

William & Mary Law Review

Volume 23 (1981-1982)
Issue 3

Article 6

March 1982

Law Based on Accepted Authority

Michael A. Payne

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Law Commons](#)

Repository Citation

Michael A. Payne, *Law Based on Accepted Authority*, 23 Wm. & Mary L. Rev. 501 (1982),
<https://scholarship.law.wm.edu/wmlr/vol23/iss3/6>

Copyright c 1982 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

LAW BASED ON ACCEPTED AUTHORITY

MICHAEL A. PAYNE*

In *The Concept of Law*, H.L.A. Hart rejected the dichotomy between "law based merely on power" and "law which is accepted as morally binding," and attempted to base law on accepted authority.¹ In a previous essay, I argued that in *The Concept of Law* Hart fails to provide an acceptable alternative to this dichotomy and that his theory may be reduced to one of law based merely on power.² Recently, Professor Roger Shiner, in an article primarily devoted to a comparison of Hart and Hobbes on legal obligation, responded to my critique of Hart.³ This Article is a critical examination of Professor Shiner's defense of Hart.

Shiner's defense of Hart attempts to develop a descriptive theory of legal obligation. The view that law may be based on accepted authority, rather than on power or morality, implies a nonreductive account of legal obligation in which legal obligation is reducible neither to self-interest nor to morality. "The two standard theories of obligation," Shiner writes, "are reductive. The first regards the term 'obligation' as a misnomer. . . . 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."⁴ In *The Concept of Law*, Hart maintains that there is a distinction between "obligate" and "oblige,"⁵ and that an Austinian model of law as orders backed by threats fails to yield the idea of a *normative* rule.⁶ For Hart, however, while legal obligation implies the existence of a normative rule, the latter need not be a moral rule, despite the fact that law and morals share a minimum

* Associate Professor of Philosophy, University of Dayton; B.A., Xavier University; M.A., Boston College; Ph.D., University of Georgia.

1. H. HART, *THE CONCEPT OF LAW* 198 (1961).

2. Payne, *Hart's Concept of a Legal System*, 18 WM. & MARY L. REV. 287 (1976).

3. Shiner, *Hart and Hobbes*, 22 WM. & MARY L. REV. 201 (1980).

4. *Id.* at 202.

5. H. HART, *supra* note 1, at 80.

6. *Id.* at 78.

content.⁷ Thus, Hart's theory of law based on accepted authority rests on a theory of legal obligation that includes both a clear distinction between legal and moral obligation as well as the idea of obligation as distinctively normative.

My critique of Hart purports to show that, *if* one considers merely the text of *The Concept of Law*, one discovers a deep internal inconsistency. Hart's concept of an accepted social rule is insufficient to generate legal obligation, and this inconsistency may be seen through an analysis of Hart's two minimum conditions for the existence of a legal system. Shiner's thesis is that the foundation for legal obligation is *implicit* in Hart's argument for a minimum content of natural law, even though Hart himself did not reach this conclusion in *The Concept of Law*. Shiner's central contention therefore is that legal obligation follows from the accepted authority of law, and that the latter rests on the argument for a minimum content of natural law.

The first section of this Article summarizes my critique of Hart and Shiner's response. Shiner defends Hart's attempt to base law on accepted authority by "going beyond Hart" in two ways.⁸ The first way involves an analysis of the internal point of view and concludes that acquiescence may be regarded as a form of acceptance; section II examines this stage of Shiner's argument. The second way concerns an application of Hart's argument from natural necessity for a minimum content; section III provides both a detailed examination of this stage of Shiner's argument, and an explication and defense of my interpretation of Hart's argument for a minimum content of natural law. Section IV is a conclusion discussing several difficulties with a descriptive theory of legal obligation and with the attempt to base law on accepted authority.

I. SHINER'S DEFENSE OF HART

Payne's Critique of Hart

My critique of Hart focuses on the conditions under which a legal system may exist. Hart proposes two minimum conditions necessary and sufficient for the existence of a legal system:

7. *Id.* at 83-85.

8. Shiner, *supra* note 3, at 221.

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.⁹

These two minimum conditions require *obedience* by citizens of the primary rules and *acceptance* by officials of the secondary rules. Consequently, the two minimum conditions imply that a legal system may exist in which neither officials nor citizens *accept* the primary rules. For Hart, however, acceptance is a necessary condition for the existence of a social rule.¹⁰ Hence, where individuals are not required to accept primary rules, a system may exist without having any primary social rules of obligation and thereby may impose no rules of legal obligation.¹¹ Therefore, because a system fulfilling the two minimum conditions might not generate rules of legal obligation, such a system may be reduced to a system based on power alone.

Furthermore, even if the primary rules are accepted and are thereby social rules, they may still not be rules of obligation, for Hart distinguishes between accepted social rules that impose obligations and those that do not.¹² The conditions for an obligatory social rule may well be met, but the two minimum conditions do not *require* that these conditions be met. Indeed, the only apparent way to require that the conditions for an obligatory social rule be met involves the addition of a moral requirement to the two minimum conditions: one cannot argue that it is *legally* required that the social rules of law be obligatory, because that is to argue that the rules are legally obligatory because they are legally obligatory. By itself, then, acceptance of a social rule is not sufficient to enable Hart to distinguish between law based on power and law based on accepted authority, for an accepted rule is not necessarily an obligatory rule.

The apparent dilemma for Hart is that my criticisms of the two

9. H. HART, *supra* note 1, at 113.

10. *Id.* at 54-56.

11. *Id.* at 83-84.

12. *Id.* at 84-85.

minimum conditions seem to show that the introduction of a *normative* social rule, which Hart hails as the key to avoiding the reduction of law to the Austinian model of orders backed by threats, may be necessary but is not a sufficient basis for legal authority. Therefore, Hart must appeal beyond the law to morality for a foundation for the authority of law. Shiner's contention, however, is that Hart need not face this dilemma, for there is a "way out" of my critique of Hart that is indeed "referred to by Payne, although he thinks it will not work."¹³ Here, Shiner is referring to a reply I devised to my critique of Hart's two minimum conditions.¹⁴

This reply takes its cue from a short passage of Hart's book in the chapter on "International Law." In discussing whether a rule of recognition must be present for law to exist, Hart comments that the rule of recognition

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. [I]n 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.¹⁵

Where there is an accepted rule of recognition, there are primary rules of obligation, not because citizens do in fact accept the primary rules, but because citizens are *committed* to accept them in advance. According to the devised reply, the accepted authority of the legal system is the grounds for the citizen's commitment to accept the valid primary rules. Hence, in this way a legal system satisfying the two minimum conditions is not reducible to a system of power alone, but is law based on the accepted authority of the system.¹⁶

Shiner's Response to Payne

Shiner maintains that the notion of commitment to acceptance in advance of the primary rules provides the "way out" of my criti-

13. Shiner, *supra* note 3, at 221.

14. Payne, *supra* note 2, at 310.

15. H. HART, *supra* note 1, at 229.

16. *Id.* at 196-99.

cisms of Hart. Thus, Shiner writes:

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. 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.¹⁷

Shiner's argument is that if the citizens accept the secondary rule of recognition, then that acceptance seems to provide the basis for Hart's notion of commitment to acceptance in advance of the primary rules.

Put in terms of the two minimum conditions for the existence of a legal system, however, Shiner's argument clearly goes beyond Hart, although Shiner does not seem to realize this. The two minimum conditions only require acceptance of the secondary rules by the legal officials; the citizens are required to accept neither the primary nor the secondary rules. My critique of Hart focused on the two minimum conditions as they are stated in *The Concept of Law*; consequently, Shiner is inaccurate in claiming that "Payne's objection to this move" is that it can be reduced to Hobbesian terms, for I never considered a requirement that citizens accept the rule of recognition. On the contrary, my objections to my devised reply concentrated on the unacceptability of Hart's concept of authority.¹⁸

II. ACQUIESCENCE AS A FORM OF ACCEPTANCE

In defending Hart, Shiner's strategy is to base the authority of law on the acceptance by citizens of the rule of recognition; hence, his first task is to show that such acceptance by citizens is implied by Hart's notion of an internal point of view. Shiner argues that an

17. Shiner, *supra* note 3, at 222 (footnote omitted).

18. Payne, *supra* note 2, at 313-15.

examination of the internal point of view reveals that Hart does not "sort out in detail the criteria in terms of mental attitudes which distinguish obedience, acquiescence, and acceptance,"¹⁹ and that we may "stipulate that one may regard acquiescence as a form of acceptance, albeit a weak one."²⁰

Shiner points out that Hart's use of "acquiescence" illustrates that Hart does not clearly distinguish between mental criteria that are dispositions and those that are occurrences. Thus, Hart sometimes seems to link acquiescence with acceptance, for he says, "The ordinary citizen manifests his acceptance largely by acquiescence in the results of official operations."²¹ Usually, however, Hart distinguishes between acquiescence and acceptance by noting that the latter requires the internal point of view. Furthermore, Shiner points out, though Hart speaks of the citizen using the law "he does not make clear whether this 'using' counts as acceptance or acquiescence or obedience or what."²² Shiner's contention is that, although in "acquiescing in" or "using" the law, the citizen may not be manifesting the usual indications of the critical reflective attitude involved in the internal point of view, such occurrences must be distinguished from the long-term dispositions to accept the law that the citizens may have. Thus, although a citizen's behavior may manifest mere acquiescence in the law, this still may be enough to assert that the citizen accepts the law. Shiner concludes:

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 a lawyer when the chips are down, it seems to be perfectly proper to speak of him or her as accepting the fundamental rule of recognition.²³

There is little doubt, of course, that citizens frequently acquiesce in and use the system; hence, if acquiescence is a form of acceptance, then citizens do generally accept the system. And if acceptance of the system implies acceptance of the rule of recognition,

19. Shiner, *supra* note 3, at 222.

20. *Id.* at 223.

21. H. HART, *supra* note 1, at 60.

22. Shiner, *supra* note 3, at 223.

23. *Id.*

then Shiner has succeeded in making the case that citizens accept the rule of recognition.

Critique of Shiner's Argument

In my criticisms of this stage of Shiner's argument, I shall distinguish between the stipulation that acquiescence is a form of acceptance and the argument that the citizen who acquiesces in the system thereby accepts the rule of recognition.

There are several reasons why Hart could not accept Shiner's stipulation. For Hart, a social rule exists only if there is a social practice of acceptance, and the key element in the explication of acceptance is the internal point of view. In Hart's notion of an internal point of view, there must be *some* evidence of the critical reflective attitude,²⁴ though it does not follow that the latter must *always* be manifested. There is therefore no reason why Hart's notion of the internal point of view cannot accommodate Shiner's distinction between occurrences and dispositions. But *mere* acquiescence with *no* evidence or manifestation of the critical reflective attitude that is necessary for the internal point of view could not be regarded by Hart as the acceptance of a social rule. Therefore, the most that Shiner can stipulate, while remaining consistent with Hart's notion of acceptance, is that acquiescence manifesting the internal point of view may count as acceptance; such a stipulation, however, would be superfluous, for it denies that *mere* acquiescence is acceptance, and it again requires manifestation of the internal point of view. Rather than stipulate that *some* form of acquiescence is acceptance, all that is necessary is the point that *manifestation* of the internal point of view is not *always* required for acceptance.²⁵

Furthermore, if mere acquiescence were to count as acceptance, Hart's distinction between a social rule and a group habit could be obscured. Citizens participating in habitual behavior may be observed to be merely acquiescing in a certain pattern of behavior, but Shiner's stipulation might often imply that such habitual behavior may be regarded as acceptance. In Hart's view, such an in-

24. H. HART, *supra* note 1, at 56. Hart does not specify that any amount of evidence is required.

25. The internal point of view is not required at *all* times, that is.

ference would lead to the contradiction that a normative social rule exists because citizens accept (through mere acquiescence) a social rule, but a normative social rule does not exist because the behavior is merely habitual and lacks the internal point of view. Hence, if acquiescence may not be clearly distinguishable from habitual behavior, and acquiescence is a form of acceptance, Hart's critique of the Austinian model of law may be jeopardized, for mere acquiescence would be sufficient, according to Shiner's stipulation, to yield the notion of a normative social rule. Hart draws a clear line between acceptance on the one hand, which requires some manifestation of the internal point of view, and mere acquiescence, mere obedience, or mere habitual behavior. Without drawing this line clearly, there is no obvious way for Hart to argue that habitual obedience to the Austinian sovereign does not indicate the existence of a normative rule.²⁶ Consequently, if we stipulate that acquiescence alone is a form of acceptance, we leave the door open for a reduction of Hart's view to that of law based on power alone.

Shiner's argument that citizens who acquiesce in or use the system thereby accept the rule of recognition is also problematic. First, unless it is already stipulated that acquiescence is acceptance, it does not necessarily follow that the citizen *accepts* anything simply because he or she hires a lawyer when the chips are down. Thus, there are situations in which "the chips are down" in the sense that one has no *viable* option but to hire a lawyer. For example, a black person in South Africa who in fact abhors the system, but who nevertheless hires a lawyer when the chips are down, may have no viable option. In such a case, there is no acceptance of anything, but mere acquiescence. One might reply, however, that if the citizen uses the system in the sense of benefiting from that use, then the citizen is *obligated* to the system.²⁷ This reply does not show that citizens who use the system thereby accept it, for the reply provides only a *moral* argument that citizens *ought* to accept the system.

Second, even assuming that acquiescing in the system establishes that one also accepts something, it does not follow that one

26. H. HART, *supra* note 1, at 54.

27. A form of this argument will be examined later. See text accompanying notes 56-61 *infra*.

accepts the rule of recognition. One might hire a lawyer and accept a social rule to the effect that one ought to hire a lawyer, but that does not imply that one accepts the rule of recognition. Again, the black person in South Africa might argue that one ought to hire a lawyer, yet might have the attitude that "that's how the system works," which is quite different from "that's how the system should work." The latter includes the internal point of view and is normative, while the former is not normative but is just a recognition of the facts of life. Assuming, therefore, that one accepts the practice of hiring a lawyer as a common standard to be followed by all, it follows that one accepts that standard, but not that one accepts the rule of recognition. The black person may accept the practice of hiring a lawyer but may reject the rule of recognition as racist.²⁸

The Interpretation of Shiner's Argument

Before turning to the second stage of Shiner's defense of Hart, it is necessary here to note that the first stage appears to be sufficient to base law on accepted authority, and therefore the second stage is unnecessary. The first stage purports to show that acquiescence is a form of acceptance. But assuming for the moment that Shiner had succeeded with this stage, the conclusion to be drawn is that citizens accept the rule of recognition. Recall, however, that Shiner thinks that acceptance by citizens of the rule of recognition will serve as the basis for their commitment to accept in advance the primary rules. The stipulation therefore is sufficient to show that law is based on accepted authority. The problem of interpretation that arises at this point is whether the stipulation stage of Shiner's defense of Hart is intended by Shiner as a necessary step in a larger argument or as an independent argument. Two points indicate that it is best to view the first stage as part of a larger argument.

First, Shiner says that his defense of Hart involves going beyond Hart in two ways and that one must relate the internal point of view to the minimum content of natural law.²⁹ In addition, he in-

28. A person may consider particular laws to be obligatory, but reject part or all of the constitution.

29. Shiner, *supra* note 3, at 221.

quires, "What follows from that?" thus indicating that the stipulation has implications for Hart's view of law. I shall argue shortly, however, that the stipulation has no such implications and it is an unnecessary step in the overall argument.³⁰

Second, the stipulation is insufficient to establish that the citizens have any *commitment* to accept the primary rules, and thus this stage would not have succeeded as an independent argument. That is to say, Shiner provides *no* reason to suppose that acquiescence may serve as the basis for a commitment to accept rules of *obligation*. Acquiescence, even if it is regarded as acceptance, does not entail obligation, for again, Hart distinguishes between accepted rules that impose obligations and those that do not. If normal acceptance does not necessarily meet the conditions for an obligatory rule, it would be implausible to argue that nevertheless mere acquiescence fulfills the conditions for an obligatory rule. Acquiescence does not therefore imply that the law rests on accepted *authority*. To establish a *commitment* to accept *obligatory* rules, something much stronger than acquiescence is required.

III. THE ARGUMENT FROM NATURAL NECESSITY

Shiner argues that the basis for a commitment to accept obligatory rules may be found in Hart's argument from natural necessity for a minimum content of natural law. Shiner's rationale here is far more complex than his argument that acquiescence is a form of acceptance. The argument may be divided into three components, namely that natural necessity establishes that it is internal to humans as social beings to accept (1) rules of recognition, (2) legitimate legal authority, and (3) legal obligation.

Natural Necessity and the Rule of Recognition

Having stipulated that acquiescence is a form of acceptance and having stated that the ordinary citizen who hires a lawyer when the chips are down accepts the rule of recognition, Shiner introduces the second way of going beyond Hart:

What follows from that? For Hart, societies with any kind of a

30. Further difficulties of interpretation are noted at text accompanying notes 31-33 *infra*.

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.³¹

Shiner's contention is that it is *internal* to humans as social beings to accept rules of recognition and to bind together in societies because it is a *natural necessity* for humans to do so. This argument rests entirely on the concepts of natural necessity and internality, as I shall call it, and we shall examine these concepts later.³² Here, we may note that this argument has no apparent connection to the first stage involving Shiner's stipulation, for this argument is based on natural necessity. Consequently, it is not entirely clear what Shiner is arguing when he asks, "What follows from that?"

Shiner cannot be arguing that it *follows* that societies with legal systems have rules of recognition, for this follows from Hart's concept of a legal system, not from the contention that citizens who acquiesce in the law also accept the rule of recognition. Shiner might, however, think it follows that to be a member of a society is to accept a rule of recognition. But *if* this is Shiner's conclusion, it is false for Hart. Hart distinguishes between societies with primary rules alone and societies with both primary and secondary rules. The former may be said to have law, though not a legal system, while the latter alone may be said to have a legal system.³³ For Hart, therefore, one might be a citizen in a society with no legal system and no rule of recognition. Shiner's next statement is therefore also false for Hart: the rule of recognition is not cohesive of and constitutive of a society, for a society may exist without a rule of recognition. We may conclude that for Hart none of these three assertions actually follows from the first stage of Shiner's argument; the first assertion follows from Hart's concept of a legal sys-

31. Shiner, *supra* note 3, at 223 (footnote omitted).

32. See text pp. 517-18 *infra*.

33. H. HART, *supra* note 1, at 231, distinguishes between a *set* of rules and a *system*.

tem, while the next two follow from an inaccurate characterization of Hart's view of society.

Shiner contends that the rule of recognition is cohesive of and constitutive of a society and that the deep significance of this for Hart is that the *reason* for such association is natural necessity. Apart from the question of whether this contention correctly characterizes Hart's argument from natural necessity, it does not follow that humans will *both* bind together in societies and accept rules of recognition. If it is a natural necessity that humans bind together in societies, it may nevertheless be the case that a given society has no rule of recognition. Though his argument again is not entirely clear, Shiner seems to be arguing that as social beings humans will accept rules of recognition. Hart, however, does not take such a stand in *The Concept of Law* on the nature of humans as social beings, but rather merely distinguishes between two kinds of societies, those with primary rules and those with primary and secondary rules.

Finally, there is one additional difficulty with this part of Shiner's argument. The argument has an apparent ambiguity concerning whether natural necessity establishes that humans (1) *will* in fact bind together and accept rules of recognition, or (2) merely *must* or *should* do so. Shiner argues that *inevitably* humans *will* bind together and accept rules of recognition. Aside from whether natural necessity establishes factual statements and whether Hart employs natural necessity in this way, the problem of ambiguity arises in the following way: Shiner is attempting to establish a basis for a *commitment* by citizens to accept the primary rules, but an argument for a commitment seems to necessitate a reason why humans must or should accept the primary rules, not an existential statement that humans will accept the rule of recognition. As we shall see, the problem of ambiguity with the use of natural necessity also arises in Shiner's arguments for legal authority and legal obligation.³⁴

Natural Necessity and Legal Authority

The existence of authority, Shiner maintains, is not merely an

34. See text pp. 520-21 *infra*.

external fact of one's environment. On the contrary, Shiner writes, "the doctrine of natural necessity for a minimum content of natural law says that it [the existence of authority] is not external to oneself as a social being but internal."³⁵ In the Hobbesian conception of man and society, men existing in the state of nature are conceivable as men, Shiner adds, but "[b]y contrast, if Hart is right, the metaphor of 'natural necessity' implies that such a thing is *not* conceivable," and "the relation between citizen and sovereign must be understood in terms of a certain *quality* of life."³⁶ Consequently, Shiner argues, the voluntariness needed to create legitimate legal authority is "the long-term dispositional voluntariness internal to the existence of a complex social practice of acceptance of a rule of recognition."³⁷ Shiner concludes: "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."³⁸ Again, the key to Shiner's argument for legal authority is the doctrine of natural necessity, but Shiner has developed the idea of natural necessity so that it now *implies* that humans must be *conceived of* as social beings. Finally, we may note once more that Shiner employs natural necessity to establish the *existence* of legitimate legal authority.

Natural Necessity and Legal Obligation

Shiner maintains that "[a] descriptive theory of legal obligation leaves legal obligation as it is."³⁹ Shiner encapsulates his argument for legal obligation in the following way:

[L]egal 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

35. Shiner, *supra* note 3, at 224.

36. *Id.*

37. *Id.*

38. *Id.* at 225.

39. *Id.*

a given.⁴⁰

Legal obligation is rooted in natural necessity, but we may note once again the problem of ambiguity. On the one hand, legal obligation "is there," while on the other hand, legal obligation "has to be accepted as a given."

A descriptive theory of legal obligation may leave legal obligation as it is; yet, according to Shiner, the theory is not a triviality, for it

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 the natural history of human beings.⁴¹

The argument in this passage is based again on natural necessity, which, according to Shiner, implies that there is a *necessary* element to any society's form of life. The interesting twist is that in Shiner's descriptive theory the description concerns what is *internal* to humans as social beings, so that the theory both avoids triviality and preserves an internal point of view necessary, in Hart's view, for the existence of a *normative* rule.

Thus far, my summary and discussion of Shiner's defense of Hart have revealed several problems with Shiner's arguments, but the central feature of Shiner's defense of Hart is clearly the doctrine of natural necessity. Despite the fact that Shiner's entire case rests on natural necessity, Shiner nowhere attempts to substantiate his interpretation of Hart's argument for a minimum content of natural law. Through a detailed examination of Hart's argument from natural necessity, I shall now argue that Shiner employs a version of the argument from natural necessity that is so different from Hart's that Hart could not accept Shiner's defense of him.

Hart's Argument for a Minimum Content of Natural Law

The general form of the argument for the minimum content of natural law, Hart writes, "is simply that without such a content

40. *Id.* (footnote omitted).

41. *Id.* (footnote omitted).

laws and morals could not forward the minimum purpose of survival which men have in associating with each other."⁴² Thus, assuming survival as a human aim, Hart says, certain "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."⁴³ Hart cites the following truisms: humans are vulnerable to bodily harm; they are approximately equal in strength and intelligence; they have limited altruism although they are neither angels nor predominantly selfish; there are limited resources; and humans have limited understanding and strength of will.⁴⁴ 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 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.⁴⁵

There must be a place, Hart continues, for a category of statements besides definitions and factual statements, namely "those the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have."⁴⁶ Hart emphasizes the importance of stressing "the distinctively rational connexion between natural facts and the content of legal and moral rules in this approach."⁴⁷ Thus, the function of the truisms or generalizations in statements of natural necessity is that "in each case the facts mentioned afford a *reason* why, given survival as an aim, law and morals should include a specific content."⁴⁸

We may consider the argument for sanctions developed under the heading "Limited Understanding and Strength of Will" to il-

42. H. HART, *supra* note 1, at 189.

43. *Id.* at 188.

44. *Id.* at 190-93.

45. *Id.* at 195.

46. *Id.*

47. *Id.* at 189.

48. *Id.*

lustrate Hart's approach. It is a truism, Hart argues, that people "are tempted at times to prefer their own immediate interests and, in the absence of a special organization for their detection and punishment, many would succumb to the temptation."⁴⁹ In view of the *fact* that there will be malefactors, Hart continues, "submission to the system of restraints would be folly if there were no organization for the coercion of those who would then try to obtain the advantages of the system without submitting to its obligations."⁵⁰ Because humans do have limited strength of will and often do give in to their immediate interests, Hart concludes:

'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 in a *coercive* system.⁵¹

Sanctions are therefore a natural necessity, according to Hart, *because* humans have limited strength of will. The general form of the argument is: given survival as a human aim, and given certain facts about human beings, sanctions are a natural necessity. Assuming survival as an aim, it is the generalizations or truisms that provide the *reason why* something is a natural necessity.

This form of the argument for a minimum content of natural law is not peculiar to the argument for sanctions. Thus, under the heading "Approximate Equality," Hart argues that it is a truism "that no individual is so much more powerful than others, that he is able, without cooperation, to dominate or subdue them for more than a short period," and that "[t]his fact of approximate equality, more than any other, makes obvious the necessity for a system of mutual forbearance and compromise."⁵² Likewise, under the heading "Limited Altruism," Hart writes that "if men are not devils, neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual

49. *Id.* at 193.

50. *Id.*

51. *Id.*

52. *Id.* at 190-91.

forbearances both necessary and possible.”⁵³ Similarly, it is human vulnerability that provides the reason for protection of the person from the free use of violence,⁵⁴ and it is the fact of limited resources that affords the reason for the institution of property.⁵⁵

Shiner Versus Hart on the Natural Necessity Argument

There are several obvious differences between Hart and Shiner regarding the argument from natural necessity. First, the general form of the argument is very different. For Hart, given survival as a human aim, the contingent *facts* are the reason why something is a natural necessity. For Shiner, the reason for something is natural necessity, and there is no mention of truisms about humans or their world. Thus, in Hart’s argument, natural necessity implies nothing without the assumptions of survival and the truisms, and therefore implies no doctrine of internality. Hart’s argument from natural necessity cannot be used to derive internality, the necessity of humans binding together in societies or of their acceptance of a rule of recognition, legal authority, or legal obligation.

Second, in Hart’s argument, natural necessity is used to establish that social organizations *must* or *should* have certain rules of conduct if they are to be viable. This is because the contingent facts in Hart’s argument provide a *reason why* social organizations *need* certain basic rules of conduct; the argument therefore provides a *justification* for having sanctions and rules protecting person and property, but the argument does not imply that anything *will exist*. Hart’s argument may not be used to establish that humans *will* bind together and accept the rule of recognition, legal authority, and legal obligation.

For these two reasons, I conclude that Shiner has gone too far beyond Hart and introduced an argument from natural necessity that is different in kind from Hart’s. Therefore, to the extent that Shiner’s defense of Hart rests on Hart’s version of an argument from natural necessity, Shiner’s defense does not succeed. This conclusion rests on my interpretation of Hart’s doctrine of a minimum content of natural law. But my contention that Hart’s natu-

53. *Id.* at 191-92.

54. *Id.* at 190.

55. *Id.* at 192.

ral necessity argument does not imply a basis for a commitment to accept the primary rules is contradicted by Professor Barry Hoffmaster's interpretation of Hart.

Hoffmaster's Interpretation of Hart's Minimum Content

According to Hoffmaster, "Hart holds that there is a rational and moral justification for obeying valid laws. The source of this justification is his argument for the minimum content of natural law."⁵⁶ Hoffmaster begins by citing a passage at the beginning of the section entitled "The Minimum Content of Natural Law":

In the absence of this [minimum] content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of cooperation given voluntarily by those who find that it is in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible.⁵⁷

As we have seen in Hart's argument for sanctions, reason demands voluntary obedience in a coercive system. But there is more to Hart's view, according to Hoffmaster:

That some people voluntarily obey valid laws not only is a necessary condition for the existence of a legal system with coercion but also entitles those who do obey to extract obedience from others by attaching sanctions to disobedience. The justification of the coercive use of sanctions seems to be ultimately a principle of fairness.⁵⁸

Our examination of the argument for sanctions contradicts Hoffmaster's claim that the justification of sanctions is a principle of fairness, for we saw that the reason for sanctions was the fact of limited strength of will on the part of humans. Hoffmaster argues, however, that the appeal to the principle of fairness is linked to an argument from benefits:

Hart's view is that most people are rational and self-interested and so will recognize the benefits of having a legal system with

56. Hoffmaster, *Professor Hart on Legal Obligation*, 11 GA. L. REV. 1303, 1316 (1977).

57. H. HART, *supra* note 1, at 189.

58. Hoffmaster, *supra* note 56, at 1316.

at least the minimum content. This appreciation of the benefits of a legal system provides both justification and motivation for voluntary compliance with the valid legal rules of the system. Yet at the same time, everyone, irrespective of whether he obeys the valid legal rules, benefits from the voluntary restraint of the majority. The majority consequently has a moral right to coerce everyone into obedience.⁵⁹

Hoffmaster concludes his argument by commenting that although "[t]he ground of the moral right is not made explicit by Hart . . . his worry about people trying to obtain the advantages of the system without accepting the burdens certainly suggests that the moral right rests on a principle of fairness."⁶⁰

Hoffmaster's argument faces the obvious problem that Hart does not mention anything about moral rights, moral justifications, benefits, or the principle of fairness in his argument for sanctions; Hart argues that the justification of sanctions lies in the weakness of the human will, given survival as an aim.

But this short reply to Hoffmaster is perhaps too abrupt, for Hart does say that in the absence of a minimum content humans would have no reason for obeying voluntarily any rules, and that a system of mutual forbearance and compromise is the *base* of both legal and moral obligation. Do not these points suggest that the minimum content is the basis for the justification of legal obligation? This conclusion, however, rests on a confusion between a justification and a necessary condition. The minimum content of natural law is a necessary condition for the existence of a viable social organization. Hence, a system of mutual forbearance is the *base* of legal and moral obligation because without such a system the institutions of legal and moral obligation could not survive. But the fact that a social organization does satisfy the minimum content and therefore exists does not imply a justification for obligation: as Hart points out, a system satisfying the minimum content may be too "iniquitous to be applied or obeyed."⁶¹ Satisfaction of the minimum content may be a necessary condition for the existence of a

59. *Id.*

60. *Id.* at 1317 (footnote omitted). We may note here that Hart's famous argument from fairness, which involves a "mutuality of restrictions," is developed, not in *The Concept of Law*, but in *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185-86 (1955).

61. H. HART, *supra* note 1, at 203.

social organization that imposes rules of obligation, but it is not a sufficient condition for the existence of an organization that imposes obligations, for the minimum content hardly fulfills the conditions for the existence of an obligatory rule. Indeed, to argue that the minimum content is sufficient justification for a moral right to coerce people into obedience reduces Hart's view to absurdity, for any social organization, whether a tennis club or a gang of killers, could claim such a moral right.

Because the minimum content is a necessary, but not a sufficient, condition for the existence of a social organization that imposes obligations, the minimum content is far too weak to serve as a basis for a commitment to accept primary rules for the simple reason that the minimum content does not, for Hart, imply obligation. Consequently, Shiner's attempt to defend Hart with a minimum content argument had no chance of succeeding, unless the argument was changed significantly

Shiner's Concept of Natural Necessity

We have already seen that Shiner's concept of natural necessity is different in kind from Hart's: by itself, Hart's concept yields nothing, for it operates under the assumptions that humans want to survive and that there are certain contingent truisms about humans and their world; whereas Shiner's concept of natural necessity implies that certain things are internal to humans as social beings, and that certain things and actions will occur. Viewed independently, Shiner's concept of natural necessity presents three difficulties.

First, Shiner thinks the argument from natural necessity establishes factual statements, but this seems wrong simply because natural necessity provides a *reason why* something should or must exist, not that it does exist. Thus, it may be the case that some citizens (perhaps even a majority) do not *in fact* accept the rule of recognition. In such a case, natural necessity may be given as a reason why they *should* or *must* accept the rule of recognition, but it does not imply that they *do* or *will* accept it.

Second, the argument from natural necessity does not seem to imply internality, but rather presupposes it. To make this point clear, suppose we ask, "Why is it a natural necessity for humans to bind together in societies?" or "Why is it a natural necessity that

humans accept a rule of recognition?" Shiner's response seems to be that both are internal to humans as social beings. But this response cannot be the reason why something is a natural necessity, for that would mean that natural necessity is implied by internality, and we know that Shiner says that the doctrine of natural necessity implies internality. If, however, natural necessity implies that man must be conceived as a social being, we may simply inquire again, "Why?" Shiner's only response can be that that is the way things are, which means that humans are by nature social beings; although that may be true, it nevertheless is not implied by natural necessity. I conclude, therefore, that Shiner's arguments from natural necessity presuppose a conception of humans as social beings because the concept of natural necessity does not by itself imply the idea of internality.

Third, Shiner does not consider the implications that the argument from natural necessity would have for Hart's notion of an accepted social rule. Thus, if we assume that there are no problems with Shiner's argument from natural necessity and that the argument does establish the conclusions Shiner draws, then an *accepted* social rule will *exist* regardless of whether it is accepted or not. That is, according to Shiner's version of natural necessity, the rule of recognition as well as the primary rules will exist. There are two problems here. First, the primary rules will be accepted because the citizens are committed to accept them; hence, the primary rules may be accepted rules despite the fact that they might not be accepted at all. Second, even if in fact some or many of the citizens do not accept the rule of recognition, natural necessity demands that the rule of recognition be an accepted rule anyway. In both cases, then, natural necessity establishes the existence of *accepted* rules that are *not* accepted. Therefore, if natural necessity establishes factual statements, reality may contradict natural necessity. Alternatively, if natural necessity establishes that a rule must or should be accepted, the rule might still not exist because it is not in fact accepted. In either version of natural necessity, Hart still would face the problem that a commitment to acceptance apparently involves a different notion of a social rule than that developed in *The Concept of Law*.⁶²

62. *Id.* at 54.

Shiner's Descriptive Theory of Legal Obligation

We may now examine Shiner's descriptive theory of legal obligation. Such a theory, Shiner contends,

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 society is dependent upon an ultimate rule of recognition. The existence 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 obligation is therefore 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.⁶³

In Hart's theory, because the rule of recognition is an accepted social rule, its existence is a matter of fact. Furthermore, for Hart, a rule is legally valid if and only if it satisfies the criteria of validity spelled out in the rule of recognition. Hence, legal obligation may be determined simply by seeing whether a rule is valid. As Shiner puts it, a descriptive theory leaves legal obligation as it is.

But Shiner's argument faces the same difficulty noted at the end of the last section. Shiner says that laws are social rules; for Hart, this means they are *accepted* rules. Yet Shiner maintains that legal obligations follow from the rule of recognition, which implies that the laws, at least the primary rules of obligation, need not be accepted. But if the primary rules need not be accepted, it is unclear how they are to be considered social rules and how they are rules of obligation. Once again, the problem is that in *The Concept of Law* Hart develops only one idea of a normative rule, while arguing that legal obligation follows from the existence of a rule of recognition. However, this problem also creates trouble for Shiner's descriptive theory of legal obligation: his theory claims to leave legal obligation as it is because the existence of legal obligation is a matter of fact; but if a rule of legal obligation exists solely because it follows from the rule of recognition, that rule may not be accepted, which means that it will fail to satisfy the conditions for obligation.

63. Shiner, *supra* note 3, at 218.

Shiner's descriptive theory therefore may *describe* a situation as one involving the existence of legal *obligation*, despite the *fact* that no accepted rule of obligation exists. Such a misdescription is of course the result of Hart's doctrine of legal validity, but it is doubtful that Shiner would want to abandon Hart's notion that legal validity follows from the rule of recognition, for this notion is a central feature of Hart's version of legal positivism.⁶⁴

IV. CONCLUSION

The idea that law is based on accepted authority, rather than on power or morality, implies that legal obligation may be reduced to neither coercion nor moral obligation. Therefore, something like a descriptive theory of legal obligation (at least a theory in which legal obligation is nonreductive) is presupposed by Hart's attempt to base his theory on accepted authority. In this final section I shall examine the concept of law based on accepted authority, as it is found in *The Concept of Law*, and the concept of a descriptive theory of legal obligation.

Hart's Argument for Legal Authority

Hart discusses the concept of authority in the section on "Legal Validity and Moral Value." In this section, Hart argues that a legal system may have valid laws that nevertheless offend basic moral principles. Thus, while the system of mutual forbearances underlying law and morals is a natural necessity, the protections and benefits of such a system may be extended to very different ranges of persons; indeed, Hart says, "it is plain that neither the law nor the accepted morality of societies need extend their minimal protections and benefits to all within their scope, and often they have not done so."⁶⁵ At this point in his argument Hart refers to 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 govern-

64. H. HART, *supra* note 1, at 100.

65. *Id.* at 196.

ment cannot be established. But coercive power, thus established on its basis of authority, may be used in two principal ways.⁶⁶

These two ways, Hart continues, include using the coercive power of the law against malefactors and using it against oppressed groups, who are the law's "victims, not its beneficiaries."⁶⁷

In this section of his work 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."⁶⁸ Hart then rejects the dichotomy between law based on power and law based on morality:

Not only may vast numbers be coerced by laws which they do not regard as morally binding, but it is not even true that those who do accept the system voluntarily, must conceive of themselves as morally bound to do so [T]heir allegiance to the system may be based on many different considerations 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.⁶⁹

Those who accept the authority of law, Hart adds, "look upon it from the internal point of view . . . Yet they are not thereby committed to a *moral* judgment that it is morally right to do what the law requires."⁷⁰ Hart's view is therefore that we can speak of the *normative* authority of law because of *acceptance*; we need only recall that for Hart it is the practice of acceptance, with its internal point of view, that makes a standard a *normative* rule rather than a mere regularity.

In Hart's view, though the coercive power of law presupposes its accepted authority, law based on accepted authority brings gains at a cost: "the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose sup-

66. *Id.*

67. *Id.* at 197.

68. *Id.* at 198.

69. *Id.* at 198-99.

70. *Id.* at 199.

port it can dispense.”⁷¹ The existence of a legal system, Hart points out, involves two aspects: “It involves the attitudes and behaviour involved in the voluntary acceptance of rules and also the simpler attitudes and behaviour involved in mere obedience or acquiescence.”⁷² And because the two minimum conditions for the existence of a legal system require acceptance only by the legal officials, we may infer that only the officials need accept the legal system. Therefore, law based on accepted authority implies only authority accepted by legal officials.

In my original Article in this Review, I argued that it is begging the question to base the authority of law on the officials’ acceptance of their own authority.⁷³ But there is a further difficulty with Hart’s contention that voluntary cooperation and acceptance *create* authority. Hart maintains that the argument for sanctions demonstrates that if a system of rules is to be imposed by force, there must be some people who accept it voluntarily; this implies that voluntary acceptance is a necessary condition for the existence of any social organization. Hart illegitimately concludes, however, that “[w]ithout their voluntary co-operation, thus creating *authority*, the coercive power of law and government cannot be established.”⁷⁴ Here Hart confuses the idea of voluntary acceptance being a necessary condition for the coercive power of law and government with the claim that voluntary acceptance creates authority. The latter claim, however, is not acceptable because voluntary cooperation and acceptance do not necessarily satisfy the conditions for the existence of obligation; again, for Hart, acceptance does not imply obligation. My original argument of course still holds: voluntary cooperation and acceptance by officials of their own authority is circular. Here, however, my point is that satisfaction of the minimum content of natural law (which requires voluntary acceptance by *some* of the system) does not imply the existence of authority.

The problem that keeps surfacing, then, is that acceptance is not sufficient for obligation. Hence, the attempt to base law *solely* on

71. *Id.* at 198.

72. *Id.* at 197.

73. Payne, *supra* note 2, at 314.

74. H. HART, *supra* note 1, at 196.

accepted authority does not succeed, simply because acceptance alone does not imply authority. Apparently, Hart's only alternative is to provide that there be enough acceptance to fulfill the conditions for obligation. But this will not do, for then the question arises, "Why is it that if a certain *number* of citizens accept the legal system, that *fact* establishes obligation?" The question asks for a moral justification for legislating that beyond a certain point obligation exists. I can find no response to this question in *The Concept of Law*, and certainly the minimum content of natural law does not provide the answer.

The Descriptive Theory of Legal Obligation

No response to the question can be provided in *The Concept of Law* other than the inadequate attempt to ground obligation and authority in the minimum content of natural law. This is because the question requires a *justification* for drawing the line between fulfillment and nonfulfillment of the conditions that imply obligation, but Hart's social practice theory of a social rule is incapable of providing such a justification (which is why one must turn inevitably to something like an argument from natural necessity, which provides a justification for something). Ronald Dworkin makes a similar point in his criticism that Hart's idea of a social rule constituted by acceptance fails to distinguish between the social practice of acceptance and a normative rule: Hart's social rule theory "believes that the social practice *constitutes* a rule which the normative judgment accepts; in fact the social practice helps to *justify* a rule which the normative judgment states."⁷⁵ By making the distinction between a social practice and a normative rule, Dworkin may ask *why* a social convention creates an obligation; or, in terms of my question, "What is the justification for drawing the line at a certain number?" I am in agreement here with Dworkin that, in Hoffmaster's words, "the sense in which an obligation is binding must be explained in terms of a justification."⁷⁶ And this means, as Hoffmaster correctly infers, that for Dworkin, as well as for myself, "it is impossible to have a purely descriptive analysis of

75. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855, 867 (1972).

76. Hoffmaster, *supra* note 56, at 1324.

obligation."⁷⁷

If this conclusion is correct, Hart's theory of law faces the following dilemma: if he analyzes a social rule in terms of a practice of acceptance, then his theory of law may be reduced to law based on power alone because the existence of social practices does not necessarily imply obligation and authority; alternatively, if Hart supplements his analysis of a normative rule with arguments establishing the grounds for obligation and authority, then his idea of a social rule constituted by the practice of acceptance is superfluous to the establishment of obligation and authority. If the minimum content of natural law were employed as a foundation for a commitment to accept in advance the primary rules, there would be no need for an actual practice of acceptance. The problem that this dilemma creates for Hart's theory of law is that the separation of the idea of a normative rule from the existence of the practice of acceptance threatens Hart's legal positivist claim that there is a factual criterion distinguishing law from morality. The virtue of acceptance is that it provides a factual criterion for the existence of a normative rule; hence, Hart's rule of recognition is a matter of fact. My criticisms imply, however, that acceptance of the rule of recognition does not necessarily establish obligation; consequently, it is false that legal *obligation* follows solely from conformity with the criteria of validity laid out in the rule of recognition. On the contrary, what appears to follow from conformity with the rule of recognition is that a rule is *valid*, though not necessarily *obligatory*.⁷⁸

For Hart at least, the distinction between what the law *is* and what the law morally *ought* to be presupposes that legal and moral obligation may be clearly distinguishable.⁷⁹ On the level of particular laws, it is plausible to draw a fairly sharp distinction between

77. *Id.*

78. Hoffmaster points out that for Hart it is not the case that legal validity implies legal obligation, if this is understood to mean that "any rule that is legally valid imposes a legal obligation. But Hart's power-conferring or facilitative rules are obvious counterexamples." *Id.* at 1307 (Hoffmaster's analysis of a point made by Hill in *Legal Validity and Legal Obligation*, 80 YALE L.J. 47, 48 (1970)).

79. Austin's famous dictum is: "The existence of law is one thing; its merit or demerit is another." J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 184 (1954). For the meanings of "positivism," see Hart, *Positivism and the Separation of Law and Morals*, in *THE PHILOSOPHY OF LAW* 18 (R. Dworkin ed. 1977).

what a law is and what a law morally ought to be.⁸⁰ The force of my critique of Hart, however, is that the distinction breaks down at the level of the legal system as a whole, because the authority of law, if it indeed has any, must rest not on law itself, which would be begging the question, but on moral grounds.⁸¹ Without such a basis in morality, laws would be merely valid, not obligatory.

80. This is not to say that a law may have *any* content, for it is Hart's point in his doctrine of a minimum content of natural law that law must have a minimum content: "It is in this form that we should reply to the positivist thesis that 'law may have any content.'" H. HART, *supra* note 1, at 195.

81. One might argue that law has no authority at all. See Payne, *The Basis of Law in Hart's The Concept of Law*, 9 SW. J. PHIL. 16 (1978).