Hart and Hobbes

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I. INTRODUCTION

The possibilities for comparison between Hobbes and Hart are clearly legion. This paper concentrates on a topic central to the thinking of both men, the nature of our obligation to obey the law. I use 'obligation' here and throughout in a preanalytic sense, thus leaving the term open as to the theoretical account to be given of legal obligation. A great deal of what Hobbes says may be, and traditionally by commentators has been taken to be, about political obligation. I take the latter to be a more diffuse term than legal obligation. Legal obligation has to do with the proper stance of men to what is in a strict sense black-letter law. Political obligation has to do with the proper stance of men to any manifestation of the institute of the state. The distinction can be seen in this way. Legal sovereignty—one might say, that which generates legal obligation—has as its source in Canada the practice of the courts together with what is enacted by the Queen in Parliament (ignoring the complication of the British North America Act). But the source of 'real' political sovereignty in a modern Western democracy such as Canada is a much more complex matter, involving questions of the influences which actually get candidates elected to Parliament, those who control those influences, the political relevance of non-political institutions, and so forth. As Harold Laski puts it:

For the lawyer, all that is immediately necessary is a knowledge

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1. The British North America Act of 1867, 30 Vict., c.3, established and constituted Canada as a separate Union from the United Kingdom of Great Britain and Ireland. Although the Act is British, it serves in effect as the Canadian constitution.
of the authorities that are legally competent to deal with the problems that arise. For him, then, the idea of sovereignty has a particular and definite meaning. . . .

For political philosophy, on the other hand, legal competence is no more than a contingent index to the facts it needs. The political philosopher is concerned with the discovery of motives, the measure of wills, the balance of interests.²

These issues tend to be conflated in Hobbes because he was writing at a time when the practical concerns about political obligation and sovereignty were manifesting themselves in systematic failure to obey the law. He does speak, however, about the nature of civil law and how we should stand towards it, though these remarks are integrated into his wider theory. Thus it is legitimate to treat him as having a theory of legal obligation.

The topic of legal obligation interests me in its own right, and the focus of this paper is clearly on it, rather than on the scholarly understanding of Hobbes. Nonetheless, I hope that the points I make will help to clarify what seems to be a matter of concern to some commentators.

The two standard theories of legal obligation are reductive. The first regards the term ‘obligation’ as a misnomer. ‘Obligation,’ as both Hobbes and Hart recognise, carries connotations of doing what one does not wish to do; as Hart puts it, by obligation conduct is made ‘nonoptional.’³ According to the first standard theory, the only sound reasons for thus restricting oneself are prudential ones. One is obliged to obey the law because the cost to oneself of not doing so would be intolerable. Obedience to the law is required by no more and no less than self-interest. The other traditional theory reduces legal obligation to moral obligation. We must obey the law because the law enshrines legitimate moral demands, and we have an obligation to obey legitimate moral demands.

Hart defends an account of legal obligation which in his view is not reducible to either of these. It is an account which asserts the existence of legal obligation as a phenomenon in its own right, that does not need to ride the coattails of morality or self-interest. His theory has been aptly labeled by Barry Hoffmaster a “descriptive

account of legal obligation." I am inclined to think that some such theory of legal obligation is the correct one. But that is a large issue. Even the question of the strengths and weaknesses of Hart’s own theory involves more questions than can be discussed here. However, the point of taking time to compare and contrast Hobbes and Hart on legal obligation is that Hobbes’ theory, although clearly a prime candidate for the first kind of reductive theory, is a more subtle version of that type of theory than is often realised. Hobbes is sensitive to many of the issues which lead Hart to reject all such prudentialist reductions of legal obligation. Thus, by investigating and understanding why, from Hart’s point of view, Hobbes’ theory is still too prudentialist, I shall expose for consideration some of the reasons for adopting a ‘descriptive’ theory of legal obligation. By the end of the paper, I shall show that there are deficiencies in Hart’s own statement of such a theory, although I shall be able to do little more than lay out the broad lines of a programme for dealing with them.

In English jurisprudence, the classical statement of a prudentialist view of legal obligation would be John Austin’s “Command Theory of Law.” In section II, therefore, I shall show how Hobbes’ account of legal obligation is not so prudentialist as Austin’s. In section III, I shall consider the ways in which Hart’s theory is similar to Hobbes’. Section IV will turn to the more argumentative issue of the ways in which Hart is different from Hobbes. I shall show that, when all is said and done, the constraints which Hart places on an adequate theory of legal obligation cannot ever be satisfied by a Hobbesian theory. I shall implicitly defend the claim that Hart’s constraints are legitimate. In section V, I shall turn to Michael Payne’s fundamental criticisms of Hart’s theory of legal obligation. Payne argues that Hart’s account of the authority of the law and legal obligation is deeply inconsistent and that Hart does not have the resources in his theory to distinguish it from a basically Hobbesian assimilation of authority to power. I shall argue that this criticism is mistaken, but that it can only be seen to be so by providing Hart’s theory with a metaphysical grounding that he has neither supplied nor seen the need for.

II. Hobbes and Austin

The broad outlines of Austin's theory will be familiar. I offer no surprises. Law or rules properly so called are a species of command. A command is distinguished from other significations of desire by the power and purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. Being liable to evil if one does not comply with the command, one is bound or obliged by it. Laws proceed from superiors and bind inferiors. Superiority signifies might, the power of affecting others with evil or pain. Every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. The superiority which is styled sovereignty and the independent society which sovereignty implies are distinguished from other superiority by the following marks or characters: (1) the bulk of the given society are in a habit of obedience or submission to a determinate and common superior; (2) that certain individual or body of individuals is not in a habit of obedience to a determinate human superior. Hart adduces the case of a gunman threatening one with being shot if one does not hand over one's money and refers to the Austinian theory as finding legal obligation in the gunman situation writ large.

Austin's version of the command theory has an appealing, though in Hart's view meretricious, simplicity. Hobbes' account of legal obligation is not so simple. Let me begin with the Austinian elements. Hobbes offers both an informal and a formal definition of civil law, and each seems to anticipate Austin:

[A]s men for the attaining of peace, and conservation of themselves thereby, have made an artificial man, which we call a commonwealth; so also have they made artificial chains, called civil laws, which they themselves, by mutual covenants, have

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6. Id. at 14.
7. Id.
8. Id. at 24.
9. Id.
10. Id. at 134.
11. Id. at 193-94.
12. H. HART, supra note 3, at 80.
fastened at one end, to the lips of that man, or assembly, to whom they have given the sovereign power; and at the other end to their own ears.\textsuperscript{13}

Less fancifully he states:

\textbf{Civil Law, is to every subject, those rules, which the commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of, for the distinction of right and wrong; that is to say, of what is contrary, and what is not contrary to the rule.}\textsuperscript{14}

Hobbes also espouses the Positivistic separation of law and morality. Austin's famous dictum is that "the existence of law is one thing; its merit or demerit, another."\textsuperscript{15} Hobbes writes:

\[\text{[T]he laws of nature, which consist in equity, justice, gratitude, and other moral virtues on these depending, \ldots are not properly laws, but qualities that dispose men to peace and obedience. When a commonwealth is once settled, then they are actually laws, and not before; as being then the commands of the commonwealth; and therefore also civil laws.}\textsuperscript{16}\]

Similar sentiments are expressed later in the work.\textsuperscript{17}

What chiefly evokes the comparison of Hobbes to Austin is the emphasis on fear and punishment in connexion with behaviour according to the law. The bonds by which men are bound and obliged "have their strength, not from their own nature, for nothing is more easily broken than a man's word, but from fear of some evil consequence upon the rupture."\textsuperscript{18} The force of words is too weak to hold men to their covenant; fear of the consequence is the greater power in enabling them to keep it.\textsuperscript{19} Chapter XVII, "Of the Causes, Generation and Definition of a Commonwealth," begins with a characterization of "that miserable condition of war" in terms of there being "no visible power \ldots to tie [men] by fear of

\textsuperscript{14} Id. at 173.
\textsuperscript{15} J. Austin, supra note 5, at 184.
\textsuperscript{16} T. Hobbes, supra note 13, at 174.
\textsuperscript{17} See id. at 180.
\textsuperscript{18} Id. at 86.
\textsuperscript{19} Id. at 92.
punishment to the performance of their covenants, the observation of [the] laws of nature.”

“[C]ovenants, being but words and breath, have no force to oblige, contain, constrain, or protect any man, but what it has from the public sword.”

Civil laws, “in their own nature but weak, may nevertheless be made to hold by the danger, though not by the difficulty of breaking them.”

Men do not know that “the laws are of no power to protect them, without a sword in the hands of a man, or men, to cause those laws to be put into execution.”

Finally, with coruscating wit, he asserts, “For such [sovereign] authority is to trump in Card-playing, save that in matter of Government, when nothing else is turn’d up, Clubs are Trump.”

Such sentiments as these lead Peters to assert baldly that, for Hobbes, fear of punishment is the cause of political obedience. Plamenatz takes a similar line. But it is not that simple. Gauthier wisely reminds us that there is a crucial distinction between the question of what might lead men in the first place to make the covenant setting up the sovereign and the question of what might make men keep their covenants in the established commonwealth. One cannot be sure that the passages in Hobbes address the second question exclusively. Yet it is exclusively in the second context that Austin refers to the visiting of evil on those who do not comply, and his views of laws as commands of a sovereign backed by threats presuppose an existing state. In fact, Raphael is right when he says that Hobbes rejects the “gunman” analogy, although, in order to see why, a fuller story must be told than Raphael provides.

I shall begin that story by mentioning a commentator who tries but fails to make the relevant point. Barry rightly criticises

20. Id. at 109.
21. Id. at 115.
22. Id. at 138.
23. Id. at 139.
Plamenatz for assimilating Hobbes to Austin, and later, borrowing Hart's distinction between 'being obliged' and 'being under an obligation,' Barry says that, whereas Austin makes legal obligation a case of the former, Hobbes makes it a case of the latter. As we shall see, this contains a good measure of truth. Barry's articulation of the point, however, fails to bring it out.

Barry claims that, for Hobbes, our obligation to obey the law is a special case of our obligation to keep our word. By constraining others, rather than ourselves, the sovereign reduces for us the evils to which we are liable by giving our word. One is obliged to obey the law just in case certain nullifying conditions are absent. This will not do. Hobbes certainly recognises that one who makes covenants in the state of nature "exposeth himself to the perverse will" of the others. Trust that another will reciprocate is foolish gullibility. But if the only role of the sovereign is to reduce the odds of getting hurt by making covenants, what sense is to be made of the whole notion of the right of nature being transferred over to the sovereign? Certainly, the transference of right is conditional upon the sovereign delivering the goods in terms of security and freedom from war. As long as the sovereign does that, there is no question of a prudential calculation as to whether on this occasion to keep a contract. The Legal Realist's bad man calculates whether he will get caught when he considers whether to obey the law. Barry's Hobbesian calculates whether others will get caught when they disobey the law. Such calculation is to consider, in effect, on each and every occasion whether to assign to the sovereign the right to act on one's own behalf. Hobbes, however, quite clearly intends that, once the commonwealth is agreed on and set up, there is no question of repeatedly reopening negotiations. This is implied in Leviathan:

[W]hen a man hath in either manner [by renouncing or transfer-
ring] abandoned or granted away his right; then he is said to be 
OBLIGED, or BOUND, not to hinder those, to whom such right is 
granted, or abandoned, from the benefit of it.37

Elsewhere he explicitly states, “He that Transferreth his power, 
hath deprived himself of it.”38

The key to understanding this aspect of Hobbes is in the word 
‘formerly’ in the statement that law is the command “only of him, 
whose command is addressed to one formerly obliged to obey 
him.”39 That is, we have taken on the obligation to keep the law, to 
abide by our covenant, at the time that we agreed to set up the 
sovereign. This obligation is certainly in some sense prudential. 
Life in the state of nature is an exceedingly tiresome business. 
“[T]he motive, and end for which this renouncing, and transferring 
of right is introduced, is nothing else but the security of a man’s 
person, in his life, and in the means of so preserving life, as not to 
be weary of it.”40 Performance of covenant is a dictate of a law of 
nature,41 namely, the third law of nature.42 Without the perform-
ance of covenant, we would be back in the state of nature. “[A] 
civil law, that shall forbid rebellion, (and such is all resistance to 
the essential rights of the sovereignty), is not, as a civil law, any 
obligation, but by virtue only of the law of nature, that forbiddeth 
the violation of faith.”43 Men may join together in the state of na-
ture for a while; but, without a sovereign, “they must needs by the 
difference of their interests dissolve, and fall again into a war 
among themselves.”44

It should now be clear that the fear referred to by Hobbes,45 
which provides the motivation to obey the law, is not the fear of 
immediate punishment by the sovereign (fine, jail, hanging, etc.). 
Rather, it is the fear of a return to the state of nature, and all the 
misery that such a return involves, if by rebellion (in Hobbes’ tech-

37. T. Hobbes, supra note 13, at 86.
38. T. Hobbes, supra note 24, at 89.
40. Id. at 87.
41. Id. at 174.
42. Id. at 93.
43. Id. at 220.
44. Id. at 110-11.
45. See text accompanying notes 18-20 supra.
nical sense) the power of the sovereign is undermined. Hobbes re-
marks explicitly that in the case of sovereignty by acquisition there
is fear of the sovereign; but in the case of sovereignty by institu-
tion, it is fear of one another that makes men keep their cove-
nant. 46 Immediately after, Hobbes says that, once a commonwealth
is instituted, fear of death constitutes a different kind of obliga-
tion from that constituted by a promise to keep the covenant.
These are very different sentiments from the Austinian command
theory, and their prudential-seeming character should not blind us
to this.

Of course, a Hobbesian sovereign will visit with evil one who
breaks the law; as well as law-abiding men in a Hobbesian com-
monwealth, there will be those who always do calculate whether
the game is worth the candle, and for them a Hobbesian sovereign
will function as a negative utility. We can account very well for
this in Hobbesian theory, however, without having it forced upon
us as an account of legal obligation in Hobbes tout court. The com-
monwealth is an artificial creation, we are repeatedly told. Raphael
likens it to a clockwork train. 47 The setting up of the common-
wealth is likened to the initial winding up of the train and setting
it on the tracks, but the clockwork mechanism will run down and
need to be rewound. So also the commonwealth has in it forces at
work which will cause it to “run down.” These are the natural pas-
sions of men, which are contrary to the laws of nature. 48 If Hobbes
were an Austinian, then mere punishment of wrongdoers would be
sufficient to keep the commonwealth going. Since he is not, there
must therefore be some other force which supplies the basic mo-
mentum, a force to which the natural passions are opposed. That
cannot be merely the fear of immediate punishment. It must be
some deeper and more far-reaching natural commitment to the
sustaining of the commonwealth, and that is exactly what Hobbes
provides, in terms of fear of a return to the state of nature.

Raphael’s “clockwork train” analogy is inadequate to represent
Hobbes’ view of the state and its legal system. The clockwork train
has only two forces at work, gravitational inertia and the force pro-

vided by the coiled spring. The winding up is by a force external to the mechanical system. In the Hobbesian commonwealth, however, the three basic natural forces—the law of nature to keep covenants, those natural passions which incline men to break covenants, and the fear of a return to the state of nature to counteract those natural passions—are internal. All this makes Hobbes' theory of legal obligation not reducible to the commands of a sovereign backed by threats.

III. HOBBES AND HART: SIMILARITIES

I merely mentioned Hart in section II as another opponent of Austin's command theory of law. I shall not make a separate statement of Hart's view on law and legal obligation. The structure of his theory will emerge along the way in my statement of his similarities to Hobbes in this section and my statement of the crucial differences between him and Hobbes in the next section.

The similarities between Hobbes and Hart, apart from their shared Positivistic inclination to separate law and morality, may be considered under two heads: the role of coercion in Hart's analysis of legal obligation, and his celebrated doctrine of the minimum content of natural law. The Concept of Law makes it quite clear that for Hart law is, in part, essentially coercive. Although he rejects the 'gunman' view of law, he still articulates the obligatoriness of law partly in terms of the ideas that law makes conduct nonoptional and that physical sanctions are prominent among the kinds of social pressure that go to creating legal obligation. "[T]he insistence on importance or seriousness of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations," be these legal or moral rules. Later on, he writes:

'Sanctions' are therefore required not as the normal motive for obedience, but as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not. To obey, without this, would be to risk going to the wall. Given this standing danger, what reason demands is voluntary cooperation

49. H. Hart, supra note 3, at 80-88.
50. Id. at 84.
in a coercive system.  

Even though Hobbes talks more explicitly of fear, he does insist that fear and liberty are consistent and that action out of fear is still voluntary action.  

So he attempts likewise to combine elements of free choice and coercion in his account of legal obligation.  

We shall be returning to Hart’s emphasis on coercion in section V in considering Payne’s claim that Hart has not escaped the tentacles of the Hobbesian deification of power.  

Hart’s doctrine of the minimum content of natural law can be compared with Hobbes’ theory by the examination of three aspects: its content, its role, and what I shall call its metaphysical depth. Hart begins Chapter IX of The Concept of Law by reminding us of the teleological way of viewing human life. Mentioning Hobbes, he expresses the thought that survival is a basic aim of human life.  

He continues:

From this point the argument is a simple one. Reflection on some very obvious generalisations—indeed truisms—concerning human nature and the world in which men live, shows that as long as these hold good, there are certain rules of conduct which any social organisation must contain if it is to be viable.  

These truths constitute the minimum content of natural law. They afford a reason why, given survival as an aim, law and morals should include a specific content.  

The truisms are human vulnerability and approximate equality, limited altruism, limited resources, and limited understanding and strength of will. These will produce respectively prohibitions restricting the use of violence in killing or inflicting bodily harm, a system of mutual forbearance and compromise which is the base of both legal and moral obligation, some minimal form of the institution of property and rules to enable individuals to create obligations and to vary their incidence, and a system of organised sanctions to coerce malefactors.  

It is a commonplace that the Hobbesian sovereign is there to  

51. Id. at 193.  
52. T. Hobbes, supra note 13, at 137.  
54. Id. at 188.  
55. Id. at 189.  
56. Id. at 189-95.
restrict physical violence. He is also there to ensure forbearance and some acceptance of reciprocity of claim; he functions in terms of the Golden Rule.\(^5\) He is charged with the maintenance of property and mercantile transactions in a regular way.\(^6\) He coerces the recalcitrant. In terms of content, therefore, both Hobbes and Hart have similar opinions about the core of a legal system.

The role of this minimum content doctrine in Hart is in some ways similar to that of Hobbes' unlimited sovereign: to underpin an account of legal obligation without simply reducing it to moral obligation. It is also noticeable that both Hobbes and Hart deny that it is simply a fact that these truisms are so. Hobbes makes constant references to laws of nature, to reason and right reason. Hart speaks of "natural necessity," and says:

\[\text{It is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those the truth of which is contingent in human beings and the world they live in retaining the salient characteristics which they have.}\]

It is true that Hobbes does want to emphasise the need for precise definitions in the writing of civil philosophy, and reason for him has much more to do with definitional truth than it does for Hart. But the common idea I want to emphasise is that the nature of man is not a mere fact like the colour of the shirt one wears.

\[\text{IV. HOBBES AND HART: DIFFERENCES}\]

The previous section has pointed out that both Hobbes and Hart think of law as in part a coercive system, and that for both this has to do with survival as the aim of human society and the role of law in such society. Nonetheless, this section will show that there are fundamental differences between the Hobbesian and the Hartian views of legal obligation. The foundation of legal obligation for Hobbes is still ultimately free choice based on self-interest, whereas no such thorough individualism can be found in Hart. We

\[57. \text{T. Hobbes, supra note 13, at 103.}\]
\[58. \text{Id. at 161.}\]
\[59. \text{H. Hart, supra note 3, at 195.}\]
must again be reminded that neither man regards legal obligation as collapsed into moral obligation in the sense in which the latter term would be systematically distinguished from obligations of prudence or self-interest. We shall see how Hobbes fails in the end to find a middle road between the two standard reductive analyses of legal obligation and how, if we accept his account at face value, Hart does so succeed. In this way we will better understand the significance of offering a descriptive theory of legal obligation and the issues which such a theory illuminates.

We have seen already that, for Hobbes, the obligation to obey the law is grounded in the covenant that Hobbesian men make with themselves to set up a sovereign. That obligation is self-imposed, even though it is underwritten by self-interest. "[N]o man is obliged by a covenant, whereof he is not author," 60 "there being no obligation on any man which ariseth not from some act of his own." 61 It is essential to the creation of legal obligation in Hobbes that those obliged have certain beliefs about what will happen if no covenant is agreed upon and have certain motives for agreeing to the covenant. Hart associates such beliefs and motives with 'being obliged' rather than 'being under an obligation.' 62 It is essential to legal obligation, for Hobbes, that there is some kind of felt pressure to obey the law, even though, as I have argued, this is not the felt pressure of the gunman situation.

As Wolin has properly emphasised, 63 and as Macpherson has stressed in his notion of 'possessive individualism,' 64 the purpose of the covenant and the sovereign is not to overcome particularity but to guarantee it. As Wolin says, Hobbes' concern with the individ-

60. T. HOBBS, supra note 13, at 106.
61. Id. at 141. Compare an earlier statement of this self-imposed obligation:
   But if he that so covenanteth, knew beforehand he was to expect no other assurance, than the actor's word; then is the covenant valid; because the actor in this case maketh himself the author. And therefore, as when the authority is evident, the covenant obligeth the author, not the actor; so when the authority is feigned, it obligeth the actor only; there being no author but himself.
   Id. at 106.
62. H. HART, supra note 3, at 80.
63. S. WOLIN, POLITICS AND VISION, CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT 274-75 (1960).
ual's natural desires is not that these desires are evil or that they need the discipline of reason; it is merely that they are self-defeating. Free indulgence of them produces a state of war, and thus misery, not happiness. Hobbes' emphasis on society as an automaton, an artificial machine, is deliberately intended to contradict the mediaeval image of society as a body, an organic whole. Hobbes does say that society after the covenant is "more than consent, or concord; it is a real unity of them all . . . . The multitude so united in one person is called a COMMONWEALTH." The unity is that of a smoothly functioning mechanical system, however, and the repressive force of the sovereign is a necessary part of its frictionless functioning. The mental stance towards the laws of the commonwealth is in the end conscious acceptance of them as rational in terms of natural self-interest.

The Hartian picture is very different. Hart's point of departure is rejection of the Austinian theory of law, on the grounds that "the elements out of which the theory was constructed, viz. the idea of orders, obedience, habits and threats, do not include, and cannot by their combination yield, the idea of a rule, without which we cannot hope to elucidate even the most elementary forms of law." For Hart, 'rule' is the central concept for understanding legal obligation. He distinguishes between two different types of rule in a legal system. Primary rules are rules under which human beings are required to do or abstain from certain actions, whether they wish to or not; these rules impose duties. Secondary rules provide that human beings may be doing or saying certain things that introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations: secondary rules confer powers, public or private; they provide for operations which lead to the creation or variation of duties or obligations. "[I]n the combination of these two types of rules there lies what Austin wrongly claimed to have found in the notion of coercive orders, namely, 'the key to the science of jurisprudence.'"
What precisely does Hart mean by a ‘rule’? Rules are to be distinguished from habits. In both cases there will be a convergent pattern of behaviour, but social rules have three salient points of difference from habits. First, in the case of rules but not habits, deviations are generally regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity. Second, in the case of rules but not habits, deviation from the standard is generally accepted as a good reason for criticism. Third, and perhaps most important, rules have and habits do not have what Hart calls “an internal aspect.” Persons subject to rules must have the internal point of view towards them. Some at least must look upon the behaviour enjoined by the rule as a general standard to be followed by the group as a whole. The internal point of view is manifested in a critical reflective attitude towards the behaviour enjoined by the rule. This critical reflective attitude to certain patterns of behaviour as a common standard should display itself in criticism, including self-criticism, in demands for conformity, and in acknowledgements that such criticism and demands are justified. The heart of a legal system is the structure which has resulted in the combination of primary rules of obligation with the secondary rules of recognition, change, and adjudication. The complex social situation in which a fundamental secondary rule of recognition is accepted and used for the identification of primary rules of obligation is the situation “which deserves, if anything does, to be called the foundations of a legal system.”

The existence and nature of legal obligation follows directly from the idea that a legal system is a system of social rules. The characteristic use of the vocabulary of ‘obligation’ presupposes the existence of a rule supplying a standard of behaviour which is generally accepted and draws attention to the fact that the situation in which one finds oneself is covered by the rule. But that is not enough for obligation. “Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear on those who devi-

70. Id. at 54.
71. Id. at 55.
72. Id. at 95.
73. Id. at 97.
74. Id. at 83.
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ate or threaten to deviate is great.” The distinctive feature of legal obligation is that the rules in question are those which are identified as valid rules of the legal system according to the fundamental rule of recognition which will exist, however complex, however unwritten, in any society with a legal system.

We must be clear about how Hart is using the notion of a ‘rule.’ He criticises Austin for leaving it out of his theory, but in one sense this is odd. Austin at the very beginning of The Province of Jurisprudence Determined says: “A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him,” and he after that frequently writes “law or rule” rather than just “law.” So Hart’s point has to be that Austin has not employed the proper concept of rule or has not employed it in the proper way. Similar things may be said about Hobbes. As Wolin has emphasised, Hobbes insists that laws are rules. But the work that the notion of a rule is doing in Hobbes is quite different. Hobbes says that laws are rules, so that men will want to look for precision and clarity in their statement. These notions have a far-reaching importance in Hobbes in relation to the way the sovereign is to exercise legal (in a narrow sense) power. Hobbes is the champion of statute over common law. Statutes are laid down by the sovereign in words; these words must be as precise as possible. Being merely words, however, they will be subject to ambiguity. The ambiguity is to be resolved in terms of the intent of the sovereign. Thus the sovereign’s role in the exercise of legal power is complete. However, there is a standing presumption that the sovereign will intend the equitable thing. Thus the complete legal power of the sovereign, is, for Hobbes, the way to ensure the equitable decision in the courts. For Hobbes, then, the insistence that laws are rules is an important part of the justification for the sovereign’s legal power.

For Hart, the point of making the notion of a rule fundamental

75. Id. at 84.
76. J. Austin, supra note 5, at 10.
77. S. Wolin, supra note 63, at 253.
78. See T. Hobbes, supra note 13, at ch. xxvi.
is also, partly, to clarify legal obligation and to make clear in what sense legal obligations are voluntarily assumed, and in what sense they are not voluntarily assumed, to make clear in what the authority of the law consists. But the insistence that laws are rules and therefore must be the objects of the internal point of view takes us right away from Hobbesian convenants and sovereigns. Hart explicitly links the authority of the law to acceptance of the law as a system of social rules. This may sound like "no man is obliged by a covenant whereof he is not author," but it is not. Consider this passage:

[O]bligations created in those derivative ways under enacted rules owe their status as obligations ultimately to the underlying practice of the social group in accepting the legislative enactments as constituting standards of behaviour and can be understood only if we understand the simple fundamental case of the creation of obligation by direct enactment and its dependence on the complex social practice that constitutes this basic authority.

It is not a covenant, but a complex social practice that is, for Hart, the ground of legal obligation. Though he emphasises voluntary cooperation in a coercive system as essential to legal authority, the voluntariness here needs careful explication. It is not the voluntariness of a conscious and deliberate individual decision, but something more subtle.

In Are There any Natural Rights?, Hart talks of the mutual restriction involved in a legal system and says that this is not deliberately incurred, although it does arise out of a person's previous voluntary acts. Later in The Concept of Law, this idea is developed more fully in the doctrine of laws as social rules and in the doctrine of the legal system as depending on an ultimate rule of recognition. What occurs in Hobbes by covenant, occurs in Hart as an essential element in an evolved complex legal system. The existence of a rule is a matter of the existence of a social practice of a certain kind. Such a social practice embodies the internal point of

79. H. Hart, supra note 3, at 133.
view, that is, internal acceptance of the fact that the rule intrinsi-
cally embodies a standard of behaviour. In the case of legal rules, 
internal acceptance is to be construed as acceptance of the validity 
of a certain procedure for enacting laws that impose legal obliga-
tions. Behaviour that is rule-governed, rather than merely habit-
ual, is behaviour such that those who practice it do so because they 
accept that it conforms to a standard, embodied in the rule, which 
places requirements of conformity upon them.

Why is this to be called a “descriptive” theory of legal obliga-
tion? It does not say that people obey the law out of fear of pun-
ishment. It does not say that people obey the law out of fear of a 
return to the state of nature. It does not say that people obey the 
law because the law contains moral obligations. It says that people 
obey the law because that is what law is—something that people 
obey. Laws are social rules. Their existence as valid laws in a soci-
ety is dependent upon an ultimate rule of recognition. The exis-
tence and content of such a rule in any given society are matters of 
fact about that society. Legal obligations follow from this rule of 
recognition. The existence and content of legal obligations is there-
fore a matter of fact. Statements asserting that someone is under a 
legal obligation are simply statements that his case falls under a 
valid legal rule. Statements of legal obligation are thus ultimately 
simply statements descriptive of what is so in a certain society. 
Hence the name “descriptive theory of legal obligation.”

V. TOWARDS A DESCRIPTIVE THEORY OF LEGAL OBLIGATION

It likely seems that, so stated, a descriptive theory of legal obli-
gation is a monumental triviality. We have an obligation to obey 
the law because law is the kind of thing people have an obligation 
to obey; where there is law, therefore, there is legal obligation. 
Who has ever thought to deny that? Certainly not Hobbes, or Aus-
tin, or Aquinas. It all depends on what you mean by ‘law’ and by 
‘obligation,’ and Hart has not, it may be said, really shown that the 
understanding of those terms possessed by his opponents is indeed 
defective. I think, however, that his approach will stand up, al-
though one will have to go beyond The Concept of Law or any-
thing else he has written to bring this out.

I shall proceed towards a developed descriptive theory of legal 
obligation and preserve the connexion with Hobbes by considering
some criticisms of Hart by Michael Payne. Payne’s criticisms are important and point up some genuine difficulties in Hart’s theory as he presented it. Barry Hoffmaster also has raised some important difficulties in Hart’s account of legal obligation. I shall not be able to solve in detail all of those problems in the balance of this paper. I shall discuss Payne’s criticisms here, and Hoffmaster’s elsewhere. But it is worth mentioning the gist of Hoffmaster’s criticisms, as they suggest that Hart really is getting between the two standard reductive accounts. I have already said that, according to Payne, Hart, by his emphasis on laws as social rules, has simply reintroduced by the back door the Hobbesian tradition of authority as being simply power to elicit obedience. Hoffmaster, by contrast, says that by his emphasis on laws as social rules, Hart has deprived himself of a way of denying legal obligation to be reducible to moral obligation. So Payne takes Hart’s theory to be fundamentally Hobbesian and prudentialist, while Hoffmaster thinks it is fundamentally moralist. This suggests that Hart might well have succeeded in his quest to preserve the best of the traditional theories, but, since both Payne’s and Hoffmaster’s criticisms are carefully documented and constructed, it also suggests that he has not succeeded in demonstrating how this goal is attained.

Payne concentrates on what I agree is an extremely mysterious passage in Chapter VI of The Concept of Law, in which Hart offers what he describes as “two minimum conditions necessary and sufficient for the existence of a legal system.” Since the passage is crucial, I shall quote it in full:

There are therefore two minimum conditions necessary and 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. The first condition is the only one which private

82. Shiner, Towards a Descriptive Theory of Legal Obligation, in [1979] Proceedings of the World Congress of the International Association for Philosophy of Law and Social Philosophy (in publication).
83. Hoffmaster, supra note 4, at 1324.
84. H. Hart, supra note 3, at 113.
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. The second condition must also be satisfied by the officials of the system. They must regard these as common standards of official behaviour and appraise critically their own and each other’s deviations as lapses. Of course it is also true that besides these there will be many primary rules which apply to officials in their merely personal capacity which they need only obey.

The assertion that a legal system exists is therefore a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of behaviour.85

In order to set up Payne’s criticism, we must be reminded that ‘accept’ for Hart is definitionally connected with the exercise of the internal point of view, and thus with ‘rule.’ Moreover, early in The Concept of Law he has associated ‘obedience’ definitionally with the type of coercion occurring in the gunman situation, and therefore with an Austinian view of legal obligation rather than his own.86 Hart explicitly says that law based on acceptance of social rule is a third alternative to law based on power and law based on moral obligation.87 But, if the above passage is taken literally, is his position maintained consistently? Payne’s argument is that it is not. I shall present only his conclusions rather than the detailed discussion which precedes them, since, as far as they go, I do not wish to dispute them.

Payne states the fundamental difficulty thus:

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 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

85. Id.
86. Id. at 19-20.
87. Id. at 198.
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 acceptance of a social rule must be supplemented by another concept of social rule that squares with our concepts of obligation and authority. 

He goes on to say that what is needed is the concept of a normative rule and that, although Hart brings this out, he cannot do so in a way consistent with his basic position. The key claim is the sentence that is italicised. That this sentence is correct can be shown briefly (though it is shown by Payne in greater detail) by considering the long quote from Hart. He says there that the primary rules of obligation need only be "obeyed" by both citizens and officials. 'Obey,' as I have noted, is the codeword for one's conformity to a gunman-type coercive order. Thus no one accepts the primary rules of obligation from the internal point of view. Thus no one regards the primary rules as in the appropriate sense authoritative. Therefore observance of the primary rules can only come about by the exercise of power, and here we have a Hobbesian Hart.

I think that there is in fact a way out of this objection, although it will involve going beyond Hart in two ways. First, it will involve giving much more attention than Hart does to considering from the point of view of philosophy of mind exactly what is meant by the internal point of view. Hart’s ideas about this are very muddled. I shall show this, but I shall only be very programmatic about the remedy. Second, one must do more to relate this part of Hart’s theory to the later remarks about the minimum content of natural law. Hart himself says comparatively little about the link in a self-conscious way. More must be said, and that ‘more’ must be related to a wider metaphysical background.

The way out is referred to by Payne, although he thinks it will not work. Hart, as Payne notes, speaks towards the end of The

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89. See text accompanying note 85 supra.
90. Payne, supra note 88, at 310.
Concept of Law of obligation resulting from a rule of recognition as being "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."\textsuperscript{91} It might seem as though there is a sufficient sense of 'acceptance' applicable to citizens' attitude towards the primary rules if the validity of the primary rules depends on a secondary rule of recognition and the citizens accept that. Payne's objection to this move is essentially that it can only be explicated in Hobbesian terms: the citizens are obliged because they are committed in advance by their acceptance of the rule of recognition to letting the state push them around.\textsuperscript{92} This commitment in advance fails to produce authority rather than power. This conclusion does not follow, however, although Hart does not make the point easy to see.

On the one hand, Hart says: "For the most part the existence of the rule of recognition is not stated, but its existence is shown in the way in which particular rules are identified, either by courts or other officials or private persons or their advisers."\textsuperscript{93} On the other hand, he says later that it is a "fiction" to suppose that in a complex modern state the bulk of society generally share, accept, or regard as binding the ultimate rule of recognition. "[T]he reality of the situation is that a great proportion of ordinary citizens—perhaps a majority—have no general conception of the legal structure or of its criteria of validity."\textsuperscript{94} The root problem is that Hart simply does not sort out in detail the criteria in terms of mental attitudes which distinguish obedience, acquiescence, and acceptance. Nor does he distinguish clearly between those mental criteria which are logically dispositions and those which are logically occurrences, although in either case one knows them to exist from observing human behaviour.

The term 'acquiescence' is a palmary case. He writes, "The ordinary citizen manifests his acceptance largely by acquiescence in the results of these official operations,"\textsuperscript{95} thus linking acquiescence

\textsuperscript{91} H. Hart, \textit{supra} note 3, at 229.
\textsuperscript{92} Payne, \textit{supra} note 88, at 315.
\textsuperscript{93} H. Hart, \textit{supra} note 3, at 98.
\textsuperscript{94} Id. at 111.
\textsuperscript{95} Id. at 60.
and acceptance. Yet, later he talks about the ordinary individual acquiescing in the rules by obeying them for his part only. Here, acquiescence is distinguished from the internal point of view and from acceptance and is associated with mere obedience. He often talks of acceptance as active and obedience as passive. Yet he lists an enormous number of things a citizen can do by obeying, rather than by accepting from the internal point of view, and most of these are volitionally quite active.

Hart also talks about ordinary citizens using the law in many ways which do not find expression in formal legal proceedings. Yet he does not make clear whether this "using" counts as acceptance or acquiescence or obedience or what. When acceptance is associated closely with the critical reflective attitude, it is associated with behaviour that occurs on specific occasions, and so also when it is associated with explicit acts of officials in legislatures and courts of law. Yet, law is here like love. I can properly say, "Jane Doe loves Richard Doe," and also that Dick and Jane accept that they are under an obligation to obey the law, even though Dick and Jane are not at the time I speak exhibiting any of the usual behavioural manifestations of these states of mind.

There are many things here which need sorting out. But I must resume the main argument. I shall stipulate that one may regard acquiescence as a form of acceptance, albeit a weak one. Thus, despite the fact that the ordinary citizen needs to hire a lawyer when the chips are down, it seems to me perfectly proper to speak of him or her as accepting the fundamental rule of recognition. What follows from that? For Hart, societies with any kind of a legal system at all are identifiable and definable in terms of that rule of recognition. To be a member of a given society is to accept a given rule of recognition. The rule of recognition is in that way cohesive of and constitutive of a society. The deep significance of this for Hart is that ultimately the reason for such association is, as he calls it, natural necessity. Inevitably, men will bind themselves together in societies and accept fundamental rules of recognition. This is internal to what it is to be a social being.

96. Id. at 114.
97. See, e.g., id. at 198.
98. Id. at 195.
As Winch has remarked in rejecting the Hobbesian conception of man and society, if obedience to the law is motivated only by prudence, then the existence of authority is merely an external fact of one's environment.\textsuperscript{99} Yet the doctrine of natural necessity for a minimum content of natural law says that it is not external to oneself as a social being but internal. Hobbes thinks that men existing in the state of nature are quite conceivable as men. Indeed, any contractarian theory of legal obligation so posits: that is part of the point of the metaphor of a contract.

Macpherson's proper emphasis on the fact that Hobbes constructs the state of nature out of present society does not affect the issue.\textsuperscript{100} By contrast, if Hart is right, the metaphor of 'natural necessity' implies that such a thing is not conceivable. As Winch suggestively puts it, the relation between citizen and sovereign must be understood in terms of a certain quality of life.\textsuperscript{101} The voluntariness that thus is needed to create legitimate authority for the law is not the occurrent voluntariness of the signing of a covenant, but the long-term dispositional voluntariness internal to the existence of a complex social practice of acceptance of a rule of recognition.

Payne is quite right that, if we take Hart literally when he says that ordinary citizens need only obey, the law exercises power rather than authority. This thought of Hart is a blunder which has no place in a descriptive theory of legal obligation. As Wolin puts it, turning Hobbes on his head, the stuff of power is not to be found in a passively acquiescent subject.\textsuperscript{102} Political reality is that power which is best exercised when its authority is actively accepted; it becomes in that way no longer in the philosopher's sense mere power.

Hart's theory of laws as social rules is not, as Payne claims, the source of difficulty in erecting a satisfactory account of the authority and obligatoriness of the law. Or at least it is not when it is handled correctly. We do need to delineate carefully what specific mental attitudes go into acceptance of a rule of recognition. That task must be left for another time. But, assuming its completion,

\textsuperscript{100} C. Macpherson, \textit{supra} note 64, at 21.
\textsuperscript{101} P. Winch, \textit{supra} note 99, at 108.
\textsuperscript{102} S. Wolin, \textit{supra} note 63, at 275.
Hart’s doctrine of the minimum content of natural law claims that the existence of legitimate legal authority is internal to man as a social animal. It manifests itself fundamentally in acceptance of a rule of recognition constitutive of a society, at least in its legal aspect. Hart, as noted, speaks of the existence of this rule of recognition as *shown* rather than stated.

I do not know whether the Wittgensteinian echo is deliberate, but it is certainly appropriate. A descriptive theory of legal obligation must be understood not to be giving an account from an external point of view of the obligation to obey the law. Hart suggests that the existence of the ultimate rule of recognition in a society *can* be ascertained by an observer from the external point of view.¹⁰³ This is a mistake. A descriptive theory of legal obligation must be understood from within something which is fundamental to any complex society, an essential part of the framework of that society’s form of life. If, as Hart argues, there is a *necessary* element to any such form of life, then a descriptive theory of legal obligation is revealing metaphysically deep aspects of, in Wittgenstein’s phrase, the natural history of human beings.¹⁰⁴ The theory is not a triviality. Philosophy, Wittgenstein says, leaves everything as it is.¹⁰⁵ A descriptive theory of legal obligation leaves legal obligation as it is. But one which employs the proper elements, and properly deploys them, as Hart’s theory goes a good way towards doing, shows how legal obligation is in its own right a necessary part of human life as we know it. Legal obligation does not have to be reduced to prudence and self-interest or to moral obligation in order to have its authority justified. It is there, part of our form of life, because it is rooted in natural necessity. It has to be accepted as a given.¹⁰⁶

¹⁰⁵. Id. § 124.
¹⁰⁶. Id. at 226.