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HART'S CONCEPT OF A LEGAL SYSTEM

MICHAEL PAYNE*

THE CONCEPT OF LAW, by H.L.A. Hart, is truly, in the words of Ronald Dworkin, "a paradigm for jurisprudence. . . ." The purpose of this Article is to examine critically an important element in Professor Hart's concept of law, the concept of the existence of a legal system. The first two sections of this Article will elucidate the "two minimum conditions necessary and sufficient for the existence of a legal system,"² as well as clarify the relationship between Hart's concept of a legal system and his concept of law. The second section will focus on Rolf Sartorius's critique of Hart.

The third section contains a clarification and assessment of the rationale behind the two minimum conditions for the existence of a legal system, particularly the first minimum condition, which requires that private citizens need only obey the valid rules of a legal system. The third section will be concerned also with Hart's concept of authority, a concept of great interest recently to social scientists and philosophers,³ which might seem rather unrelated to Hart's concept of the existence of a legal system. After all, Hart does not even examine formally the concept of authority in THE CONCEPT OF LAW; in fact, early in the book he says that one cannot "profitably use, in the elucidation of law, the notion of a command," because "the element of authority involved in law has always been one of the obstacles in the path of any easy explanation of what law is."⁴ Nevertheless, Hart maintains that the coercive power of law presupposes its accepted authority,⁵ and a key point in his attack against John Austin's model of law⁶ is that the sovereign's coercive orders cannot "account for the continuity of legislative authority characteristic of a modern legal system."⁷ Furthermore, much of the rationale for the two minimum conditions for the existence of a legal system is developed in Hart's discussion of the continuity of legisla-

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1. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

2. H.L.A. HART, THE CONCEPT OF LAW 113 (1961).

3. For a comprehensive bibliography, see Friedman, *On the Concept of Authority in Political Philosophy*, in CONCEPTS IN SOCIAL & POLITICAL PHILOSOPHY 121 (R. Flathman ed. 1973).

4. HART, *supra* note 2, at 20.

5. *Id.* at 198.

6. J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (H.L.A. Hart ed. 1954).

7. *Id.* at 77.

tive authority. Thus, the third section explicates the rationale for the two minimum conditions and also elucidates Hart's concept of authority and analyzes its relation to the two minimum conditions. The final section of this Article will consider the implications for Hart's concept of law in light of the conclusions reached in the first three sections.

I. THE EXISTENCE OF A LEGAL SYSTEM

Professor Hart elaborates two minimum conditions that are individually necessary and jointly sufficient for the existence of a legal system:

On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.⁸

It is important to underscore that the first condition requires only general obedience, rather than acceptance, by ordinary citizens.⁹ The second condition specifies that the officials must do more than merely obey the rules of recognition, change, and adjudication: "They must regard these [the secondary rules] as common standards of official behaviour and appraise critically their own and each other's deviations as lapses."¹⁰ According to the two conditions, it is possible for a legal system to exist in which only officials accept and use the system's criteria of legal validity.¹¹ Such a society, Hart comments, "might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system."¹²

To explicate the two conditions, it is necessary to elucidate three distinctions basic to an understanding of Hart's concept of law: (1)

8. *Id.* at 113.

9. Hart says:

The first condition is the only one which private citizens *need* satisfy: they may obey each 'for his part only' and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution.

Id.

10. *Id.*

11. *Id.* at 114.

12. *Id.*

the distinction between primary and secondary rules, (2) how a habit of obedience differs from the acceptance of a social rule, and (3) the differences between rules that impose obligations or duties and rules that do not impose obligations or duties.

Primary and Secondary Rules

According to Hart, a legal system may be best considered a "union" of primary rules of obligation or duty and secondary rules of recognition, change, and adjudication. Hart characterizes the distinction between primary and secondary rules in the following way:

Rules of the first type impose duties; rules of the second type confer powers, public or private. Rules of the first type concern actions involving physical movement or changes; rules of the second type provide for operations which lead not merely to physical movement or change, but to the creation or variation of duties or obligations.¹³

In Hart's view, a society might live only by primary rules of obligation, but will suffer from three defects: there will be *uncertainty* as to what the rules are and their scope; the rules will be *static* insofar as there is no means of deliberately eliminating or introducing rules; and, the social pressure by which rules are maintained will be *inefficient* because there is no agency for finally settling disputes over violations of the primary rules.¹⁴ These defects may be remedied by secondary rules that "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."¹⁵ Thus, a secondary rule of recognition will remove the uncertainty of the regime of primary rules by providing a rule for conclusive identification of the primary rules of obligation.¹⁶ Secondary rules of change will remedy the static character of primary rules by empowering an individual or body to introduce new primary rules of conduct for the group, or for some class within it, and to eliminate old rules.¹⁷ The remedy for the inefficiency of the social pressure is secondary rules of adjudication empowering individuals to determine authorita-

13. *Id.* at 79.

14. *Id.* at 90-91.

15. *Id.* at 92.

16. *Id.*

17. *Id.* at 93.

tively whether, on a particular occasion, a primary rule has been broken.¹⁸ Hart concludes that "[t]he introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world," and that "certainly all three remedies together are enough to convert the régime of primary rules into what is indisputably a legal system."¹⁹ The "union" of primary and secondary rules may be regarded as the "essence" of law,²⁰ for a modern municipal legal system will combine both kinds of rules, and the secondary rule of recognition will *unite* all the rules of the system in that all genuine laws will satisfy the criteria of validity specified by the rule of recognition.

Habits of Obedience and Social Rules

The notion of acceptance of a social rule is important to an understanding of Hart's concept of the existence of a legal system, not only because legal officials must effectively accept the secondary rules, but also because the secondary rule of recognition, which provides the criteria of legal validity by which the (valid) primary rules may be identified, is a complex practice constituted by the actual acceptance of the rule of recognition by the legal officials. Hart elucidates the notion of acceptance by comparing the idea of a group habit, such as watching television late at night, with that of a social rule, such as driving on the right side of the street. Although both involve behavior that converges or occurs "as a rule," they differ in three respects. First, when there is a social rule, deviations generally are regarded as faults open to criticism, and threatened deviations are met with pressure for conformity.²¹ Secondly, for a social rule to exist, criticism is not only in fact made but deviation generally is accepted as a good reason for the criticism.²² Thirdly, a social rule exhibits an internal aspect, which Hart characterizes in this way:

What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find

18. *Id.* at 94.

19. *Id.* at 91.

20. *Id.* at 151.

21. *Id.* at 54.

22. *Id.*

their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'.²³

A social rule also has an "external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record."²⁴ Those who adopt the "internal point of view" of social rules will regard the rules as reasons or justifications for behavior and for the criticism of behavior; social rules are therefore normative, whereas group habits are not. But similar to group habits, the critical reflective *attitudes* of the internal point of view are *evidenced* in terms of behavioral criteria; those who adopt the internal point of view need not experience any particular feelings or have the same motive for adopting the critical reflective attitude. And because it is this form of social practice that constitutes the acceptance of a rule,²⁵ a social rule will exist as long, and only as long, as the practice conditions for acceptance are satisfied. Therefore, to assert that a rule of recognition is the rule of recognition of a legal system is to say that it is accepted by the legal officials of that system. To accept a social rule, adoption of the internal point of view is necessary, from which internal statements may be made. But to say that the practice conditions for acceptance are satisfied is to make an external statement from the external point of view. Hence, the question whether a legal system exists is a question of fact. Furthermore, whether citizens generally obey the primary rules, and whether the legal officials effectively accept the secondary rules as critical common standards of official behavior are also matters of fact.

Rules That Impose Obligations and Rules That Do Not Impose Obligations

The third distinction to be elucidated is that between rules that impose obligations and rules that do not. According to Hart, the idea of obligation makes sense only in the context of (normative) social rules. Yet not all rules imply the existence of an obligation; rules of etiquette, for example, do not impose obligations. Hart explicates three characteristics that distinguish social rules that impose obligations from those that do not: (1) rules imposing obligations are those rules for which the demand for conformity is insistent

23. *Id.* at 56.

24. *Id.* at 55.

25. *Id.* at 58.

and the pressure against those who deviate or threaten to deviate is great; (2) these rules are thought to be important because they are believed necessary to the maintenance of social life; (3) the obligations and duties required by these rules are thought of as involving sacrifice of renunciation.²⁶ As with the internal point of view, the person under obligation need not experience any particular psychological feelings; one need not feel obligated or under compulsion as a result of the serious social pressure supporting rules of obligation. "Hence there is no contradiction in saying of some hardened swindler that he had an obligation to pay the rent but felt no pressure to pay when he made off without doing so."²⁷

II. THE EXISTENCE OF A LEGAL SYSTEM VIS-A-VIS THE CONCEPT OF LAW—SARTORIUS'S CRITIQUE OF HART

Hart's concept of the existence of a legal system is constructed out of these three distinctions. Behind the concept is a structure built with great care. Thus far perhaps this Article has scratched only the surface of the edifice and has not yet come to grips with Hart's concept of law. Rolf Sartorius would agree, for he argues that Hart's two minimum conditions for the existence of a legal system "constitute nothing more than *purely formal criteria* for the existence of a legal system. As such, they could be satisfied by the rules, officials, and players of the National Football League, as well as many other rule governed social organizations."²⁸ It will prove instructive to amplify and examine Sartorius's position to provide a firmer grasp of Hart's concept of the existence of a legal system and of the relation between this concept and Hart's concept of law.

Sartorius insists that Hart certainly is aware of the inadequacy of defining law and morals in formal terms.²⁹ The two minimum conditions for the existence of a legal system, Sartorius contends, are relevant neither to Hart's concept of a legal system nor to his concept of law:

If one is intent upon extracting from Hart's analysis a *definition* of 'legal system', indeed, if one wants a complete picture of Hart's *concept* of law, one must put together (1) what is said about the union of primary and secondary rules with (2)

26. *Id.* at 84-85.

27. *Id.* at 86.

28. Sartorius, *Hart's Concept of Law*, in *MORE ESSAYS IN LEGAL PHILOSOPHY* 131, 139 (R. Summers ed. 1971).

29. *Id.*

what Hart argues is the minimal content of Natural Law shared by both law and morals, and then combine all of this with (3) what Hart claims are the four features of morality which distinguish it from law, custom, etiquette, and other kinds of social rules.³⁰

Sartorius rejects the suggestion that the views represented by (1), (2), and (3) above together may form a real definition of the term 'legal system'; that is, that they are a set of conditions individually necessary and jointly sufficient for the correct application of a term or concept.³¹ To the contrary, Sartorius argues that Hart clearly perceives that the concept of a legal system is not to be elucidated by a real definition,³² and that the term 'legal system' is for Hart what Professor Hilary Putnam calls a "cluster concept."³³ Cluster

30. *Id.*

31. As a set of individually necessary and jointly sufficient conditions, a real definition indicates those properties the possession of *each* of which is necessary and the possession of *all* of which is sufficient for the correct application of a term or concept. For example, to say, in the classical definition *per genus et differentia*, that 'man' means rational animal, is to say both that for *X* to be a man, *X* must have the properties of rationality and animality (so that whatever lacks either property cannot be a man), and that if *X* has both properties of rationality and animality, *X* is a man. For his criticism of the notion of real definition, see R. SARTORIUS, *INDIVIDUAL CONDUCT & SOCIAL NORMS* 37-40 (1975).

32. Sartorius, *supra* note 28, at 141. As Hart has explained:

I am not sure that in the case of concepts so complex as that of a legal system we can pick out any characteristics, save the most obvious and uninteresting ones, and say they are necessary. Much of the tiresome logomachy over whether or not international law or primitive law is really law has sprung from the effort to find a considerable set of necessary criteria for the application of the expression 'legal system'. Whereas I think that all that can be found are a set of criteria of which a few are obviously necessary (e.g., there must be rules) but the rest form a subset of criteria of which everything called a legal system satisfies some but only standard or normal cases satisfy all.

Hart, *Theory & Definition in Jurisprudence*, 29 *PROC. OF THE ARISTOTELIAN SOC'Y* 251-2 (1955).

33. Sartorius, *supra* note 28, at 142. Professor Putnam has illustrated this concept with the following example:

Suppose one makes a list of the attributes P_1, P_2, \dots that go to make up a normal man. One can raise successively the question 'Could there be a man without P_1 ?' 'Could there be a man without P_2 ?' and so on. The answer in each case might be 'Yes' and yet it seems absurd that the word 'man' has no meaning at all . . . the meaning in such a case is given by a cluster of properties. To abandon a large number of these properties, or what is tantamount to the same thing, to radically change the extension of the term 'man', would be felt as an arbitrary change in its meaning. On the other hand, if most of the properties in the cluster are present in any single case, then under suitable circumstances we should be inclined to say that what we had to deal with was a man.

Putnam, *The Analytic & the Synthetic*, 3 *MINN. STUDIES IN THE PHIL. OF SCI.* 378 (H. Feigl & G. Maxwell eds. 1962).

For a recent apparent attempt to treat the term 'legal system' as a cluster concept, see M.

concepts or terms are "such that few, if any, of the conditions associated with them (i.e., satisfied in the standard or paradigm cases of their correct application) are individually necessary, and those which are necessary are not jointly sufficient."³⁴

The Union of Primary and Secondary Rules

The following passages clearly indicate that Hart does not offer the union of primary and secondary rules as a real definition of 'law':

The union of primary and secondary rules is at the centre of a legal system; but it is not the whole, and as we move away from the centre we shall have to accommodate . . . elements of a different character.³⁵ These truths [about certain important aspects of law] can, however, only be clearly presented, and their importance rightly assessed, in terms of the more complex social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation. It is this

GOLDING, *PHILOSOPHY OF LAW* 6-17 (1975). Golding examines five conditions that elucidate the statement that "A legal system exists in a society S": (1) there are laws in S, and there exist in S jural agencies for (2) making and changing the laws, (3) determining infractions of the laws, (4) enforcing the laws, and (5) settling disputes between individuals. Following Hart, see note 32 *supra*, Golding argues that legal systems must have as necessary conditions only laws and jural complexity. But according to Golding, jural complexity may assume many forms, so that one legal system may lack condition (3), while another may lack condition (4) and condition (5).

34. Sartorius, *supra* note 28, at 142. See also SARTORIUS, *supra* note 31, at 37-40, in which he distinguishes between Wittgenstein's notion of "family resemblances" and Putnam's "cluster concept." The notion of "family resemblances" maintains that at least some class terms do not have any common properties. Wittgenstein puts the point this way:

Consider for example the proceedings that we call 'games.' I mean board-games, card-games, ball-games, Olympic games, and so on. What is common to them all?—Don't say: "There *must* be something common, or they would not be called 'games'"—but *look and see* whether there is anything common to all.—For if you look at them you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that.

L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 66, at 31 (1958).

Although both a family resemblance concept and a cluster concept deny that all class terms have common properties, Sartorius sees this difference between them:

[I]t may be possible to describe a standard case of a cluster concept which can serve as a paradigm for any other typical exemplar of the concept; this cannot be the case with a family resemblance concept. A paradigm case of a board game, such as chess, for instance, cannot serve as a paradigm for the quite different kind of game of which baseball is an instance. This captures the point of Wittgenstein's notion of family resemblance; different exemplars of the same concept may be equally paradigmatic and yet share no common defining characteristics; there simply is no single set of features definitive of what it is to be a paradigm. SARTORIUS, *supra* note 31, at 40.

35. HART, *supra* note 2, at 96.

situation which deserves, if anything does, to be called the foundations of a legal system.³⁶ The main theme of this book is that so many of the distinctive operations of the law, and so many of the ideas which constitute the framework of legal thought, require for their elucidation reference to one or both of these two types of rule, that their union may be justly regarded as the 'essence' of law, though they may not always be found together wherever the word 'law' is correctly used.³⁷

The union of primary and secondary rules is the 'essence' of law, as Sartorius points out, in the sense that it is *the* most important feature or features of a legal system;³⁸ in the words of John Austin, it is "the key to the science of jurisprudence."³⁹ But their union is not necessary for the correct application of the term 'law', and Hart specifically discusses primitive law and international law as examples of sets of primary rules existing without secondary rules.

The Minimal Content of Natural Law

The general form of the argument for the minimum content of Natural Law, Hart says, "is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other."⁴⁰ Assuming survival is an aim of human activity, "[r]eflection on some very obvious generalizations—indeed truisms—concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organization must contain if it is to be viable."⁴¹ Hart cites the following generalizations: humans are vulnerable to bodily harm; they are approximately equal in strength and intelligence; they have limited altruism although they are neither angels nor are they predominantly selfish; there are limited resources; humans have limited understanding and strength of will.⁴² Hart concludes:

We can say, given the setting of natural facts and aims, which make sanctions both possible and necessary in a municipal system, that this is a *natural necessity*; and some such phrase is

36. *Id.* at 97.

37. *Id.* at 151.

38. Sartorius, *supra* note 28, at 133.

39. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, 13 (H.L.A. Hart ed. 1954).

40. HART, *supra* note 2, at 189.

41. *Id.* at 188.

42. *Id.* at 190-93.

needed also to convey the status of the minimum forms of protection for persons, property, and promises which are similarly indispensable features of municipal law. It is in this form that we should reply to the positivist thesis that 'law may have any content'. For it is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have.⁴³

Notably, although Hart defends a minimum content of Natural Law by which law must provide a system of mutual forbearances enforced by sanctions, he also maintains that the minimal protections and benefits of such a system need not be extended to all members of a society.⁴⁴ Clearly, as Sartorius emphasizes, the minimum content of Natural Law "is *not* taken by Hart to constitute a necessary definitional criterion for the existence of a legal system."⁴⁵ The minimum forms of protection for persons, property, and promises, as well as the need for sanctions, are described by Hart as a natural necessity, and the truisms about human nature and society are not necessary truths but contingent statements.

The Four Distinguishing Features of Morality

Sartorius points out that although the minimum content of Natural Law distinguishes a legal system from an organization like the National Football League, "[w]hat is easily conceivable . . . is a *moral code* having both the form of a union of primary and secondary rules as well as the minimal content demanded by Hart's version of Natural Law."⁴⁶ To distinguish between morality and law, Hart elucidates four cardinal related features that collectively serve to distinguish morality from legal rules and from other forms of social rule.⁴⁷ The first distinguishing feature is importance. A legal rule regarded as unimportant is a legal rule until it is repealed whereas a moral rule is believed to be important.⁴⁸ A second difference is that although a legal rule may be introduced or eliminated by deliberate

43. *Id.* at 195.

44. *Id.* at 195-96.

45. Sartorius, *supra* note 28, at 144.

46. *Id.* at 140.

47. HART, *supra* note 2, at 169.

48. *Id.* at 169-71.

enactment, moral rules or principles are not subject to deliberate change by enactment.⁴⁹ Thirdly, moral offenses are of a voluntary character. If a person establishes that he or she acted unintentionally, he or she is excused from moral responsibility. In law, this often is not true, as in systems that employ strict liability.⁵⁰ Finally the form of moral pressure differs. In law, the typical form of pressure exerted in support of the rules is the threat of punishment. The typical form of moral pressure is an appeal to the respect for the rules, as things important in themselves. This respect for the rules presumably is shared by those addressed.⁵¹

Critique of Sartorius

Sartorius maintains that the union of primary and secondary rules, the minimal content of Natural Law shared by both law and morals, and the four distinguishing features of morality do not comprise a real definition of 'legal system' and advances two arguments to support his contention that Hart's concept of a legal system is a cluster concept.⁵² First, Sartorius argues that although Hart postulates that the existence of a rule of recognition constitutes the foundation of a legal system, he does not claim that its existence is *necessary* for the existence of a legal system.⁵³ For example, primitive communities, in Hart's view, may live in regimes of primary rules alone, and Sartorius quotes Hart as saying that "'it is possible to imagine a society without a legislature, courts, or officials of any kind,' . . . which would 'live by . . . primary rules alone'."⁵⁴ Secondly, Sartorius argues that the minimum content of Natural Law is not a necessary definitional criterion for the existence of a legal system, as has been seen above.⁵⁵

49. *Id.* at 171-73.

50. *Id.* at 173-75.

51. *Id.* at 175.

52. See notes 32 & 33 *supra* & accompanying text.

53. Sartorius, *supra* note 28, at 143.

54. *Id.*, quoting HART, *supra* note 2, at 89. Further, Hart's comments on international law are used by Sartorius to bolster his criticism:

It is, therefore, a mistake to suppose that a basic rule or rule of recognition is a generally necessary condition of the existence of rules of obligation or 'binding' rules. This is not a necessity, but a luxury, found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity.

Id. at 143-44, quoting HART, *supra* note 2, at 229.

55. See note 45 *supra* & accompanying text.

Sartorius's argument can be criticized at this point. Hart quite clearly does not mean to offer a real definition of 'law', nor does he consider the minimum content of Natural Law part of a real definition of 'legal system.' Sartorius is also correct that the union of primary and secondary rules, the minimal content of Natural Law, and the features distinguishing law from morality do not form a set of necessary and sufficient conditions for the term 'legal system.' My disagreement with Sartorius is with his main contention that a rule of recognition is not necessary for the existence of a legal system.

Sartorius's error is that he fails to distinguish between Hart's concept of law and his concept of a legal system, a distinction developed by Hart in terms of the difference between a set and a system. The rules of international law, according to Hart, do not form a system but a mere set.⁵⁶ And in the regime of primary rules alone, "the rules by which the group lives will not form a system, but will simply be a set of separate standards, without any identifying or common mark, except of course that they are the rules which a particular group of human beings accepts."⁵⁷ It is precisely the rule of recognition that unites the rules of a set, resulting in what is called a single legal system. Thus Hart argues that the practice conditions for acceptance by the legal officials of the rule of recognition are "not merely a matter of the efficiency or health of the legal system, but [are] logically a necessary condition of our ability to speak of the existence of a single legal system."⁵⁸

Hart's concept of law, therefore, includes on the one hand sets of primary rules alone, such as primitive law and international law, and on the other hand, systems of primary and secondary rules united by secondary rules of recognition. It is submitted that once a distinction between 'law' and 'legal system' is recognized in THE CONCEPT OF LAW, Sartorius's notion of a cluster concept accurately describes Hart's use of the term 'law,' for Hart does say that the purpose of the book "is not to provide a definition of law, in the sense of a rule by reference to which the correctness of the use of

56. HART, *supra* note 2, at 229. The failure to distinguish between 'law' and 'legal system' undermines a recent attack on Hart in Note, *Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions*, 84 YALE L.J. 584 (1975). This Note is heavily indebted to Sartorius's explication of Hart, so much so that the Note not only does not discuss Hart's two minimum conditions of the existence of a legal system, but also does not even mention that Hart provides the two minimum conditions.

57. HART, *supra* note 2, at 90.

58. *Id.* at 112-13.

the word can be tested."⁵⁹ It does not follow, however, that Hart also utilizes a cluster concept of 'legal system,' at least not for the reasons Sartorius gives.

Sartorius rejects the view that the two minimum conditions for the existence of a legal system constitute a set of individually necessary and jointly sufficient conditions for the application of the term 'legal system' simply because these are formal criteria that could be satisfied by many rule-governed organizations. Sartorius is correct that Hart is aware of the inadequacy of defining 'law' in formal terms without regard to content. Perhaps Hart refers to the two conditions as "minimum" conditions to indicate that they must of "natural necessity" be supplemented by the minimum content of Natural Law. As Sartorius points out, however, the minimum content of Natural Law cannot be a necessary definitional criterion for the existence of a legal system.

Hart seems to take another approach that Sartorius fails to consider. The two minimum conditions are based on the distinction between primary rules of legal obligation and secondary rules of recognition, change, and adjudication. The primary rules are rules of legal obligation because they are the valid rules of the legal system; they are valid rules of the legal system because they satisfy all the criteria provided by the rule of recognition.⁶⁰ According to Hart, the rule of recognition is the *ultimate* rule of a legal system, in that as the criterion of valid rules, internal questions about the validity of the rule of recognition cannot be raised; only external questions about the existence of the rule of recognition may be asked.⁶¹ A social organization may have all the formal characteristics of a municipal legal system, including a constitution accepted by its members. In this sense, Hart probably would not object to saying that some social organizations have legal systems. But Hart would not say that the National Football League is *the* legal system of the United States, because although the National Football League is subject to the ultimate rule of recognition of the United States, it does not have the ultimate rule of recognition. The constitution of a social organization may be the rule of recognition for that organization, but questions concerning the legal validity of that constitution may be raised. This argument demonstrates that the

59. *Id.* at 17.

60. *Id.* at 100.

61. *Id.* at 103-05.

two minimum conditions do seem to provide a set of individually necessary and jointly sufficient conditions for the existence of a legal system, just as Hart says.

One objection to the two minimum conditions however appears to be nearly decisive. If the distinction between primary and secondary rules cannot be made adequately, the two minimum conditions, based as they are on that distinction, will fail. Professors Singer⁶² and Sartorius⁶³ have detected ambiguity in the ways in which Hart draws the distinction. The primary rules consistently are characterized as rules imposing duties or obligations, but the secondary rules seem to have two different characterizations. First Hart describes secondary rules as rules that "confer powers, public or private,"⁶⁴ enabling citizens to create or vary their legal relations (private powers) and enabling legal officials to legislate and adjudicate (public powers). But Hart also describes secondary rules in another way:

Thus they [secondary rules] may all be said to be on a different level from the primary rules, for they are all *about* such rules; in the sense that while primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.⁶⁵

In this passage, Hart characterizes the secondary rules of recognition, change, and adjudication, all of which are about the primary rules. But many secondary power-conferring rules will not be about the primary rules, especially those that confer powers on private individuals. Furthermore, the rule of recognition, which specifies the criteria of legal validity, need not be a power-conferring rule, as Professor Jonathan Cohen points out:

The rules he [Hart] calls rules of recognition are not rules that confer powers, whether public or private: they set up criteria. They determine the sources of law: they do not give power to someone to make it, like the rules that Hart calls 'rules of change'.⁶⁶

62. Singer, *Hart's Concept of Law*, 60 J. PHIL. 197, 208-09 (1963).

63. Sartorius, *supra* note 28, at 136-38.

64. HART, *supra* note 2, at 79.

65. *Id.* at 92.

66. Cohen, *Hart's Concept of Law*, 71 MIND 395, 408 (1962).

Apparently Hart's two characterizations of secondary rules cannot be reconciled; consequently, unless some satisfactory characterization of secondary rules is made, the two minimum conditions for the existence of a legal system must be rejected. Of course, there may be further objections to the two minimum conditions, some of which will be considered in the next section.⁶⁷

III. THE RATIONALE FOR THE MINIMUM CONDITIONS

The explication of the rationale for the two minimum conditions for the existence of a legal system may be divided into two parts: the first condition requiring general obedience of the primary rules by the private citizens and the second condition requiring acceptance of the secondary rules by the legal officials. But Hart's development of the rationale begins with his criticism of John Austin's doctrine of sovereignty.⁶⁸ An elucidation of Hart's concept of authority is necessary in examining his critique of Austin. Once the rationale behind the two minimum conditions has been explicated, the rationale for the first condition requiring general obedience of the valid laws by ordinary citizens will be examined critically.

Hart's Critique of Austin's Doctrine of Sovereignty

Austin's doctrine of sovereignty contains two elements relevant to Hart's criticism. Wherever there is a legal system there must be (1) a determinate person or body of persons rendering habitual obedience to no one, and (2) subjects who render habitual obedience to this sovereign person or body of persons. Of Hart's criticisms of the Austinian sovereign, the concern here pertains to the idea of habitual obedience. In particular, Hart argues that the idea of a habit of obedience is deficient in that it cannot account for "the continuity of the authority to make law possessed by a succession of different legislators, and the *persistence* of laws long after their maker and those who rendered him habitual obedience have perished."⁶⁹

To appreciate the difficulty Austin's theory has with explaining the continuity of legislative authority on the basis of habits of obedience, Hart asks the reader to imagine a very simple society in which Rex is sovereign. On the Austinian model of sovereignty, Rex enjoys the habitual obedience of his subjects. Yet if Rex dies and is suc-

67. See notes 84-96 *infra* & accompanying text.

68. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart ed. 1954).

69. HART, *supra* note 2, at 50.

ceeded by Rex II, the latter cannot, on the Austinian model, be sovereign, because he enjoys no habitual obedience. It is precisely to avoid this difficulty, Hart contends, that there must be rules providing for the succession of a sovereign:

If the rule provides for the succession of the eldest son, then Rex II has a *title* to succeed his father. He will have the *right* to make law on his father's death, and when his first orders are issued we may have good reason for saying that they are already law, before any relationship of habitual obedience between him personally and his subjects has had time to establish itself.⁷⁰

Hart argues that the Austinian habits of obedience neither can confer any right or title of succession nor make it probable that the successor's orders will be obeyed:

If there is to be this right and this presumption at the moment of succession there must, during the reign of the earlier legislator, have been somewhere in the society a general social practice more complex than any that can be described in terms of habit of obedience: there must have been the acceptance of the rule under which the new legislator is entitled to succeed.⁷¹

The root cause of failure of Austinian habits of obedience is that they cannot yield the idea of a rule.⁷² Without the notion of general acceptance of a (normative) social rule of succession, the authority to legislate cannot be conferred. Hart concludes that because the acceptance of a rule of succession constitutes the existence of that rule, "its acceptance affords . . . grounds *both* for the statement of law that the successor has a right to legislate, even before he starts to do so, and for the statement of fact that he is likely to receive the same obedience as his predecessor does."⁷³

The right or title to succeed Rex I is conferred on Rex II by a rule of succession. The authority conferred on Rex II is *de jure*, as opposed to *de facto*, authority. To say that someone has authority in the *de jure* sense is to claim that he or she has the right or title to do something, and this presupposes a system of rules or method of entitlement determining the possessor of this right or title. Thus, Rex II may claim the right or title to succeed Rex I because he is

70. *Id.* at 53.

71. *Id.* at 54.

72. *Id.* at 78.

73. *Id.* at 57-58.

warranted by a rule of succession. 'Authority' also is used in a de facto sense to indicate that someone has the ability to elicit "a distinctive kind of obedience, allegiance, or belief, involving (roughly and provisionally speaking) deference or respect or trust."⁷⁴ Contrasting de facto authority with de facto power makes this distinction clearer. To say that someone is obeyed out of fear of punishment (Hart's notion of being obliged)⁷⁵ or out of habit is not to say that he possesses de facto authority, but that he possesses de facto power, because the distinctive kind of obedience involving respect or trust is missing. Furthermore, de jure authority does not imply de facto authority; a ruler may have the de jure right to give orders, yet his orders may be obeyed out of fear or habit (in which case he lacks de facto authority), or they may even be ignored (in which case he lacks de facto power). Nor of course does de facto authority imply de jure authority; though unauthorized under a rule of primogeniture, the youngest brother of Rex II may possess the de facto authority that eludes a very unpopular Rex II.

Someone in authority of course may possess both de jure and de facto authority, and to describe such a situation the term "legitimate power" will be used. Apparently, Hart thinks that Rex will have legitimate power, for, in his discussion of the continuity of legislative authority, he writes:

We may suppose that our social group has not only rules which, like that concerning barring the head in church, makes a specific kind of behaviour standard, but a rule which provides for the identification of standards of behaviour in a less direct fashion, by reference to the words, spoken or written, of a given person. In its simplest form this rule will be to the effect that whatever actions Rex specifies (perhaps in certain formal ways) are to be done. This transforms the situation which we first depicted in terms of mere habits of obedience to Rex; for where such a rule is accepted Rex will not only in fact specify what is to be done but will have the *right* to do this; and not only will there be general obedience to his orders, but it will be generally accepted that it is *right* to obey him.⁷⁶

In this passage, Hart argues that when a rule of recognition to the effect that whatever actions Rex specifies are to be done is generally

74. Friedman, *On the Concept of Authority in Political Philosophy*, in *CONCEPTS IN SOCIAL & POLITICAL PHILOSOPHY* 126 (R. Flathman ed. 1973).

75. HART, *supra* note 2, at 79-83.

76. *Id.* at 56-57.

accepted throughout the society, Rex will have the de jure right to legislate as well as de facto authority. Rex will have a claim to exercise legitimate power because the majority of the members of the society, in accepting and therefore adopting the internal point of view, will consider it right to respect Rex's legal right to legislate.

With these distinctions in mind, we may now return to Hart's discussion of the continuity of legislative authority. Having shown, in the passage quoted above, the importance of generally accepted social rules that underlie Rex's legislative authority, Hart continues:

In order to see how such rules explain the continuity of legislative authority, we need only notice that in some cases, even before a new legislator has begun to legislate, it may be clear that there is a firmly established rule giving him, as one of a *class* or line of persons, the right to do this in his turn. Thus we may find it generally accepted by the group, during the lifetime of Rex I, that the person whose word is to be obeyed is not limited to the individual Rex I but is that person who, for the time being, is qualified in a certain way, e.g. as the eldest living descendant in the direct line of a certain ancestor: Rex I is merely the particular person so qualified at a particular time.⁷⁷

Hart begins with the notion of a rule of succession conferring de jure authority to legislate on a line or class of persons. In the second sentence, however, the rule of succession is contained within a rule of recognition specifying that the *word* of a class of persons is the law. Hart confuses the notion of de jure authority with that of de facto authority. As noted above, when a rule of recognition is generally accepted, a claim to legitimate power may be made; when the word of Rex is generally accepted, he may claim de jure and de facto authority. But when a rule of succession is generally accepted, his successor may claim only de jure authority on the basis of that rule. In his argument *Hart* incautiously mixes secondary rules. A rule of succession is technically a secondary rule of change. Thus, Hart characterizes secondary rules of change as power-conferring rules that "may, besides specifying the persons who are to legislate, define in more or less rigid terms the procedure to be followed in legislation."⁷⁸ But from a secondary rule of change providing that the eldest living descendant in the direct line of Rex I will succeed

77. *Id.* at 57.

78. *Id.* at 93.

upon his predecessor's death, it does not follow that the rule of recognition is that the *word* of Rex or his successors will be the law.

Apparently the difficulty with Hart's argument is quite minor and may be dissolved simply by insisting that Hart could have established his main point against Austin without confusing a rule of succession with a rule of recognition. The criticism of the Austinian habits of obedience would need a slight modification. Hart argues that there are two problems with the idea of habits of obedience when it is used to account for the continuity of legislative authority. Habitual obedience can neither confer on a successor the right to succeed nor render it probable that the successor's orders will receive the same obedience as those of the predecessor. If a generally accepted rule of succession confers the right to legislate while habits of obedience do not, the first criticism holds. The second criticism, however, must be examined in light of the following argument, which refers to a generally accepted rule that the word of a class of persons is to be obeyed:

The acceptance, and so the existence, of such a rule will be manifested during Rex I's lifetime in part by obedience to him, but also by acknowledgements that obedience is something to which he has a right by virtue of his qualification under the general rule. Just because the scope of a rule accepted at a given time by a group may look forward in general terms to successors in the office of legislator in this way, its acceptance affords us grounds *both* for the statement of law that the successor has a right to legislate, even before he starts to do so, and for the statement of fact that he is likely to receive the same obedience as his predecessor does.⁷⁹

This argument supposes the general acceptance of a rule of recognition that contains a rule of succession; from such a rule of recognition, Rex I has a claim to both *de jure* and *de facto* authority. Therefore, Rex I may have a claim to legitimate authority, upon which he will assert the *de jure* right to legislate as well as the *de facto* right to have his word obeyed. Thus, Hart says of Rex I that he will have the right to legislate under a generally accepted rule, but also that the acceptance of this rule will be manifested "by acknowledgements that obedience is something to which he has a right by virtue of his qualification under the general rule." When there is general acceptance of a rule of recognition, acceptance, by

79. *Id.* at 57-58.

definition, must be manifested by acknowledgements that it is right to obey Rex I or that one ought to obey him. But these manifestations of *de facto* authority will not follow "by virtue of his qualification under the general rule"; Rex I's qualification under the general rule implies that he has the *de jure* right to legislate, though not necessarily *de facto* authority or even *de facto* power. It does not follow, therefore, from a secondary rule of succession alone, that Rex II "is likely to receive the same obedience as his predecessor does." Consequently, if Hart wants to maintain that the acceptance of a rule implies both the right to legislate and the likelihood that a successor will receive the same obedience as the predecessor, this must be a rule that is both generally accepted in the society as well as a rule of recognition containing a rule of change of succession. It will not suffice to reply that the main point of Hart's argument is that the general acceptance of such a rule implies both the right to legislate and the likelihood of obedience "[j]ust because the scope of a rule accepted at a given time by a group may look forward in general terms to successors in the office of legislator." If such a rule is a rule of succession specifying a line or class of persons who are to legislate, a person who satisfies the qualifications specified in the rule will claim a *de jure* right to legislate as long as this rule is accepted. But the forward-looking scope of a general rule cannot imply the likelihood of *future* obedience, regardless of whether the generally accepted rule is one of succession or recognition. As Hart himself points out, society's acceptance of a rule at one moment does not *guarantee* its continued existence.⁸⁰ A social rule exists if and only if it is accepted. The general acceptance *now* of a rule of succession does afford *grounds* for the statement of law that a successor has a right to legislate before taking office, although this does not guarantee that a successor will have the right to legislate upon taking office. The acceptance now of a rule does not imply its continued acceptance in the future. One can hardly argue that the scope of an accepted rule, whether it refers to a future line of legislators or to legislators in the past, implies the statement of fact that a successor is likely to enjoy the same obedience as the predecessor.

The relevance of this detailed examination of Hart's discussion of the continuity of legislative authority is not, for the purposes of this Article, that Hart's criticism of Austinian habits of obedience fails. Indeed, Hart's main criticism, that habitual obedience cannot ac-

80. *Id.* at 58.

count for the right or title to succeed, appears to be decisive. The concern here has not been to evaluate Hart's criticism of habits of obedience, but rather to elucidate his concept of authority as a propaedeutic to the rationale behind the two minimum conditions for the existence of a legal system.

The main reasons the legal officials generally must accept the secondary rules of recognition, adjudication, and change have been explained already. Unless there were some actual practice of acceptance, there would be no secondary rules at all, for the existence of a social rule is constituted by the acceptance of that rule. And, for reasons to be encountered shortly, private citizens cannot be expected to accept the secondary rules; hence, the legal officials at least are required to accept them. Furthermore, Hart argues that the very attitude of officials toward the secondary rules cannot be characterized as one of mere obedience:

This is most patently the case with the ultimate rule of recognition in terms of which the validity of other rules is assessed. This, if it is to exist at all, must be regarded from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only. Individual courts of the system though they may, on occasion, deviate from these rules must, in general, be critically concerned with such deviations as lapses from standards, which are essentially common or public. This is not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system. If only some judges acted 'for their part only' on the footing that what the Queen in Parliament enacts is law, and made no criticisms of those who did not respect this rule of recognition, the characteristic unity and continuity of a legal system would have disappeared.⁸¹

This passage gives the impression that the rule of recognition is not a power-conferring rule but a duty-imposing rule. Professor Joseph Raz notes that Hart intends the rule of recognition to be interpreted as a customary duty-imposing rule.⁸² Raz adds that if the rule of

81. *Id.* at 112-13.

82. J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 199 (1970).

Hart often contrasts the rule of recognition and other secondary rules with primary rules which are rules of obligation. So presumably rules of recognition do not impose obligations but confer powers. This hypothesis is strengthened by the following half sentence: in certain circumstances '... the rule which confers

recognition is a duty-imposing rule, "its law-subjects cannot be the population at large, for there is no duty on ordinary people to identify certain laws and no others."⁸³ This is not Hart's argument, however, although under the two minimum conditions private citizens do not have a duty to identify certain laws and no others.

To explicate the rationale behind the first condition specifying general obedience of the primary rules by private citizens, it is necessary to return to the imaginary world of Rex I and Rex II. In describing such a simple society, Hart says, matters were oversimplified, for the description assumed that "most ordinary people not only obeyed the law but understood and accepted the rule qualifying a succession of lawgivers to legislate."⁸⁴ The situation is significantly more complicated in a modern society in which "it would be absurd to think of the mass of the population, however law abiding, as having any clear realization of . . . a continually changing body of persons entitled to legislate."⁸⁵ Hart insists that ordinary citizens in a modern society cannot be expected to adopt the internal point of view and accept such rules. The private citizen therefore is required to obey only the valid primary rules of the legal system.

Hart's First Condition for a Legal System: General Obedience of the Primary Rules by Private Citizens

An evaluation of the rationale for the two minimum conditions of a legal system should begin by noting several difficulties with the condition specifying general obedience of the primary rules by citizens. The first is that the argument is a non sequitur. From the premise that we cannot expect private citizens to grasp adequately the legal complexities of the secondary rules, it does not follow that private citizens need only obey the primary rules. On the contrary, what follows, if anything, is that the ordinary citizen cannot be required to accept the secondary rules because the operative premise concerns secondary rules, not primary rules. Hart's argument

jurisdiction will also be a rule of recognition'. But it is quite clear that this is not Hart's intention, as he himself confirmed to me. In his book Hart explains only that duty-imposing laws can be customary laws. There is no sense, according to his theory, in which power conferring laws can be customary laws, unless they are part of a legal system of which they are not the rule of recognition.

Id., quoting HART, *supra* note 2, at 95. (footnotes omitted).

83. RAZ, *supra* note 82, at 199.

84. HART, *supra* note 2, at 59.

85. *Id.*

does not demonstrate that it is unreasonable or unrealistic to require private citizens to accept the primary rules.

The second difficulty with the argument is the contention that the reason acceptance cannot be required is that the ordinary citizen cannot be expected to possess a sufficient grasp of the legal technicalities of the secondary rules. This condition will be called the requirement of minimal legal expertise. Hart is arguing, then, that a necessary condition for the application of the term 'acceptance' is minimal legal expertise. Unfortunately, in characterizing the concepts of acceptance and the internal point of view, Hart does not mention any requirement of legal expertise. Nor can such a requirement be part of the concept of acceptance, for if it were the acceptance of primary rules by citizens would be ruled out.

There is a third difficulty connected with the second. If minimal legal expertise is required for the acceptance of secondary rules, what becomes of Hart's characterization of citizens typically employing power-conferring rules to create structures of rights and duties within the coercive framework of the law?⁸⁶ Hart says that the possession of these powers makes the private citizen a private legislator, whereas without the rules, the citizen would be a mere duty-bearer.⁸⁷ Furthermore, as Hart emphasizes, "[t]he power thus conferred on individuals to mould their legal relations with others by contracts, wills, marriages . . . is one of the great contributions of law to social life; and it is a feature of law obscured by representing all law as a matter of orders backed by threats."⁸⁸

Part of the problem noted in the second and third difficulties with Hart's argument stems from his ambiguous descriptions of secondary rules as, on the one hand, power-conferring rules and, on the other hand, as rules about the primary rules. Perhaps Hart could amend his position so that minimal legal expertise is required for the acceptance of certain technically complex secondary rules, but is not required for the acceptance of many of the secondary power-conferring rules that would enable ordinary citizens to be private legislators. If such an amendment were available, there would be no reason to require acceptance of the secondary rules by the legal officials only. The three difficulties with Hart's argument show, therefore, that the rationale for the two minimum conditions does

86. *Id.* at 27.

87. *Id.* at 40.

88. *Id.* at 28.

not establish that private citizens need not be required to accept at least some of the primary rules and some of the secondary rules.

But there is a fourth difficulty with the rationale for the two minimum conditions that requires thorough consideration. If private citizens are not required to accept the valid primary rules, and if legal officials are required to accept only the secondary rules, it seems that no one is required to accept the primary rules of the legal system. But if neither citizens nor officials need accept the primary rules, in what sense must these rules be social rules and rules of obligation? To be rules of obligation, primary rules must be social rules; to be social rules, primary rules must be accepted. Consequently, the two minimum conditions apparently must be amended so that either officials or citizens, or both, accept the primary rules.

It seems that in *THE CONCEPT OF LAW* Hart provides the following response to the fourth difficulty. Primary rules are social rules imposing obligations not because of any attitudes toward them on the part of citizens, but because they are the valid rules of the system in that they satisfy all the criteria provided by the secondary rule of recognition which must be accepted by the legal officials. Hart puts it this way in commenting on the rule of recognition:

This is not a necessity, but a luxury, found in advanced social systems whose members not merely come to accept separate rules piecemeal, but are committed to the acceptance in advance of general classes of rule, marked out by general criteria of validity. In the simpler form of society we must wait and see whether a rule gets accepted as a rule or not; in a system with a basic rule of recognition we can say before a rule is actually made, that it *will* be valid *if* it conforms to the requirements of the rule of recognition.⁸⁹

Hart's Second Condition for a Legal System: Acceptance of Secondary Rules by Legal Officials

The second minimum condition requires officials to accept the secondary rules generally. If they do, a particular rule will be valid; if the rule is valid, it imposes a legal obligation on those subject to it because they are committed to the acceptance of valid rules in advance. It does not matter, therefore, that no one is required to accept the primary rules because accepted secondary rules of change will empower officials to introduce new primary rules citi-

89. *Id.* at 229.

zens are committed to accept in advance. It is not necessary that everyone accept a primary rule for it to impose an obligation; a hardened criminal may not accept a particular legal rule for any variety of reasons or motives yet he is legally obligated to obey the rule if it is valid. The legal system has the right to punish him because its coercive power rests on its accepted authority:

It is true, as we have already emphasized in discussing the need for and the possibility of sanctions, that if a system of rules is to be imposed by force on any, there must be a sufficient number who accept it voluntarily. Without their voluntary co-operation, thus creating *authority*, the coercive power of law and government cannot be established.⁹⁰

Hart also writes that "a necessary condition of the existence of coercive power is that some at least must voluntarily co-operate in the system and accept its rules. In this sense it is true that the coercive power of law presupposes its accepted authority."⁹¹ Therefore the primary rules are legally obligatory because of the voluntary acceptance of the authority of the legal system.

Several aspects of this interpretation of Hart's response must be clarified. First, the reason "a necessary condition of the existence of coercive power is that some at least must voluntarily co-operate in the system and accept its rules" is contained in Hart's discussion of the minimum content of Natural Law. The truism that there is approximate equality among humans in regard to physical strength and intellectual capacity means that

no individual is so much more powerful than others, that he is able, without co-operation, to dominate or subdue them for more than a short period. Even the strongest must sleep at times and, when asleep, loses temporarily his superiority. This fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearance and compromise which is the basis of both legal and moral obligation.⁹²

Given the fact of approximate equality, it is a natural necessity for the existence of coercive power that there be a minimum of voluntary cooperation in a system of *mutual* forbearances. This minimum of voluntary cooperation and acceptance that create the authority of the legal system may be limited to a small dominant group that

90. *Id.* at 196.

91. *Id.* at 198.

92. *Id.* at 190-91.

uses the coercive power of the system to further its own ends at the expense of those whose loyalty to the system is based on fear. In a regime of primary rules alone, whose authority rests on general acceptance throughout the society, this would be quite unlikely; yet the "cost" of stepping from the pre-legal to the legal world "is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense, in a way that the simpler regime of primary rules could not."⁹³ The authority of a legal system, parallel to the conditions for its existence, must rest upon the voluntary acceptance of the legal system by its legal officials at least; their voluntary acceptance also will be sufficient to establish the authority of the legal system.

Secondly, Hart argues that those who do accept voluntarily the authority of the legal system need not think of themselves as morally bound to do so:

In fact, . . . allegiance to the system may be 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. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.⁹⁴

"Those who accept the authority of a legal system," Hart continues, "look upon it from the internal point of view, and express their sense of its requirements in internal statements couched in the normative language which is common to both law and morals. . . ."⁹⁵ Acceptance, though necessary for a rule of moral obligation, is not sufficient. Not all social rules of obligation are moral rules. The acceptance of a legally obligatory rule does not imply a moral obligation; on the contrary, there may be moral reasons to disobey a valid legal rule.

Recall that the fourth difficulty with the two minimum conditions is that if neither officials nor citizens are required to accept the primary rules of the legal system, apparently the primary rules are neither social rules nor rules of obligation. The response I have devised is that the valid primary rules are legally obligatory rules

93. *Id.* at 198.

94. *Id.* at 198-99.

95. *Id.* at 199.

because the legal officials have the authority to make new legal rules that the citizens are committed to accept in advance. It will be argued that this response does not meet the objection, and the reply will be divided into three parts: (1) Hart's contention that the authority of a legal system is created by the voluntary acceptance of the legal system by the legal officials; (2) Hart's argument that the authority of a legal system may rest on prudential grounds; (3) Hart's notion of the members of society being "committed to the acceptance in advance" of valid rules.

Authority of Legal System Created by Voluntary Acceptance by Officials

The first question is: In what sense is Hart using the term 'authority' in speaking of the authority of a legal system? He cannot mean that the authority of a legal system is *de jure* authority, because although *de jure* authority implies the right or title, under a system of rules, procedures, or methods of entitlements, to do certain things, such as to make laws, there is no sense in which it can be asserted intelligibly that the entire legal system exercises *de jure* legal authority. Questions can be raised about the *de jure* authority of a particular legal official or about the *de jure* authoritative status of a particular rule, and their authority may be traced back to certain constitutional rules. In Hart's terms, internal questions about the rights of a particular official or about the validity of a particular law will be raised. But, similar to Hart's view that there can be no internal questions of validity concerning the rule of recognition, there can be no *de jure* questions about the authority of the legal system. It is a tautology to say that the legal system itself is the very system of rules upon which the *de jure* authority of the legal system is authorized.

To assert of an entire legal system or government that it has authority is, properly speaking, to assert that it has legitimate power. That is to say, a legal system or government has legitimate power if and only if those who exercise it have the *de jure* right or title to perform certain actions as well as the *de facto* authority to elicit a certain kind of obedience involving respect or trust. Indeed, this is the kind of notion of authority employed in the argument that the valid primary rules are legally obligatory rules because the legal officials have the authority to make new legal rules the citizens are committed to accept in advance. In this argument, the legal officials have authority in the sense that they have the *de jure* right, under

the rule of recognition, to make laws and they have the de facto authority to have their laws accepted in advance by citizens.

This argument fails, however, because it hardly can be said that the legal officials whose voluntary acceptance creates authority have de facto authority, for that would be to assert that they have de facto authority because they have the ability to elicit allegiance to themselves. They may be devoted to themselves, and yet be ignored by the citizens. Nor will it suffice to argue that the legal officials will have de facto authority because their laws will be accepted in advance by citizens. Hart does not require that the citizens accept the primary rules.

Authority of Legal System May Rest on Prudential Grounds

Hart maintains that the authority of a legal system presupposes its voluntary acceptance by legal officials, and that their voluntary acceptance of, or allegiance to, the legal system may rest on prudential grounds. The authority of the entire legal system, as I have argued above, cannot rest on legal grounds. Apparently Hart would agree, for he argues that the authority of the legal system may rest on prudential or moral grounds. The position Hart defends in regard to a modern legal system is in sharp contrast to the simple society of Rex, where "it will be generally accepted that it is *right* to obey him."⁹⁶ To say that it is right to obey Rex cannot mean that the basis for obligation may be self-interest; the right thing to do may conflict with self-interest. To assert that it is right to obey Rex means that it is morally obligatory to obey him. In the world of Rex, where there is general acceptance of a rule of recognition specifying his word as law, Rex has grounds for a claim to moral authority. In a modern society it is not necessary that the authority of the legal system rest on moral grounds. Incidentally, if voluntary acceptance in a modern society does not imply moral obligation, there is no reason to suppose that general acceptance implies moral obligation in the world of Rex.

It is submitted that the authority of a legal system cannot rest on prudential grounds. It does not seem that self-interest is either necessary or sufficient for de facto authority, because de facto authority may be acknowledged by a citizen for moral reasons. Nor is self-interest sufficient for de facto authority; that it might be in one's self-interest to turn the money over to the gunman does not imply

96. HART, *supra* note 2, at 57.

that the gunman has *de facto* authority. Self-interest is not compatible with the distinctive kind of obedience or allegiance characteristic of *de facto* authority. Hart is correct that the acceptance of a law does not imply moral obligation. But apparently from the proposition that legal obligation does not imply moral obligation he infers incorrectly that this is parallel to the statement that acceptance of the authority of the legal system may rest on prudential or moral grounds.

Members of Society Committed to Acceptance of Rules in Advance

The notion of citizens being "committed to the acceptance in advance" immediately strikes the careful reader of *THE CONCEPT OF LAW* as inconsistent with Hart's characterization of the acceptance of social rules. The notion of "acceptance in advance" appears to be a contradiction in terms because the existence of a social rule is constituted by its acceptance, which does not guarantee its continued existence. What this objection must take into account is that Hart allows for secondary rules of change that empower persons or bodies of persons to introduce new rules or eliminate old rules. If new rules introduced by rules of change are valid, they will be legal rules whether they are accepted or not. If old rules are eliminated by rules of change according to valid procedures, they no longer will be legal rules, even though they still may be accepted by citizens. Hence acceptance is neither necessary nor sufficient for the existence of legal rules. Acceptance of valid rules in advance is not a contradiction. Thus the fourth difficulty with the two minimum conditions is dissolved; primary rules may exist even though acceptance of them is not required by either officials or citizens.

Once we consider Hart's allowance of secondary rules of change by which primary rules may be introduced or eliminated, thereby rendering acceptance neither necessary nor sufficient for the existence of social rules, the objection is reinforced rather than refuted. Hart develops and defends only one concept of social rules in *THE CONCEPT OF LAW*—social rules are constituted by acceptance. Even under the supposition that Hart can explicate an adequate concept of social rules, the notion of citizens being "committed to the acceptance in advance" of valid rules would not support the two minimum conditions; if citizens are committed to acceptance in advance of primary rules, then they are required to accept the primary rules. Finally, the notion of commitment in advance to acceptance of valid rules depends upon a notion of authority that has been found defective.

IV. CONCLUSION

The first section of this Article elucidated the two minimum conditions for the existence of a legal system in terms of four distinctions: the difference between primary rules of obligation and secondary rules of recognition, change, and adjudication; how habitual obedience differs from the acceptance of a social rule; how rules of obligation are differentiated from rules that do not impose obligations; and the distinction between 'law' and 'legal system.' This Article has argued that Hart does offer a set of individually necessary and jointly sufficient conditions for the existence of a legal system, though not for the application of the term 'law,' which is best described as a "cluster concept." It was argued also that a major defect of the two minimum conditions is that a distinction upon which they are based, that between primary and secondary rules, is not drawn adequately.

The third section examined the rationale for the two minimum conditions. It also was argued that in addition to the ambiguous distinction between primary and secondary rules there are four more difficulties: it is a non sequitur to conclude that citizens need only obey the primary rules because they cannot be required to accept the secondary rules; minimal legal expertise is not a requirement of acceptance; minimal legal expertise, if necessary for acceptance of secondary rules, seems to prevent citizens from being private legislators; and if neither officials nor citizens are required to accept the primary rules, in what sense are they social rules of obligation? To the latter objection, I devised the response that the primary rules are legally obligatory rules because the legal officials have the authority to make new legal rules to which the citizens are committed to acceptance in advance if the new rules are valid. Three arguments were directed against this response: (1) the authority of a legal system is not created by the voluntary acceptance of the legal system by the legal officials; (2) the authority of the legal system cannot rest on prudential grounds; (3) the notion of citizens being committed to acceptance in advance of valid rules fails.

It has been argued, then, that the three distinctions on which the two minimum conditions are based are defective. First, the primary-secondary distinction is ambiguous. Second, the distinction between habitual obedience and the acceptance of a social rule is not clear because the notion of a social rule is developed and defended in terms of acceptance, while in the case of valid rules introduced or eliminated by secondary rules of change it is neither

necessary nor sufficient that such primary rules be accepted. Third, the distinction between rules of obligation and rules that do not impose obligations is not clear for two reasons. If a valid legal rule is to impose a legal obligation, it first must be a rule. Also, the grounds for citizens being *committed* (that is, obligated) to acceptance in advance of valid rules must be rejected because Hart's notion of authority is deficient.

That acceptance is neither necessary nor sufficient for the existence of social rules reveals a deep inconsistency in *THE CONCEPT OF LAW*. The great virtue of the idea of a social rule constituted by acceptance is that because the criteria for the acceptance of a rule are behavioral, external statements of fact may be made about the existence of the rule; at the same time, because the internal point of view is a criterion for acceptance, normative statements may be made about the value or the validity⁹⁷ of a rule. In a legal system, the existence of any rule (theoretically) may be verified; questions about the moral or non-moral value of any rule may be raised; questions about the validity may be raised about every rule except the rule of recognition. With this complex notion of the acceptance of a social rule, Hart can preserve the fundamental contention of legal positivism: there is a factual criterion distinguishing law from morals. That is to say, all the legal rules of a society can be determined conclusively by reference to an existing rule of recognition. For moral rules it is neither necessary nor sufficient that there be an actually existing rule of recognition by which to determine the moral rules; not everyone agrees that the word of God, the BIBLE, or the KORAN determines what is morally right. On the other hand, the notion of the acceptance of a social rule enables Hart to correct the Austinian model of law as commands backed by threats. By introducing the idea of a normative rule, Hart not only corrects Austin but also demonstrates a way in which legal positivism may be dissociated from the Hobbesian idea that a sovereign or legal system may rest on power. The notion of acceptance is a rejection of the dichotomy between "law based merely on power" and "law which is accepted as morally binding".⁹⁸

The great limitation of the notion of acceptance of a social rule is that although it is necessary for the existence of a rule of obligation, it is not sufficient. No amount of acceptance alone of the secondary

97. Value and validity are not equivalent for Hart.

98. HART, *supra* note 2, at 198.

rules by the legal officials will yield a rule that imposes an obligation, legal or otherwise. The two minimum conditions do not imply the existence of a system that has primary rules of legal obligation. By itself, then, the notion of acceptance does not enable Hart to distinguish between a legal system based on power and a legal system based on authority. Hence, if Hart is to break cleanly with the Hobbesian tradition, the notion of the acceptance of a social rule must be supplemented by another concept of social rule that squares with our concepts of obligation and authority. But Hart does not see this clearly in *THE CONCEPT OF LAW*. Still thinking that the notion of acceptance of a social rule will enable him to split the dichotomy between law based on power and law based on morals, he attempts to found the coercive power of law upon the accepted authority by officials of the legal system and to establish legal obligation upon a commitment to acceptance in advance of the valid primary rules of obligation by citizens. But neither acceptance nor Hart's concept of authority will yield the idea of obligation. It is possible, therefore, for a system of power alone to satisfy the two minimum conditions for the existence of a legal system. For example, if the legal officials (a fraction of the population) generally accept the secondary rules solely for the reason that without their own voluntary cooperation they could not maintain their own coercive power, and if they coerce the citizens into general obedience of the primary rules, then a legal system exists whose coercive power rests on its accepted authority by the legal officials. It is submitted that this is a system of power without authority, and that it is consistent with the minimum content of Natural Law. But such a system of power backed by threats is precisely the kind of model of law Hart rejects, and is clearly inconsistent with Hart's characterization of rules of obligation. As has been said, however, once it is seen that acceptance is neither necessary nor sufficient for the existence of a social rule, a deep inconsistency is revealed in *THE CONCEPT OF LAW*.

If a concept of legal system that is not based solely on power is desired, then we need the idea of a normative rule, as *THE CONCEPT OF LAW* superbly demonstrates. As Hart perceives, however, the alternative to law based on power is law based on authority. But as Hart also knows, the notion of authority is a most difficult and controversial concept. Any government or legal system nevertheless will attempt to justify the imposition of legal obligation on its subjects by appeal to authority. Whether any government or legal system possesses authority is, however, another controversial jurispru-

dential issue. In any event, any normative rule that imposes obligation must justify itself: in the case of a legal rule, the justification ultimately will be traced to the constitution, or, in Hart's terms, to the rule of recognition. Whether the constitution or the rule of recognition has the authority to impose legal obligation is, however, a question not just for jurisprudence but also for political philosophy. Hopefully this Article has shown not only that the two minimum conditions for the existence of a legal system are inadequate, but also that a major source of the difficulty is that the two minimum conditions rest on unexamined assumptions about the nature of political obligation and political authority.