity. Finnis' reframing has gone unnoticed in philosophical private law theory but within general jurisprudence it is implicated in a surprising convergence between positivists, natural law theorists, and legal moralists in which it is recognized that (a) an internal point of view on law is a participant vantagepoint; (b) that, being a participant vantage-point, it is oriented to – but not exhausted by – social practices within which law is posited and in which it is relied upon for normative guidance; (c) that social facts evidencing these practices cannot alone explain or vindicate the law's special claim to practical authority; and (d) to understand what might vindicate that claim one must query the law's "practical point," which is to say, qua Finnis (and many others since), one must query the kinds

of practical reasons that the law generates and conditions under which those reasons are, or might be, practically reasonable.

In what follows, we briefly canvas these developments in order that they might enrich our account, in Part I above, of problems with leading accounts of the internal point of view in private law, and inform our effort, in Part III below, to explain the value of a Finnisian reframing of the internal point of view in private law.

A. The Internal Point of View According to Hart

Hart's account of the internal point of view is central to his ambitions for, and accomplishments in, *The Concept of Law*. Hart aimed to rehabilitate the positivist tradition by showing how positivistic conceptual analysis can illuminate law without effacing its normativity or conflating it with other sources or systems of norms.

Hart's belief that positivism required rehabilitation is suggested by his devotion of the beginning pages of *The Concept of Law* to an exacting refutation of the ideas of John Austin. Austin's deceptively (yet attractively) simple rendering of law as a species of command had, for many, come to define the positivist tradition. Yet Hart considered Austin's concept of law deeply and irredeemably flawed. Showing how it was flawed cleared the way for Hart's alternative and assured *The Concept of Law*'s displacement of Austin's *Lectures* as the leading work of positivist thought in Anglo-American jurisprudence.

Amongst Hart's specific criticisms, his observation that Austin had conflated compulsion (feeling obliged) with reasoned recognition of obligation (accepting an obligation) was especially incisive. Situating this criticism within wider objections to conceptualizing legal authority as a species of command, Hart memorably contrasted external vantagepoints on law, such as that of observers of legal practices, from the internal point of view of participants, convincingly summarizing the problems with Austin's concept of law with one deft critical intervention on jurisprudential methodology. The command conception of legal authority, Hart noted, impliedly reflects an external point of view on law. It views patterned obedience to legal rules from the detached perspective of one who sees *only* behavioral regularity and wishes

(despite perspectival limitations) to make causal inferences about the behavior and to offer theoretical extrapolation about the practices within which behavioral regularity is observed.⁴⁵ This perspective lends itself to the construction of persons (specifically, in respect of motivations underlying observed behavior) as Holmesian bad actors: people who habitually conform or fail to conform their conduct to the law's requirements only by virtue of incentives generated by sanctions and nudges.⁴⁶

To his credit, Hart recognized that the construction is flawed because it ignores the first-personal standpoints of participants in legal practices (these being obscured by external vantagepoint itself). Hart saw the perspectival deficiency for the methodological problem that it is, reflecting the flawed assumption that the only or best way to understand how law lends order through social practices is to stand at remove from those practices. Doing so means neglecting the authentic normativity of social practices that are normative practices, and so it means neglecting motivation(s) that such practices are meant to summon in participants (not to mention other prevalent motivations within the practice, and the salience of differences in motivations for the practice, as may be understood by participants mindful of its normativity). In respect of legal practices: an observer might not be able to distinguish compulsion in the face of command from reasoned recognition of genuine obligation, but lawyers and other participants ought to be able to and, one might add, *must*, if we are to understand our practices at all.

Hart suggested that in order to understand law, one must understand its normativity. Thus, in turn, to appreciate the difference between feeling obliged and being obligated, and the distinction between the exercise of brute power (domination) and the potentially legitimate assertion of authority, we must adopt as primary the

⁴⁵ Hart, *Concept of Law*, at 89 (“[A]n observer is content merely to record the regularities of observable behaviour in which conformity with the rules partly consists and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met.”).

⁴⁶ *Id.* (“If ... the observer really keeps austere to this extreme internal point of view and does not give any account of the manner in which members of the group who accept the rules view their own behavior, his description of their life cannot be in terms of rules at all, and so not in the terms of rule-dependent notions of obligation or duty. It will instead be in terms of observable regularities of conduct, predictions, probabilities, and signs.”).

internal point of view of participants in legal practices.⁴⁷ For Hart, this is the point of view held by a person who looks to the law in reasoned recognition⁴⁸ that legal rules often generate obligations; that is, standards according to which conduct within society is to be appraised, informally by way of personal moral judgment and reactive attitudes of praise and blame, and formally through litigation and impartial adjudication of disputes alleging non-conformity with the law.⁴⁹ Usually Hart implies that this is the vantagepoint that is or should be held toward law by the law's addressees (i.e., by all manner of participants in legal practices). Sometimes, though, he suggests that it is most consequential that this be the vantagepoint of legal officials whose practices ground (really, instantiate) the "rule(s)" of recognition according to which determinations of legal validity are made based on the pedigree of legal rules.⁵⁰

In conceptualizing the internal point of view in terms of the acceptance and use of legal rules as evaluative standards, Hart acknowledged that a sound jurisprudence must account for the law's normativity. However, he was only willing

⁴⁷ Id., at 89 ("When a social group has certain rules of conduct, this fact affords an opportunity for many closely related yet different kinds of assertion; for it is possible to be concerned with the rules, either merely as an observer who does not accept them, or as a member of the group which accepts and uses them as guides to conduct. We may call these respectively the 'external' and the 'internal points of view.'").

⁴⁸ Id., at 57 (referencing the "critical reflective attitude" towards rules that typifies the perspective of participants in rule-governed social practices)

⁴⁹ Id., at 56-57 (arguing that rules are understood from the internal point of view as "a general standard to be followed" within a social group and that this understanding of them is "manifested in the criticism of others and demands for conformity made upon others when deviation is actual or threatened."). See also id., at 86-87 (describing social manifestations of pressure for conformity with legal rules and social practices of appraisal of conduct in light of them) and at 90 (describing that participants' perspective as that of "officials, lawyers, or private persons who use [legal rules], in one situation after another, as the basis for claims, demands, admissions, criticism, or punishment."). And see Hart's Postscript, id. at 242, where he reiterates the claim that the internal point of view is characterized by voluntary "acceptance" of law as a guide to conduct ("[P]articipants manifest their internal point of view in accepting the law as providing guides to their conduct and standards of criticism.")

⁵⁰ Id., at 116 (suggesting that it is sufficient for legal officials to take the internal point of view of law but noting that in a "healthy society" citizens and other addressees will take this point of view also, accepting primary rules "as common standards of behavior" and acknowledging "an obligation to obey them."). For critical discussion, see Stephen R. Perry, Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View, 75 Fordham L Rev 1171, 1172 (2006) (noting that, for Hart, "a legal system cannot exist unless most – if not all – of its officials adopt the internal point of view. By the same token, a legal system can, according to Hart, exist even if no one other than its officials adopts the internal point of view.").

to go so far in examining it. In particular, he was reluctant to probe the grounds of the law's normativity, retreating to a detached perspective on social practices that are suggestive (but, in Hart's rendering, no more than suggestive) of reasoned acceptance of law as a practically authoritative guide to conduct.⁵¹ While there are references to grounding considerations scattered throughout *The Concept of Law*—e.g., to the importance of law in minimizing violence and in fostering cooperation—Hart refrains from direct and sustained analysis of them, emphasizing that participants in legal practices might “accept” guidance supplied by law for prudential reasons, out of fear, or through habitual conformity with social rules of all kinds.⁵²

Hart's account of the internal point of view represented an important advance in general jurisprudence, but it was one the implications of which he failed fully to realize. Hemmed in by his methodological positivism,⁵³ Hart failed to appreciate that the internal point of view cannot be adequately theorized from the kind of detached perspective that certain kinds of anthropologists or sociologists adopt in structured observation and analysis of complex social practices.⁵⁴ To the extent that these practices are, again, *normative practices*—i.e., social practices involving the formulation of, debate over, positing, deliberation with, attitudes in relation to, and action in light of, *norms*—complete examination of the vantagepoint of a participant entails examination of the *rational bases* upon which one might commit – or critique, for one's inability rationally to commit – to law as an authoritative source of

⁵¹ For extended commentary, see generally Finnis, *On Hart's Ways: Law as Reason and Law as Fact*, Finnis, *Collected Essays: Volume 4*. See also Finnis, *id.*, at 232 (“By the time of *Essays on Bentham* ... Hart had recast his theory of authority and law so as to emphasize yet further the centrality to it of reasons for action (peremptory and content-independent reasons.”).

⁵² For example, in the *Postscript*, Hart identifies not with the internal point of view as such but with the theorist's detached recognition of the distinctiveness of that vantagepoint. *Id.* at 242 (“[T]he descriptive legal theorist must understand what it is to adopt the internal point of view and in that limited sense he must be able to put himself in the place of an insider; but this is not to accept the law or share or endorse the insider's internal point of view or in any way to surrender his descriptive stance.”).

⁵³ See generally Stephen R. Perry, *Hart's Methodological Positivism*, 4 *Legal Theory* 427 (1998).

⁵⁴ Finnis, *Describing Law Normatively*, Finnis, *Collected Essays: Volume 4*, p. 36-4. See also Finnis, *id.*, at 39 (“The aspiration to be normatively inert makes it impossible to provide any explanation of the kind Hart was seeking throughout his work.”).

normative guidance within these practices.⁵⁵ Holding fast to the importance of recognizing the positivity of law and the contingent legitimacy of its assertion of practical authority, one must also confront the law's claim to authority as a moral claim and examine the participant's perspective as one that understands and evaluates the law's guidance accordingly.

B. The Internal Point of View According to Finnis

John Finnis recognized the limitations of Hart's exposition of the internal point of view. He recognized, more specifically, that mere description of social practices that *seem* to be suggestive of the "acceptance" of legal rules as practically authoritative norms cannot fully explain the practical point of law in supplying normative guidance for the dispositive resolution of conflict and coordination issues within political communities.⁵⁶

In elucidating law's practical point, Finnis does not deny that the social practices through which the law guides conduct are, as a matter of social fact, complex and variegated. Sometimes they will, as Hart noted, be suggestive of habituated acquiescence in the law. They might also or alternatively be prominently marked by conduct of "recalcitrants" (in Finnis' rendering of Holmesian bad actors). Otherwise, they might evince advertent acceptance of law as a guide but for practical reasons that have nothing to do with those that are supplied by law and that underwrite the

⁵⁵ See Neil MacCormick, Appendix: On the Internal Aspect of Norms, in his *LEGAL REASONING AND LEGAL THEORY* (1978) (see at 287, commenting that the "detached view of social rules makes sense only if those who hold it suppose ... that there are some who do care about the maintenance of the pattern of conduct in question" and at 289 arguing that the "playing along,' 'delinquent', and 'rebel' positions (and any variants or intermediate types) are all comprehensible only in apposition or opposition to the volitionally committed position."). See also Finnis: "Like any other fact about what happens or is or has been done, practice, whether idiosyncratic, widespread, or universal, provides no reason for its own continuation. From such an Is no Ought ... can be inferred without the aid of another Ought." Finnis, *On Hart's Ways: Law as Reason and Law as Fact*, Finnis, *Collected Essays: Volume 4*, at 248 (original emphasis).

⁵⁶ Finnis, *On Hart's Ways: Law as Reason and as Fact*, Finnis, *Collected Essays: Volume 4*, p. 245-246 (describing Hart's as a "legal theory or general jurisprudence that, having identified its own descriptive dependence on the internal point of view and attitude (in which rules are reasons for action), leaves those reasons largely unexplored, and rests largely content with reporting the fact that people have an attitude which is the internal aspect of their practice.").

practical reasonableness of the guidance it supplies (e.g., prudential reasons rooted in affiliation or concern for reputation). But if one associates the internal point of view with all or a representative sampling of participants' perspectives, one is left with a multiplicity of divergent attitudes towards the law,⁵⁷ little sense for its practical point,⁵⁸ and, relatedly, no basis for distinguishing conduct guided by right reason (i.e., that reflecting reasoned acceptance of practically reasonable guidance) from that showing mere conformity moved by habit, calculation, fear, or servility.

Consistent with his wider method of disentangling meanings of "law," Finnis focuses on the participant perspective that is "focal" in that it reflects and is oriented toward the law's practical point. This is the perspective of one who recognizes the law's claim to practical authority for what it is (i.e., as a claim to reliably guide or direct their deliberation about what they may or should do) and seeks in it guidance which, upon reflection, they could actively accept or endorse as genuinely authoritative (i.e., as reliable in virtue of its soundness).⁵⁹ For if law can effectively supply normative guidance, and if the law's practical reasonableness is a condition of its effectiveness or mark of fitness for guidance, the focal internal point of view will be that of the person who looks to law critically in the expectation that it prove practically reasonable and so invite reliance.⁶⁰ Finnis explains:

⁵⁷ Thus, criticizing Hart's equation of the internal point of view with various social practices evincing "acceptance" of legal rules as standards of conduct, and Raz's exposition of it in terms of the vantagepoint of those who, in Raz's words, "believe in the validity of legal norms and follow them," Finnis observes that they amount to "an amalgam of different vantagepoints" and notes that this renders their exposition of the internal point of view "unstable and unsatisfactory because it involves a refusal to attribute significance to differences that any actor in the field would count as practically significant." Finnis, *Natural Law and Natural Rights*, at 13, quoting Raz, *Practical Reason*, 171 and 177.

⁵⁸ That is, "why, and when, we ... should favor introducing, having, endorsing, maintaining, complying with, and enforcing [law]." Finnis, *Describing Law Normatively*, Finnis, *Collected Essays: Volume 4*, p23

⁵⁹ See also Veronica Rodriguez-Blanco, *Tracing Finnis's Criticism of Hart's Internal Point of View: Instability and the 'Point' of Human Action in Law*, in *THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM* (Torben Spaak & Patricia Mindus, eds, 2021) at 714 ("The problem with the 'acceptance thesis' is that it does not consider the action from the deliberative point of view, that is, as it is seen from the point of view of the agent or deliberator.").

⁶⁰ Including such reliance as might involve the displacement or modification of other apt practical reasons. Lest we be misunderstood, we emphasize that the expectation is critical in nature and so consistent with a posture of alertness to the possibility that the law will be defective by virtue of its unreasonableness. See Finnis, *On Hart's Ways: Law as Reason and as Fact*, Finnis, *Collected Essays*:

If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation ... a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint ... But the term ‘moral’ is of somewhat uncertain connotation. So it is preferable to frame our conclusion in terms of practical reasonableness. If there is a viewpoint in which the institution of the Rule of Law, and compliance with rules and principles of law according to their tenor, are regarded as at least presumptive requirements of practical reasonableness itself, such a viewpoint is the viewpoint which should be used as a standard of reference by the theorist describing the features of legal order.⁶¹

But what are the characteristics of a person who expects in the normative guidance supplied by law “at least presumptive requirements of practical reasonableness?” Finnis explains further:

[T]he central case viewpoint is the viewpoint of those who not only appeal to practical reasonableness but also *are* practically reasonable, that is to say: consistent, attentive to all aspects of human opportunity and flourishing, and aware of their limited commensurability; concerned to remedy deficiencies and breakdowns, and aware of their roots in the various aspects of human personality and in the economic and other material conditions of social interaction.⁶²

Volume 4, p. 242: “[A]s a matter of fact, there is no necessary connection between law and reasonableness, justice or morality; irrational and unjust laws abound ... As a matter of practical reason, unreasonable (and therefore unjust and immoral) laws and legal systems are not what we are seeking to understand when we inquire into the reasons there are to make and to maintain law and legal systems, and what features are essential if law and legal systems are to be acceptable – worthy of acceptance – and entitled to the obedience or conformity of reasonable people.” (original emphasis).

⁶¹ Finnis, *Natural Law and Natural Rights*, at 14.

⁶² *Id.*, at 15.

Put otherwise, the central or focal internal point of view is that of the person who understands our need of law as a genuinely authoritative—and thus practically reasonable—guide to practical deliberation and conduct, and who understands that this need inheres in our nature, our social and natural environments, as well as our collective inability otherwise to fully realize or secure the realization of important goods.⁶³ Of course, Finnis also provides an influential account of these goods. But his conceptualization of the internal point of view does not depend for its cogency on one's acceptance of that account. Its fundamental soundness should be recognized by all who think that (a) there are ends of objective moral value that mark our need of law; (b) that these ends and associated values are often (if imperfectly) reflected, directly or indirectly, in posited law; (c) that one is guided normatively by law to the extent one (being practically reasonable⁶⁴) derives from the law, through practical judgment, context-specific practical reasons with which to further deliberate and ultimately upon which to act; (d) we rely upon our critical faculties of practical judgment in making use of the guidance supplied by law in evaluating, *ex post*, our own deliberation and conduct and that of others; (e) we rely upon these same faculties in evaluating the quality of the guidance supplied by law;⁶⁵ (f) we should consider, in

⁶³ Finnis, *Describing Law Normatively*, Finnis, *Collected Essays: Volume 4*, at 28 (“It is obvious ... that for the sake of justice and a flourishing community of people in good shape and doing as well as the extrinsic circumstances permit, we need a set of rules, arrangements, processes, institutions, and persons with responsibility and thus authority, the set that is commonly called law, legal, legal system, and so forth.”). Finnis, *On Hart’s Ways: Law as Reason and Law as Fact*, *Collected Essays: Volume 4*, at 256 (“[B]ecause the first-person (practical) viewpoint is concerned not, in the end, with facts about oneself but with reasons (for action) that are both available to and bear on the good of anyone like me (generically, all human beings), it is the domain of common good and so the engine room, the most proximate cause, of law.”) (emphasis supplied).

⁶⁴ Recognizing that the “primary reality of the law is ... in its claim, as itself a moral requirement, on my deliberating about what to decide ... This mode of our positive law’s existence – as a morally legitimate and compelling, albeit conditionally and only defeasibly compelling, claim on my action when I am thinking about what to do as a plain citizen (child or adult), a judge, a police officer, a tax inspector, and executor, and so forth – is the primary reality of law.” Finnis, *Describing Law Normatively*, Finnis, *Collected Essays: Volume 4*, at 29 (original emphasis).

⁶⁵ Acknowledging that “law includes success conditions ... law must be directed to the common good, must not go outside the domain of justice, which is external acts affecting other people, is subject to equitable override, and so forth.” Finnis, *Describing Law Normatively*, Finnis, *Collected Essays: Volume 4*, at 29 (original emphasis). On the character of these “success conditions” and the sense in which other natural law theorists view the requirement of practical reasonableness as a normative criterion going to the fitness of law relative to what Finnis calls its “practical point,” see Mark Murphy, *Natural Law Jurisprudence*, 9 *Legal Theory* 241 (2003).

respect of points (d) and (e), the practical reasonableness of law to be a matter of its moral soundness;⁶⁶ and (g) we should commit to the reform of law that is defective in virtue of its practical unreasonableness.

C. Convergence on a Finnisian Conception of the Internal Point of View

While some general jurists persist in advocating a Hartian take on the internal point of view,⁶⁷ the dominant tendency is toward convergence on the Finnisian alternative.

For instance – and as Finnis has observed in commenting on wider patterns of convergence in general jurisprudence⁶⁸ – comments suggestive of a Finnisian conception of the internal point of view are found in the early work of Raz. It is, for example, seen in work that grounds the authority of law in the soundness of the practical reasons through which the law guides.⁶⁹ It is also reflected in Raz’s memorable suggestion that the law presents itself as morally authoritative; an implication being that participants in legal practices who reflect critically upon the law’s claims are entitled to expect, and as appropriate to treat, legal obligations as moral obligations (even if they are special moral obligations in virtue of the peremptory nature of the practical reasons they generate).⁷⁰

⁶⁶ “[O]ne cannot begin to understand what law is about without noticing, not merely that it shares much of the same action-guiding vocabulary of morality, but – overwhelmingly more important – that it does so because it purports to occupy the same place in the world as morality.” Finnis, *Describing Law Normatively*, Finnis, *Collected Essays: Volume 4*, at 42 (original emphasis). For contemporary variations on this theme, emphasizing a ‘single system’ conception of the relationship of law and morality, see Mark Greenberg, *The Moral Impact Theory of Law*, 123 *Yale L.J.* 1118 (2014); Scott Herschovitz, *The End of Jurisprudence*, 124 *Yale L.J.* 882 (2015); and Schaus, *supra* note 44.

⁶⁷ See, e.g., Scott Shapiro, *What is the Internal Point of View*, 75 *Fordham Law Review* 1157, 1157 (2006) (echoing Hart: “The internal point of view is the practical attitude of rule acceptance ... [which implies only being] disposed to guide and evaluate conduct in accordance with the rules.”).

⁶⁸ Finnis, *Describing Law Normatively*, Finnis, *Collected Essays: Volume 4*, at 45 (original emphasis) (Saying of Gardner, Raz, and other positivists that “most of us end up on the same road and indeed at the same point on the road.”).

⁶⁹ Raz, *Practical Reason*, at 136-139. See Finnis’ commentary, *Natural Law and Natural Rights*, at 7.

⁷⁰ Raz, *Authority of Law*, at 148 (“The law—unlike the threats of the highwayman—claims to itself legitimacy. The law presents itself as justified and demands not only the obedience but the allegiance of its subjects.”); Raz, *Hart on Moral Rights and Legal Duties*, 4 *OJLS* 123, 131 (“[T]he law claims for itself moral force. No system is a system of law unless it includes a claim of legitimacy, of moral authority. That means that it claims that legal requirements are morally binding, that is that legal obligations are real (moral) obligations arising out of the law.”).

Stephen Perry has also expressed appreciation of Finnis' rendering of the internal point of view.⁷¹ In an influential article, Perry canvasses Hart's writings and argues that Hart's methodological positivism put him in a bind: he clearly recognized, but was unable to satisfactorily address, the "problem" of the law's normativity.⁷² Perry also criticized Hart for failing to distinguish descriptive-explanatory methods (which belong properly to the social sciences, and entail observational detachment) and conceptual analysis (which belongs to jurisprudence but assumes an internal point of view oriented to the law's practical point, and thus its normativity). Perry explains that Hart employed both methods without realizing that his aims for conceptual analysis of law were incompatible with the social scientific posture from which he made observations about social practices involving seeming "acceptance" of legal rules.⁷³ The incompatibility lies in the fact that "theories of law must be offered from the internal point of view and must be defended, in part, by resort to moral argument."⁷⁴ In subsequent work, emphasizing that general jurisprudence must confront the "claim by legal officials to have the authority or power to change the normative situation of those who are subject to law,"⁷⁵ Perry offered an alternative formulation of the internal point of view that tracks Finnis' in its essentials, save for its useful differentiation of the perspectives of subjects and officials:⁷⁶

⁷¹ Stephen R. Perry, *Hart's Methodological Positivism*, 4 *Legal Theory* 427, nt. 5 (1998)

⁷² Perry, *Hart on Social Rules*, *supra* note 48, at 1173 ("Hart's own theory of law does not fully escape the difficulties of the Austinian theory that he so successfully criticizes because in the end, he, like Austin, does not take normativity sufficiently seriously. Since the internal point of view is nothing more than an attitude that a standard is binding, Hart is not offering an account of the normativity of law that looks to its (potential) reason-givingness."). See also Perry, *Methodological Positivism*, *id.*, at 450 ("The essence of the problem of normativity of law is philosophical: Does the law in fact obligate us in the way that it purports to do? This is an issue that arises within the philosophy of practical reason, and it would seem inevitable that its resolution will require normative and probably moral argument.").

⁷³ *Id.*, at 449 (noting that Hart's "account of obligation," despite being the critical juncture at which he means to part ways with Austin, is "at its core ... simply a descriptive statement that ... members of the relevant group regard themselves and others in the group as obligated to conform to some general practice.") and at 455 (emphasizing that "the descriptive statement that people regard themselves as obligated by a general practice cannot, by itself, tell us whether the practice really does obligate them.") (original emphasis).

⁷⁴ *Id.*, at 429.

⁷⁵ Perry, *Hart on Social Rules*, *id.*, at 1173.

⁷⁶ A debt that Perry acknowledges. See *id.*, at 1202 (explaining that this rendering of the internal point of view, and the reorientation of general jurisprudence that it invites, involves "a return to a natural

The internal point of view, properly understood, is the perspective both of the authorities who make this claim and of the subjects who accept it. To accept the legitimacy of the law's claim to authority is to *believe* that the law has authority, and not simply to adopt an attitude of endorsement towards the law's requirements ... Legal normativity is moral normativity, and the law's claim to authority is a moral claim.⁷⁷

More recently, the late John Gardner reached similar conclusions, aligning himself with Finnis on the internal point of view while noting partial convergence in arguments about the nature and normativity of law made by positivists and natural law theorists.⁷⁸ For example, in dispelling “myths” about positivism, Gardner acknowledged that law is distinguished from other social practices involving the use of rules—including games—in that the law “purports to bind us morally,” noting that this “has implications ... for what counts as successful law, and hence for what one might think of as law’s central case.”⁷⁹ In a careful reassessment of Hart, Gardner observed that Hart’s steadfast focus on normative practices (i.e., legal practices) suggestive of the acceptance of norms (i.e., legal rules) failed to illuminate the normativity of the practices, and thus left obscured the vantagepoint of participants who take the law’s normativity seriously by critically engaging with it in a way consonant with its practical point—i.e., its moral claim to supply decisive reasons for action.⁸⁰ Thus Gardner, echoing Finnis, observed that “every legal norm ... is a

law sensibility,” referencing the work of Finnis and saying of Raz that while he “is often described as a positivist ... he is in certain respects as much an inheritor of the natural law tradition as he is of the positivist one. This is particularly true with respect to his views on the normativity of law.”)

⁷⁷ Id., at 1173-1174. See also *ibid* at 1201 (where Perry elaborates, saying “The internal point of view, properly understood, is the perspective of both those who make and those who accept the legitimacy of the law’s claim to authority.”).

⁷⁸ Gardner, *Law as a Leap of Faith*, 174 (commenting on the “affinity between Finnis’ thesis according to which morally successful law is the central case of law and the central concerns of the ‘legal positivist’ tradition.”)

⁷⁹ Gardner, *Law as a Leap of Faith*, 53.

⁸⁰ Id., at 169 (“[M]orally successful law remains the model relative to which all other kinds of law fall to be understood. Finnis is right to insist, then, that law has a moral nature. We need to understand law’s moral claim – the moral quality that it presents itself as having – in order to understand even the most immoral of laws.”)

putative (or purported or supposed) moral norm: it is a proposal, on the part of the law, for tackling and resolving one or more moral problems” and, addressing the participant perspective, argued that “those who see it as such *cannot but* be committed to it as a guide to action.”⁸¹

III. PRIVATE LAW AS A SOURCE OF NORMATIVE GUIDANCE

Part I argued that current conceptions of the internal point of view in private law, while admirable advances on Holmesian reductivism, fail to explain how private law gives practically reasonable people decisive reasons for compliance with its norms, or for use of its enabling doctrines. Given this ellipsis, it is ironic but unsurprising that leading proponents of the internal point of view share a remedialist orientation toward private law, directing attention largely to remedies and recourse and only secondarily to primary norms (i.e., norms that tell us how we may or must interact with one another, violation of which grounds civil recourse including court-ordered remedies). These are not perverse understandings of private law’s normativity but rather *incomplete* ones. And so, this section sketches the implications of an alternative, Finnisian account of the internal point of view for private law theory. Our alternative rejects remedialism and dichotomized representation of internal and external points of view while explaining the sense in which private law should be understood as a source of normative guidance addressed to interpersonal interaction, conflict, cooperation, and coordination.

A. Practical Reason and Private Law

Imagine a system of private law that held itself out as an ensemble of norms that were good for members of a political community to follow. Here, tort law would be viewed not simply as a mechanism for the realization of corrective justice, or even as a law of “wrongs” that trigger redress, but rather as a body of law that defines the *wrongness* of committing a tort (i.e., the completed violation of a primary norm) in

⁸¹ Id., at 162.

the first place. While theories of tort like that of Goldberg and Zipursky are ultimately agnostic on whether the “wrongs” a system recognizes are genuine moral wrongs, and so implicate institutional responses to completed violation of genuine moral norms, the thicker alternative stresses that tort’s “recognition” of and response to “wrongs” claims to be - and ought in fact to be - morally sound, reflecting the soundness (practical reasonableness) of underlying norms about how we ought to treat one another. On this view, tort and private law more widely recognizes that persons have interests of objective moral value that others should respect: interests in bodily integrity, in the secure use and enjoyment of property, and in the free exercise of normative powers (including the power to contract, to make gifts, and to forge stable associations). Persons can neither flourish without goods associated with the realization of these interests nor can we live peaceably in community with others without their security. A well-functioning community therefore is one that respects the basic moral interests of persons *not only* by providing a system of repair for the wrongful infringement of norms that secure them, but also by declaring the norms as such and, so, by providing ex ante guidance to members of the community *that* they should respect others’ entitlements and *how* they should do so. The provision of such guidance is prior or primary as a matter of practical orientation *and* temporal sequencing. It only makes sense to talk about wrongs and recourse or repair once we establish what we owe to one another in the first place.⁸²

As noted, participants in social practices shaped by private law might take any of a number of postures toward it: guileful evasion or opportunistic use; recalcitrant avoidance; grudging, merely prudential, or unthinking conformity; or committed compliance. Following Finnis, however, we treat as focal the internal point of view held by practically reasonable person who has a critical expectation that private law will serve as source of genuine normative guidance supplied through presumptively sound reasons for action. Sometimes, the overlap between morality and private law will be so complete as to render the morality of law virtually transparent, if not

⁸² See Keating, Priority of Respect over Repair, at 309–10.

redundant, to the practically reasonable person. Practically reasonable people do not need law to tell them to not to steal, punch people in the nose, drive drunk, or break promises. Even so, private law makes a difference. First, practically reasonable people should recognize the need for a system that publicly declares and enforces otherwise straightforward moral norms and should therefore work to maintain and strengthen institutions that enable such a system. Second, morality underdetermines precisely *how* to instantiate and operationalize basic moral norms in political communities, both with respect to deciding borderline cases and in identifying efficacious (usually: precisified) rules or standards.

This latter consideration segues into the bulk of private law norms, namely those channeled and guided by moral norms, but underdetermined by them. For the isolated practically reasonable person, such questions lead to deliberation and non-deductive judgment among reasonable and possibly incommensurable alternatives. But practically reasonable people also realize that, as members of groups, they are *not* reasoning alone. In circumstances where mutual provision, coordination and cooperation are necessary, and the public good and the good of others is implicated, convergence on publicly available standards is crucial. Furthermore, law can also reshape our normative landscape by generating new ways of relating and associating and, in turn, novel moral impact.⁸³ A system of private law supplies guidance in part by incorporating existing and generating new moral norms and, when it is well-functioning, it serves goods underlying these norms where people can rationally adopt its standards as their own.

Take, for example, tort law. We might agree that tort law is sound insofar as it provides effective protection for important moral interests held by persons in relation to their person, property, and agreements. Yet practically reasonable people will differ about which interests merit legal protection, how we ought to define the scope of protected interests, how we ought to precisify rules or standards through

⁸³ See David Owens, *Shaping the Normative Landscape* (2012); Greenberg, *supra* note 64, at 1310 (“[L]egal institutions change our moral obligations by changing the relevant circumstances (and not by doing so via changes in the content of law.”)

which moral norms are rendered justiciable, and how we ought to balance competing interests. Personal moral deliberation and argument cannot resolve these conflicts effectively given the range and persistence of disagreement and the need for shared standards. Thus, people who are considering what they owe their neighbors when driving a car, manufacturing tires, or blasting for a road should consider not only their private judgment about their obligations, but look to legal standards as establishing a presumptive moral minimum.

A standard that practical reason commends or permits, rather than commands, independently of the law, therefore can become genuinely obligatory when incorporated within a legal system. This is so not only because of the moral merits of the choice, which in our example could reasonably have been otherwise, but also because of the imperative to support and maintain a system that protects basic moral interests and provides a system of coordination, cooperation and conflict resolution in the face of uncertainty about their scope and upshots. It is therefore reasonable to treat the law's guidance as dispositive in one's own practical deliberations, even if the standard articulated at law, while sound, does not strike the balance one thinks optimal.⁸⁴ For example, the guidance supplied by the law of nuisance *ex ante*, while necessarily general, is valuable as I deliberate about how to use my property. That guidance may become more concrete *ex post* through adjudication (e.g., a decision that raising livestock is an unreasonable use of land in a particular locality), though there will often be reasonable disagreement about what uses are reasonable given the facts of a new dispute (e.g. 'Are backyard chickens a nuisance?'). Even if one disagrees with the general trajectory of case law on nuisance, or a particular decision, one will often have good moral reason to regard nuisance standards and precedent as presumptively binding guidance if one is an owner contemplating land use activity that will be potentially disruptive to neighbors.

A private law theory properly attentive to the internal point of view might say much the same about other private wrongs, such as breach of contract, trespass to

⁸⁴ For a more extended argument along these lines, see Michael P. Moreland and Jeffrey A. Pojanowski, *The Moral of Torts*, in *Christianity and Private Law* (Cochran and Moreland, eds. 2021), at 245–52.

real property, conversion of chattel, invasion of privacy, unfair competition, and the like. But the difference the law makes in the normative guidance it supplies is arguably even more pronounced in enabling doctrines that facilitate transactions and associations. There are likely to be many practically reasonable ways in which to form a contract, transfer property, organize a business, or structure a charity. (And to decide what kinds of promises have the force of law, what rights one can have in property, and what kind of organizations the law should recognize or constitute.) Each implicates ways of being and of interacting that can enable flourishing: long-term personal and group projects would be difficult if not impossible absent private law's various enabling doctrines and associated standards holding parties to commitments they've made to coordination and cooperation. So, the practically reasonable person looking to contract for the construction of a house, to convey property for the provision of dependent children, or to effectively support charitable causes will have good moral reasons to wish for the existence of and, as appropriate, to adopt the enabling legal forms that the law supplies. A private law theory attentive to the perspective of such a person would focus on excavating those reasons; reasons that might, for example, reflect the myriad ways in which different long-term projects enabled by private law are constitutive of or otherwise instrumental to individual or group flourishing and/or that enable these projects to fit within or contribute to a broader scheme of social cooperation. The theorist's task of identifying and critically examining the quality of the moral reasons private law supplies for acting as it permits or requires is important even if it is unlikely to result in "just so" normative analyses that posit a decisive (normatively necessary and sufficient) moral reason or closed set of reasons for the norms and enabling doctrines we have. The requirements of practical reason do not comprehensively specify the juridical constitution of *a* legal form of contract—the Golden Rule says nothing about the adequacy of consideration, the parole evidence rule, or many other default rules. But they *do* tell us that a reasonably fair system of contracting is a good thing, that one can and ought to be able to invoke legal forms of contract in order to advance one's flourishing, that one presumptively ought to respect others' contractual powers, rights and duties, and

that in doing so one shows proper regard for others' flourishing while upholding a morally important institution.

In a developed system of private law, moreover, direct appeals to thick moral reasons⁸⁵ from the internal point of view may not be frequent. As norms proliferate and resolve common questions, the bulk of legal contemplation and reasoning will consist of applying and—in the case of adjudication and scholarship—refining, systemizing, rendering functionally coherent, and extending by analogy a corpus of reasonably stable private law more or less on its own terms. A healthy and mature private law system—one whose norms and enabling doctrines are cogent, reasonably coherent, and fall within a range of practical reasonable alternatives—will often resemble an intricate, artificial normative universe with its own language and logic, one in which norms - conformity with which would otherwise be optional or debatable as a matter of reason - are treated as peremptory or at least presumptively binding. Furthermore, practical reason in such contexts will draw less on abstract moral norms as on the virtues of doctrinal learning, intellectual facility and honesty, diligence, and sound judgment born of tacit knowledge about law and associated social practices.

This does not mean a healthy and mature system of private law is unmoored from thicker moral reasons. If a particular system of private law merits presumptive compliance with its norms and habitual reliance on its enabling doctrines, it is by virtue of nested specification of moral reasons whose guidance, while abstract, is general. Even formalistic elaboration of mature private law systems often serves higher-order requirements of facilitating coordination, cooperation, and pursuit of specific public goods. Nor are these private law's only links to requirements of practical reason. Law, as John Finnis has explained, has a "double life," existing both as (a) factual, posited rules, and (b) as more enduring moral principles and standards

⁸⁵ That is, reasons that underlie and are sufficiently robust to establish the all-things-considered moral soundness of a norm or enabling doctrine; thick reasons in this sense may be contrasted with characteristically thin juridical reasons that are the stock and trade of public justification. See Paul B. Miller, *Juridical Justification of Private Rights*, in *Justifying Private Rights* (Michael Crawford et al. eds., 2021).

of justice that underpin and justify them.⁸⁶ Furthermore, private law's norms and enabling doctrines are ever-reviewable and revisable in light of those underlying requirements balanced against countervailing moral considerations (e.g., of stability and equal treatment).

B. Getting to the External from the Internal Point of View

A Finnisian rendering of the internal point of view also lends itself to a fruitful reframing of the relationship between internal and external vantagepoints on private law: one in which the latter are viewed not as excluded by, or as standing in a rivalrous relationship with, the internal point of view but, rather, as necessitated by it. We will develop these claims more fully in future work. But for now, we aim to explain how, analytically and normatively, one is led to external vantagepoints *from* the internal point of view, and how one might adopt them without losing sight of the law's practical point.

Again, internal and external points of view are typically represented in dichotomized ways in private law theory. The underlying supposition is that one adopts *either* an internal *or* an external point of view in one's interpretive or normative analyses. In this way, perspectival differences are exaggerated such that one loses the sense of importing or conveying different ways of viewing a single (if complex and interlocking) set of social practices.

Depending whether the commentator is skeptical or appreciative of private law, one who claims fidelity to the internal point of view is said either to be mesmerized by the law and lost in its intricate but empty technicality, *or* to be versed in the law, skilled in lawyerly craft, and/or understanding of the law's moral intelligibility. By contrast, one who adopts an external point of view is said either to be doomed to ignorance of the nature of law and its normativity *or* to be wisely attuned to the law's social impact and well-positioned to address its utility or disutility. These and other contrastive representations of vantagepoints are so

⁸⁶ John M. Finnis, *Adjudication and Legal Change*, in *Collected Essays*, Vol. IV, at 397.

prevalent that many think that there is no alternative but to choose “sides.”⁸⁷ Consider Weinrib’s writings championing the internal point of view and castigating “functionalist” and other external perspectives.⁸⁸ Consider, too, Posner’s⁸⁹ and Kaplow and Shavell’s⁹⁰ work suggesting that one must *either* be concerned with the fairness of private law rules as a matter of personal morality (a frame of analysis privileged in the internal point of view) *or* their economic and other social welfare effects.

Some recent work in the New Private Law asserts the complementarity of external and internal vantagepoints.⁹¹ However, the complementarity is untheorized. Much New Private Law scholarship presumes that one may reasonably, because many do, simply toggle between perspectives, zooming in on the internal point of view when one needs to understand the conceptual content, moral character and/or fine structural details of the law, and zooming out to an external point of view when one wishes to make wider observations or predictions about its social impact. Perspectival complementarity is, as we’ll explain, well-founded, as is the possibility of *toggling between*—and, more importantly, self-consciously *adjusting for*—perspectives. But a tacit methodological assumption does not, in itself, generate a serviceable conception of the analytical and normative relationship between internal and external points of view.

For reasons canvassed above, we identify the *internal point of view* with the focal participant perspective delineated by Finnis: that of the practically reasonable person who treats legal guidance as presumptively moral guidance, views claims to and the exercise of legal authority as impliedly asserting moral authority to shape the normative landscape of the law’s addressees, and treats legal reasons for action as presumptively moral reasons of the same sort, even as they are distinctive in virtue

⁸⁷ But see Andrew S. Gold and Henry E. Smith, Sizing up Private Law, 70 U. Toronto L. J. 489 (2020); Gold, Internal and External Perspectives.

⁸⁸ Weinrib, Idea of Private Law.

⁸⁹ See, e.g., Richard A. Posner, Norms and Values in the Economic Approaches to Law, in Law and Economics: Philosophical Issues and Fundamental Questions (2015).

⁹⁰ Louis Kaplow and Steven Shavell, Fairness versus Welfare (2006).

⁹¹ Smith and Gold, Sizing Up Private Law; Gold, Internal and External Perspectives.

of their source and practical effect.⁹² The practically reasonable participant in legal practices of a generally just legal system thus treats guidance supplied by law as authoritative on the rebuttable supposition that it is practically reasonable. This means that they aim for compliance with the law; that is, they aim to deliberate and act in accordance with law, for reasons derived from law.⁹³ To this, we would add that what counts as compliance will depend on particular features of a legal practice and the participant's role within it. These features will vary across and within the participant perspectives of citizens, law enforcement officials, and members of the legislative, judicial, administrative and executive branches of government.⁹⁴

Still more nuance is needed in conceptualizing *external points of view*. Though “the” external point of view is often equated exclusively with the non-participant observer's perspective, it ought not to be. One may also construe as external the vantagepoints of those who participate in a legal practice but do so without understanding or accepting its practical point. These individuals engage in the practice as one might other ritualized social practices that one suffers or engages in unthinkingly. If we are to understand these participants' perceptions of, and conduct in conformity with, private law's norms and enabling doctrines, we must do so understanding that their perspectives are external to the practice precisely in that they are unanchored in, or oriented by, its practical point.

Let us begin, though, with the familiar external vantagepoint of a non-participant observer who makes observations that are remote from a legal practice or that examine only a narrow aspect of it. This perspective—conventionally associated with social scientific study of private law—is external insofar as it is concerned only with observable behavior and, usually, in drawing explanatory and/or predictive inferences about legal practices based on patterns in observed behavior. Next, a less

⁹² Their source being law-making or -validating actions by legal officials; their practical effect being a manifestation of their peremptory nature.

⁹³ See Joseph Raz, *Practical Reason and Norms* 177–82 (1999); Joshua Pike, *How the Law Guides*, 41 *Oxford J. Legal Stud.* 169 (2021).

⁹⁴ That it will vary between these perspectives should be obvious; in respect of legal officials it also varies within participant perspectives due to material differences in authority in making or interpreting law (and equity) derived from different sources.

remote, if still external, vantagepoint may be held by a non-participant observer who aims to examine participant perspectives—as an ethnographer might—and to provide narrative reconstruction of their behavior that reveals something of the social meanings and significance held by a practice. Finally, as intimated earlier, external vantagepoints are held by participants who do not understand, do not care to understand, or who reject, the practical point of a legal practice. While the notion that participants can be detached from practices in which they participate might seem odd to those quick to analogize law to other social practices—and especially voluntary practices in which participation is motivated by interest, affiliation or other factors personal to, and shared by, participants—it should seem less so when one sets analogies to one side and remembers that participation in legal practices is often non-voluntary, inherited and, usually, so subtly integrated within social life as to be practically unnoticeable and, as such, inviting of detachment.

With these more detailed renderings of internal and external points of view in place, we shall now explain how legal scholars and officials alike can—indeed, ought—to pivot from the internal to external vantagepoints in analyzing and in making, amending, or enforcing private law. We do so by imagining a hypothetical practically reasonable legal official, charged with making or amending law.

Consistent with our conceptualization of the internal point of view, the practically reasonable legal official is aware of, and assumes responsibility for, the claim to moral authority implicit in their legal authority to make or amend law. And, being practically reasonable, they understand that in order to vindicate this claim, new or amended law ought itself to be practically reasonable and thus morally sound. Of course, our legal official is also self-aware, mindful of the frailty of practical reason (including their own), aware that fellow lawmakers with whom legal authority is shared might be practically unreasonable (whether by virtue of bad faith or lapses of judgment), and mindful that lawmakers who are practically reasonable might still disagree about the practical reasonableness of a law. Put simply, our hypothesized official is mindful of endemic risks to the practical reasonableness of laws and is committed to doing what can be done to eliminate or mitigate them. In this, and in

advocating for laws believed to be at once practically reasonable and apt as settlement of important conflict or coordination issues facing a community, our lawmaker will assess the fitness of the law relative to its desired moral impact, acknowledging that the latter will be achieved through the normative guidance that the law supplies.

In imagining a new or amended law's moral upshots, our legal official will think first of those of the law's addressees—usually, fellow citizens—who are also practically reasonable. That is, the official will think about the law's impact first in respect of addressees who occupy the internal point of view. But if they are truly practically reasonable, they will also be worldly and hence aware of such differences in motivation as might influence the practical deliberation and/or behavior of a representative set of the law's addressees. Our hypothesized official will thus *not* assume—naively—that all or most of the law's addressees are practically reasonable or that they will be motivated to comply with a law that is plainly morally sound in reasoned recognition of the practical reasonableness of the guidance it supplies. Rather, our official will recognize that some will ignore or reject the guidance supplied by law as *normative* guidance, abiding it (if at all) only to the extent that the personal benefits of doing so outweigh the costs. They will also acknowledge that others will accept the guidance as normative guidance, employing it in evaluating their own conduct and that of others, but from motivation(s) rooted in something other than reasoned endorsement of the law (e.g., out of habitual conformity or concern to cultivate a good reputation). Finally, and independently of these considerations, our legal official will view it as inappropriate (i.e., practically unreasonable) for lawmakers to try to compel compliance where mere conformity (outward conduct manifesting abidance of the law's requirements) will suffice for achievement of the law's intended moral impact.

With all of this in mind, our hypothesized legal official will adopt two approaches to lawmaking in order to increase the likelihood of a law's success relative to its intended moral impact. First, our official will prefer a law formulated such that mere conformity will suffice for its success (i.e., they will anticipate and hope for, but not, presume compliance). Second, our official will seek out, contemplate, and act on

considerations that promise improved conformity, *enabling* (by virtue of the practical reasonableness of the law) compliance without *assuming* it. In this way, lawmaking can be understood from the internal point of view of a practically reasonable legal official as *at once normatively optimizing* and *normatively satisfying*: it is *optimizing* to the extent that it aims for compliance through reasoned recognition of legal obligations as moral obligations, reflecting the objective moral value of the law's aims, but it is *satisficing* to the extent that it contemplates and plans for mere conformity in order to realize those aims.

With this in mind, our legal official will commit to ensuring that new or amended law is practically reasonable in substance and that its justification is accessible⁹⁵ to everyone, including addressees from whom compliance is anticipated. But, again, our official will not rest their gaze solely upon those with whom they enjoy privity of perspective. Rather, recognizing that the success of law is contingent on—and, if the law is well designed, might be secured by—widespread conformity, they will also consider external points of view, including that of the Holmesian bad actor.⁹⁶ In carefully considering these vantagepoints, our official does not depart from the internal point of view. They merely enlarge and enrich their field of vision in recognition that, if they are to be effective, they will need to account for perspectives that deviate from their own. Consideration of the external vantagepoints of other *participants* in legal practices as we understand it involves an informal practice of sympathetic practical deliberation.⁹⁷

We hasten to add that our hypothesized official ought also to enrich their deliberations further by accessing, where possible, the more completely external

⁹⁵ As explained elsewhere, the accessibility of legal or juridical justification is a function of it having been made properly public. See Miller, *Juridical Justification of Private Rights*, *supra* note 85.

⁹⁶ Hart, *Concept of Law*, 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, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow from violation.”).

⁹⁷ “Sympathy” here understood neutrally as an inclination to effectively imaginatively recreate the perspective of others, and not as an element of partiality, or identification with, that person and/or their perspective.

perspectives of informed *non-participant* observers (e.g., social scientists).⁹⁸ Where, as will usually be the case, a legal official must venture predictions as to the likely moral impact of a law, and thus assumptions about how different addressees will respond to the law (whether by way of compliance, conformity, or non-conformity), she will have powerful moral reasons to seek such evidence as might inform—*inform*, mind, *not displace*—their practical deliberation and judgment. Given that the predictable and preventable ineffectiveness of a law in securing its sound moral aims is a mark of its practical unreasonableness, legal officials who take an internal point of view are not merely (morally) permitted but are, we think, required to access and consider social scientific and other evidence pertinent to the development of effective law. And one can and should acknowledge this without supposing that one is licensing the substitution of evidence-based empirical judgement for qualitative normative judgment (i.e., without violating Hume’s dictum that one cannot derive an “ought” from an “is”). One can get from the internal to external points of view—and, indeed, to most remote of external vantagepoints—without risking abandonment of the internal point of view or its collapse.

Far from imperiling it, a willingness to pivot to consideration of external vantagepoints enriches the internal point of view, provided that the latter serves as the perspectival lodestar. As we have explained, a practically reasonable legal official has reasons cognizable from, and *only* from, the internal point of view for expanding their field of vision. Our official aims to craft law that is capable of soundly guiding the practically reasonable addressee. But our official will also be well aware that others will pay little-to-no mind to the law’s practical point, will ignore, reject or simply be disinclined to see the law as making a moral claim to authority, and will conform to law in ways suggestive of detachment from the normativity of legal

⁹⁸ The extent to which such perspectives are completely external, moreover, is debatable. There are serious arguments that social scientific inquiry cannot entirely prescind from interpretive, normative judgments about human nature and flourishing. In this respect, disciplines like anthropology, sociology, and political science appear more continuous with jurisprudence than an approach that models the human sciences on natural science. See Jeff Pojanowski, *Evaluating Legal Theory*, 130 Yale L.J. 1458, 1482–86 (2021). This is yet another reason for legal theorists to be wary of a sharp dichotomization between internal and external perspectives.

practices. In considering these vantagepoints, our legal official will, again, try to draft laws and provide for their administration in ways reasonably calculated to maximize conformity and thus to secure those moral aims of law that depend on widespread abidance. Where empirical evidence might meaningfully inform⁹⁹ the predictions and associated drafting and design choices that must be made in order to maximize conformity, an official ought to access and make appropriate use of that evidence.

In pivoting to external points of view in the interest of promoting conformity with practically reasonable law, our legal official—and we, in our discussion of what matters in private law—return to legal institutions charged with adjudication, administration and enforcement of law. For it is within these institutions that, following Finnis, the law protects the practically reasonable from the recalcitrant, indifferent, and malicious. And it is primarily through these institutions that legal systems promote conformity with law, protecting the bottom line of the law's satisficing aims. They do so primarily by hearing and adjudicating grievances and by ordering sanctions or awarding remedies. Thus, we return to the traditional foci of other theorists who claim fidelity to the internal point of view: those preoccupied with how private law defines wrongs, enables recourse, empowers the aggrieved, and corrects interpersonal injustices. We return to these foci not because they exhaust, or are even central to, the internal point of view, but rather because we recognize that they follow from it as an entailment of law's assertion of practical authority in light of endemic uncertainty over the motivations that shape addressees' responses to law. Procedural and remedial law include powerful mechanisms for promoting conformity and recognizing compliance. And alongside these traditional foci of private law theory we might place substantive equity, insofar as equitable jurisdiction enables courts to respond effectively to those who seek opportunistically to evade law or to bend it to their advantage. Whether one is concerned with the enforcement of law or achievement of equity, we can appreciate the significance of remedies and substantive

⁹⁹ Bearing in mind that the results of research that employs models featuring controls that increase scientific validity but decrease value (measured in terms of correspondence to real world or uncontrolled conditions) might have little explanatory or predictive utility for a lawmaker, whatever academic interest they might hold.

equity in shoring up the effectiveness of law by promoting conduct that respects the letter of the law even if it does not evince reasoned compliance.

CONCLUSION

Contemporary private law theory valorizes the internal point of view and, on the whole, this has been much to the good. But the internal point of view is incompletely—or unsatisfactorily—theorized in private law theory, with the result that its implications for our understanding of private law doctrine and institutions have yet to be fully realized. Similarly, and relatedly, recent work in private law theory sees value in internal and external points of view, but lacks an account of their relationship, analytically and normatively. John Finnis’ account of the internal point of view, embraced by many inside and outside the natural law tradition in general jurisprudence, informs a productive response to both problems. This standpoint underlines private law’s practical point: providing practically reasonable guidance that secures basic human rights and promotes important goods. It also suggests a reorientation of private law theory: moving beyond remedialist reconstruction of private law, resisting positivist agnosticism about the morality of private law’s norms and enabling doctrines, and overcoming the sharply contrastive understanding of internal and external points of view.