

# Michigan Law Review

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Volume 73 | Issue 2

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1974

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Michigan Law Review

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### Recommended Citation

Michigan Law Review, *H. L. A. Hart on Legal and Moral Obligation*, 73 MICH. L. REV. 443 (1974).

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## H. L. A. Hart on Legal and Moral Obligation

One of the central problems in both moral and legal philosophy has been to offer a satisfactory analysis of the concept of obligation. In ordinary language the word "obligation" is used in several different contexts.<sup>1</sup> It may refer to moral obligation (*e.g.*, "I am morally obligated to keep my promise to help my uncle with his knitting"), legal obligation (*e.g.*, "I am legally obligated to report as income on my tax return whatever funds I embezzle from my employer"), political obligation<sup>2</sup> (*e.g.*, "I am politically obligated to vote"), or social obligation<sup>3</sup> (*e.g.*, "I am socially obligated to write a note of thanks to my weekend hosts"). For philosophical purposes the concept must be more sharply delineated. This note will examine H. L. A. Hart's<sup>4</sup> analysis of obligation as it is developed in *The Concept of Law* and in "Legal and Moral Obligations." Two principal criticisms will be suggested. First, either there is an inconsistency between Hart's general characterization of obligation and his characterization of legal

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1. WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1680 (2d ed. 1958).

2. Whether political obligations exist distinct from other types of obligation is disputed, but some commentators accept such a usage. Cf. Ladd, *Legal and Moral Obligations*, in *POLITICAL AND LEGAL OBLIGATION* 3 (J. Pennock & J. Chapman ed. 1970).

3. H.L.A. Hart does not agree with this use of the term: "But to use in connexion with rules of this kind the words 'obligation' or 'duty' would be misleading and not merely stylistically odd." H. HART, *THE CONCEPT OF LAW* 84 (1961).

4. Herbert Lionel Adolphus Hart is Principal of Brasenose College, Oxford University. He was formerly Professor of Jurisprudence at Oxford, and Research Fellow at University College of Oxford. He has written several very influential works in the field of legal philosophy. See, *e.g.*, H. HART, *supra* note 3; H. HART, *LAW, LIBERTY AND MORALITY* (1963); H. HART & A. HONORÉ, *CAUSATION IN THE LAW* (1959); Hart, *The Ascription of Responsibility and Rights*, 49 *PAS* 179 (1948-1949); Hart, *Definition and Theory in Jurisprudence*, 70 *L. Q. REV.* 37 (1954); Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 82 (A. Melden ed. 1958); Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958).

obligation in particular, or, if they are consistent, both analyses are unacceptable. It will be argued that there are circumstances that Hart would clearly regard as posing legal obligations that do not fall under his general characterization of obligation. Second, if Hart's analyses of legal obligation and of obligation in general are incompatible, it must be his account of the general term "obligation" that is unsatisfactory.

A central theme of *The Concept of Law* is that legal obligation is explained neither by John Austin's view of law as a system of habitually followed coercive orders<sup>5</sup> nor by moral obligation;<sup>6</sup> legal obligations can be both uncoerced and amoral, or even immoral. Instead, Hart views legal and moral obligation as distinct species of the same genus.<sup>7</sup> According to Hart, any statement of obligation presupposes the existence of a general "social rule" that covers the particular circumstance that occasioned the obligation.<sup>8</sup> Social rules that impose obligations are distinguished from all other social rules by three features.<sup>9</sup> First, and most basic, obligation-imposing rules are supported by serious social pressure. The pressure may involve physical sanctions for deviation from the rule or it may be entirely psychological, but, whatever its form, "[w]hat is important is that the 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."<sup>10</sup> Unfortunately, Hart never fully explains

5. The most influential modern exponent of the view that law is a system of habitually followed coercive orders is John Austin. See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832). For an important discussion of the pitfalls of Austin's view, see H. HART, *supra* note 3, at 18-76.

6. This theme suggests two possible claims. The first is that the criteria for determining legal obligation and moral obligation are mutually exclusive. The other is simply that the criteria are not identical. Hart seeks to establish the second claim. See H. HART, *supra* note 3, at 181-207.

7. See *id.* at 83, 168. It might be argued that Hart should not be interpreted as viewing legal and moral obligation as species of general obligation. Rather, he may be claiming that there is something approaching a "family resemblance" between the three concepts, and his discussion of obligation may be an effort to begin to delineate points of resemblance:

Moral and legal rules of obligation and duty have therefore certain striking similarities enough to show that their common vocabulary is no accident. These may be summarized as follows. They are alike in that they are conceived as binding independently of the consent of the individual bound and are supported by serious social pressure for conformity; compliance with both legal and moral obligations is regarded not as a matter for praise but as a minimum contribution to social life to be taken as a matter of course.

*Id.* at 168. See also text at notes 15-17 *infra*. However, even if Hart is interpreted in this way, his analysis is subject to the criticism advanced in this note because he treats the three features that distinguish obligation-imposing social rules, see text at notes 9-14 *infra*, as characteristic of moral and legal rules of obligation as well.

8. H. HART, *supra* note 3, at 83.

9. *Id.* at 84-85.

10. *Id.* at 84. Hart, seeking to avoid difficulties inherent in the Austinian account of legal obligation, emphasizes that the existence of serious social pressure is sufficient

the meaning of "social rule," but his interest seems to be in rules that enjoy some public support.<sup>11</sup> For example, the statement, "Jones is obligated to take the state bar examination before she can practice law in the state" might presuppose a rule that anyone who practices law without having been admitted to the bar will be subject to criminal penalties and will be forever precluded from becoming a member of the bar.<sup>12</sup> The social pressure supporting this rule includes physical sanctions (the possibility of imprisonment or fine and the threat of enforcement of an injunction against future attempts at law practice) and psychological sanctions (the strong disapproval of many in the community and possibly the feelings of shame and guilt within the offender himself).

The second feature distinguishing obligation-imposing rules from other social rules is that "they are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it."<sup>13</sup> For example, the rule requiring practicing attorneys to be admitted to the bar is supported by the belief that it is necessary to the proper functioning of the judicial system for those who practice law to have met some fairly rigorous and objectively administered standard.

The third characteristic that distinguishes social rules presupposed by statements of obligation is less important than the first two. Hart suggests simply that compliance with such rules "characteristically involves sacrifice or renunciation."<sup>14</sup> Thus, the rule that requires that attorneys take bar examinations typically necessitates time-consuming study.

Hart views the law as the sphere in which the concept of obligation most clearly belongs. In a legal system it is natural to speak of a duty to do whatever it is that the laws specify be done,<sup>15</sup> and Hart

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to create an obligation. The obligated individual need not be aware of the social pressure; coercion is not a necessary condition of obligation: "To *feel* obliged and to have an obligation are different though frequently concomitant things." *Id.* at 86 (emphasis original).

11. The degree of public support required is left unspecified. In other contexts Hart focuses on the support of officials of a legal system as opposed to that of average citizens. See text at notes 50-52 *infra*.

12. See, e.g., CONN. GEN. STAT. ANN. §§ 51-80 to -94 (1958); MICH. COMP. LAWS ANN. §§ 600.901-949 (1968).

13. H. HART, *supra* note 3, at 85.

14. *Id.* This characteristic lacks the definitional importance of the first two because Hart's elucidation seems to make it optional: "[I]t is *generally recognized* that the conduct required by these rules *may* . . . conflict with what the person who owes the duty may wish to do. Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation . . ." *Id.* (emphasis added).

15. *Id.* at 6, 27, 43, 79-80. In *Legal and Moral Obligation* Hart seems to suggest that the concept of obligation is primarily legal, extended, where appropriate, to other contexts, most notably morals: "I propose first to inquire into the character of legal obligation and then to determine why in referring to certain moral situations we

accepts the view that all persons are legally obligated to follow each applicable law.<sup>16</sup> Accordingly, Hart's general analysis of obligation should subsume legal obligation; social rules that share at least two of Hart's three characteristics<sup>17</sup>—support by serious social pressure and the supporter's belief that the rules are necessary for maintenance of social life—should lie behind all statements of legal obligation.

Hart believes that "the key to the science of jurisprudence"<sup>18</sup> rests in the recognition of the relationship between two general types of legal rules—primary rules and secondary rules. Primary rules prescribe or proscribe behavior,<sup>19</sup> and secondary rules confer the power whereby primary rules may be introduced, recognized, eliminated, changed, or applied.<sup>20</sup> The most important secondary rules are rules of recognition, which identify the primary rules of a legal system. According to Hart, the "ultimate rule of recognition" of a legal system is the secondary rule that provides the criteria by which all other legal rules are validated, or given their status as rules in the system.<sup>21</sup> For example, in the United States the ultimate rule might be stated as follows: A bill passed by both houses of Congress, not vetoed by the President, and not proscribed by the Constitution, is law.<sup>22</sup> It is this rule that identifies federal statutes as laws, and hence as legally obligatory for persons to whom they apply. It is not clear, however, whether Hart believes that the social rule that must lie behind any statement of legal obligation is the primary rule from which the obligation is immediately derived,<sup>23</sup> some other primary rule, a power-conferring secondary rule from which the primary rule is derived, some other secondary rule, or in some cases one of these and in some cases another.

Considering the first alternative, it is clear that Hart thinks that

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naturally make use of the legally colored concepts of obligation and duty." Hart, *Legal and Moral Obligation*, *supra* note 4, at 84. In *The Concept of Law* Hart appears to have dropped this claim of legal primacy, but he still views the law as the paradigm case of a system that appropriately employs the concept of obligation. See H. HART, *supra* note 3, at 166.

16. E.g., H. HART, *supra* note 3, at 43, 79-80; Hart, *Legal and Moral Obligation*, *supra* note 4, at 84.

17. See note 14 *supra*.

18. H. HART, *supra* note 3, at 79.

19. *Id.* at 78-79.

20. *Id.* at 78-79, 91-94.

21. *Id.* at 102-05.

22. Constitutional limitations on legislative action complicate Hart's analysis. *Id.* at 103.

23. A statement of legal obligation is "immediately derived" from the rule of law that it most completely applies. The statement, "Jones, a citizen of the United States, is legally obligated to file an income tax return if his taxable income is over \$1,000" is "immediately derived" from the primary rule of INT. REV. CODE OF 1954, § 1.

primary rules *can* impose obligations, but it is not clear that *every* statement of legal obligation can be immediately derived from an obligation-imposing primary rule. In his discussion of the criteria that characterize all rules of obligation, Hart states:

Characteristically, rules so obviously essential as those which restrict the free use of violence are thought of in terms of obligation. So too rules which require honesty or truth or require the keeping of promises, or specify what is to be done by one who performs a distinctive role or function in the social group are thought of in terms of either "obligation" or perhaps more often "duty." Secondly, it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do. *Hence obligations and duties are thought of as characteristically involving sacrifice or renunciation*, and the standing possibility of conflict between obligation or duty and interest is, in all societies, among the truisms of both the lawyer and the moralist.<sup>24</sup>

In the legal context, rules restricting violence and requiring honesty proscribe and prescribe conduct; therefore they are primary rules. Moreover, in the clause emphasized above, Hart derives his third characteristic of social rules of obligation from a consideration of these primary rules. Hart's use of primary rules as examples in his general characterization of the social rules from which obligation is derived suggests that he believes that primary rules that meet his criteria are sufficient to serve as the social rules that underlie statements of legal obligation.<sup>25</sup> If this is the case, such primary rules would not depend on secondary rules for their obligatory quality, although they would, of course, depend on them for their recognition as legal rules.

However, even if some primary rules satisfy Hart's three criteria, and so qualify as social rules of obligation, it is clear that not every statement of legal obligation can be immediately derived from such a primary rule. Consider, for example, the venerable rule of property law that provides that a contingent remainder is destroyed if the preceding estate is terminated before the remainder vests.<sup>26</sup> This rule has its roots in the medieval notion of seisin, and is a part of the

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24. H. HART, *supra* note 3, at 85 (emphasis added).

25. All rules that satisfy his characteristics need not be obligation-imposing rules, however; cases can be imagined in which there appears to be an applicable primary rule supported by serious social pressure and believed to be necessary to the maintenance of social order, but in which no legal obligation actually exists. For instance, a statute that itself meets Hart's three criteria may be promulgated in an irregular and unauthorized fashion, yet it may be unwittingly treated by both the public and law enforcement officials as though it had been properly promulgated under applicable secondary rules.

26. C. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 128-33 (1962); L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 207-09 (2d ed. 1956).

common law.<sup>27</sup> It has been rejected, either by legislatures or by courts, in England<sup>28</sup> and in most of the states,<sup>29</sup> but it is still in force in Florida,<sup>30</sup> despite the fact that it has been uniformly discredited by the commentators as no longer having a rational function.<sup>31</sup> The rule probably satisfies the first criterion of social rules of obligation—support by serious social pressure—for the law is enforced and contingent remainders are in fact destroyed according to its terms. It may in some cases satisfy the third criterion; for example, it may require some sacrifice on the part of the executor because it complicates his administration of the estate. Hart's second criterion, however, is not satisfied. It is unlikely that the social pressure behind the rule of destructibility of contingent remainders is presently supported by the public's belief<sup>32</sup> that such a requirement is necessary to the satisfactory "maintenance of social life or some highly prized feature of it."<sup>33</sup>

Two other sorts of legal obligations that cannot be immediately derived from a primary rule that satisfies Hart's three characteristics deserve mention. The first is exemplified by a Kentucky statute that declares that "[a]ny person who profanely curses or swears shall be fined one dollar . . ."<sup>34</sup> Because it is seldom enforced, the law does not meet the first and most essential of Hart's requirements, support by serious social pressure. The law is illustrative of the fact that most developed legal systems include obsolete and unenforced statutes that do not satisfy Hart's first criterion.<sup>35</sup> Hart recognizes this in other

27. C. MOYNIHAN, *supra* note 26, at 128-29; L. SIMES & A. SMITH, *supra* note 26, at § 103.

28. C. MOYNIHAN, *supra* note 26, at 134; L. SIMES & A. SMITH, *supra* note 26, at §§ 207-09.

29. C. MOYNIHAN, *supra* note 26, at 134-35; L. SIMES & A. SMITH, *supra* note 26, at §§ 207-09.

30. *See* Popp v. Bond, 158 Fla. 185, 28 S.2d 259 (1946); Lewis v. Orlando, 145 Fla. 285, 199 S. 49 (1940); Tankersley v. Davis, 128 Fla. 507, 175 S. 501 (1937); Smith, *Destructibility of Contingent Remainders in Florida*, 3 FLA. L. REV. 319 (1950).

31. *See, e.g.*, O. BROWDER, L. WAGGONER & R. WELLMAN, FAMILY PROPERTY SETTLEMENTS 69-74 (2d ed. 1973); C. MOYNIHAN, *supra* note 26, at 134; L. SIMES & A. SMITH, *supra* note 26, at §§ 207-09.

32. In general, Hart's analysis contemplates that only those who exert the social pressure for compliance with the rule need believe in its importance. *See* H. HART, *supra* note 3, at 85. However, it is not clear whether Hart intends that the pressure be exerted by law enforcement authorities or the public at large. *See* text at notes 50-52 *infra*. Whatever the answer, the argument here remains effective, since both groups may respect specified laws (such as the Florida contingent remainder rule) simply because they are laws, without regard to their content.

33. *See* text at note 13 *supra*.

34. KY. REV. STAT. ANN. § 436.150 (1973). Similar statutes can be found in other states. *E.g.*, N.J. STAT. ANN. 2A:140-2 (1969); R.I. GEN. LAWS ANN. § 11.11.5 (1970); VA. CODE ANN. § 18.1-237 (Supp. 1973).

35. This argument assumes that legal systems may exist without a secondary rule of obsolescence that decrees that no rule is part of the legal system if it has long

contexts, and states that "[i]f by 'efficacy' is meant that the fact that a rule of law which requires certain behaviour is obeyed more often than not, it is plain that there is no necessary connexion between the validity of any particular rule and *its* efficacy . . . ." <sup>36</sup> Nevertheless, the unenforced law, in Hart's view, continues to state a legal obligation: "A legal rule may be generally thought quite unimportant to maintain; indeed it may generally be agreed that it should be repealed: yet it remains a legal rule until it is repealed."<sup>37</sup> It appears, then, that Hart does not intend and in fact is unable to claim that every statement of legal obligation presupposes and has underlying it the particular primary rule from which that statement is immediately derived. A particular law may be obligatory simply because it has been legislated; what the law says is not necessarily relevant to its status as a legal obligation.<sup>38</sup>

It may be argued, however, that a statement of legal obligation may presuppose a primary rule other than the one from which the statement of obligation is immediately derived. Consider a hypothetical revenue provision in a jurisdiction that has no general rule requiring citizens to pay revenue to support the activities of the government. Instead, revenue is collected from the citizens through specific rules requiring the payment of particular taxes. Among these specific provisions is a strictly enforced law that requires that a four per cent tax be paid on food purchases. Again, the statute that directly imposes the obligation probably does not satisfy Hart's second criterion; it is not in itself necessary to the "maintenance of social life or some highly prized feature of it." However, the provision may be one link in a larger scheme of legislative enactments designed to produce revenue, and a broader social rule may be extracted from a statement of the general purpose of such legislation: "All citizens should pay revenue to support the activities of the government." This rule might well satisfy Hart's three criteria,<sup>39</sup> but it is a different rule from the primary rule directly presupposed by the legal obligation to pay the food tax. Furthermore, it is not a primary rule,

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ceased to be efficacious. See H. HART, *supra* note 3, at 100. The United States does not seem to have such a formal rule.

36. *Id.*

37. *Id.* at 170.

38. "[The] status of [particular laws] as obligations may be independent of their content for we not only may *have* legal duties and obligations, but we may *create*, or *impose* them (e.g., by legislation), or *incur* or *assume* them (e.g., by making contracts)." Hart, *Legal and Moral Obligation*, *supra* note 4, at 84 (emphasis original).

39. In certain respects a revenue statute lends itself more readily to Hart's analysis of social rules of obligation than do other sorts of enactments. Some legislative provisions, such as the one in the text, are nonessential parts of an essential legislative scheme, while others are part of a scheme whose general purpose is not so clear that either the public or law enforcement officials exert pressure for compliance because of a perception of social importance.



because it is neither a common-law rule nor a statute.<sup>40</sup> In any case, Hart never argues that such a primary rule is necessary to create a binding statutory scheme, and it seems clear that a statutory scheme could operate effectively as part of a legal system without a primary rule directing generally that all of the provisions of the scheme be followed. If the pressure to comply with the requirements of each of the provisions of the scheme is sufficiently great, then such an additional primary rule would not be necessary. In other words, the food tax could be enforced on its own language without reliance on a provision requiring that "all citizens pay taxes." Therefore, the suggestion that every legal system must have a primary rule for each statutory scheme that directs that each of the individual provisions of the scheme be followed does not ensure the consistency of Hart's analysis of general and legal obligation.

Hart might prefer to argue instead that every legal system must include a primary rule that directs generally that all of the primary rules in the system be obeyed. This broad primary rule would be the social rule behind every particular legal obligation. Assuming that it satisfies Hart's three criteria, it would be of little consequence that some of the primary rules from which the legal obligations are immediately derived do not satisfy the criteria. Hart's analysis of legal obligation and obligation in general would be fully consistent; every statement of legal obligation would presuppose a social rule that would meet all three of the characteristics that Hart ascribes to obligation-imposing social rules. However, Hart does not argue that it is necessary to the existence of a legal system that there be a primary rule that directs adherence to all of the primary rules in the system, and it is difficult to see how such an argument could be sustained. For example, it is not clear that the American legal system includes such a rule; if there is one, it is not statutory nor directly stated in the Constitution.<sup>41</sup> Although most people probably believe that *some* effective legal system is essential to govern and to regulate human interrelations, this is substantively different from the belief that it is essential that *all* of the primary rules of a legal system be obeyed. Furthermore, the first belief may be a social more, rather than a primary legal rule.

Moreover, if every legal system must have a primary rule requir-

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40. There may be, however, a specific secondary rule authorizing the government to collect revenue from its citizens. See U.S. CONST. art. 1, § 8.

41. There are some statutory primary rules in the United States that fulfill at least part of the function of a primary rule that directs adherence to all of the primary rules in a legal system. For example, in New York anyone who is convicted of a felony loses his right to vote. N.Y. ELEC. LAW § 152 (McKinney 1964). However, this rule only requires obedience to some criminal laws, rather than to all of the primary rules in the legal system. Treason prohibitions, e.g., U.S. CONST. art. III, § 3, require general loyalty to and support of a legal system. However, they do not demand that each and every primary rule in the legal system be obeyed.

ing that each of the primary rules in the system be obeyed, and if that rule meets Hart's three criteria for an obligation-imposing rule, Hart's position becomes inconsistent. According to his analysis the central primary rule would have to be supported by serious social pressure. Yet one of Hart's main points in *The Concept of Law* is that within a legal system men "should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny."<sup>42</sup> In other words, Hart believes that if a specific legal rule is morally abhorrent, then in some circumstances men should refuse to provide serious social pressure to support it. To reconcile this belief with the proposition that every legal system must contain a primary rule requiring that all other primary rules be obeyed, Hart would be forced to argue that men must sometimes refuse to support a rule whose existence is a necessary condition to the existence of a legal system. Such a position could be construed as an argument against the use of a legal system to regulate social life. Given this result, it is unlikely that Hart would argue that every legal system must have a criteria-satisfying primary rule directing that all other primary rules be obeyed.<sup>43</sup> Thus Hart apparently does not claim that all statements of legal obligation must have an underlying primary rule that satisfies his three criteria for social rules of obligation. In some cases his analysis requires that statements of legal obligation presuppose the existence of some nonprimary social rule that satisfies his three criteria.

When no criteria-meeting primary rule can be found to underlie a statement of legal obligation, one must look to secondary rules, for Hart characterizes a legal system as a union of primary and secondary rules.<sup>44</sup> As noted earlier, a secondary rule confers the power whereby primary rules may be introduced, recognized, eliminated, changed, or applied.<sup>45</sup> If a secondary rule that meets Hart's three criteria can always be found behind any statement of a legal rule, then it can serve as the social rule underlying all statements of legal obligation that is required by Hart's analysis of the general concept of obligation.

However, the two basic types of secondary rules—rules of recognition<sup>46</sup> and rules of adjudication<sup>47</sup>—that Hart asserts give meaning

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42. H. HART, *supra* note 3, at 206.

43. This argument also applies to the suggestion that it is a necessary condition of a legal system that each separate statutory scheme include a primary rule that directs that each of the provisions of the scheme be followed. *See* text at notes 39-40 *supra*.

44. H. HART, *supra* note 3, at 79. *See* text at notes 18-20 *supra*.

45. *See* text at note 20 *supra*.

46. *See* H. HART, *supra* note 3, at 92-93. "The existence of . . . a rule of recognition

and effect to primary rules (thereby distinguishing a legal from a prelegal culture<sup>48</sup>) do not necessarily satisfy Hart's three criteria. His first and second criteria require that the average citizen support social rules of obligation with serious social pressure because they are necessary to the maintenance of social order.<sup>49</sup> Yet he states that the ordinary citizen will probably "have no general conception of the legal structure or of its criteria of validity."<sup>50</sup> If the ordinary citizen has "no general conception" of the substance of the basic secondary rules of his legal system, he is not likely to view their particular content as necessary to the maintenance of social order, even if he does view the existence of *some* secondary rules as essential.

Hart distinguishes, however, between the attitude of the ordinary citizen and that of the officials of the legal system toward that system's secondary rules. He may believe that the attitude of the officials of the legal system is the crucial factor in determining whether secondary rules satisfy the criteria of a social rule of obligation. He states that it is necessary to the existence of a legal system that "its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication . . . be effectively accepted as common public standards of official behaviour by its officials."<sup>51</sup> The key word here is "standards"; although Hart does not explicitly interpret the phrase "standards of official behaviour" in terms of his obligation-imposing social rules, he apparently believes that a "standard of official behaviour" must meet his three criteria of obligation:

What makes "obedience" misleading as a description of what legislators do in conforming to the rules conferring their powers, and of what courts do in applying an accepted ultimate rule of recognition, is that obeying a rule (or an order) *need* involve no thought on the part of the person obeying that what he does is the right thing both for himself and for others to do. . . . He need not think of his conforming behaviour as "right," "correct," or "obligatory." His attitude,

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may take any of a huge variety of forms, simple or complex. . . . [W]hat is crucial is the acknowledgement of reference to the writing or inscription as *authoritative, i.e.* as the *proper* way of disposing of doubts as to the existence of the rule. Where there is such an acknowledgement there is a very simple form of secondary rule: a rule for conclusive identification of the primary rules of obligation." *Id.* at 92 (emphasis original).

47. *See id.* at 94-95. These secondary rules "empowe[r] individuals to make authoritative determinations of the question whether, on a particular occasion, a primary rule has been broken." *Id.* at 94.

48. *Id.* at 89-94. Rules of change, also discussed by Hart in his development of the "legal world," are not given the crucial stature of the other two types of secondary rules. "Of course if there is a social structure so simple that the only 'source of law' is legislation, the rule of recognition will simply specify enactment as the unique identifying mark or criterion of validity of the rules." *Id.* at 93.

49. *See* text at notes 10-13 *supra*.

50. H. HART, *supra* note 3, at 111.

51. *Id.* at 113.

in other words, need not have any of that critical character which is involved whenever social rules are accepted and types of conduct are treated as general standards . . . . But this merely personal concern with the rules, which is all the ordinary citizen *may* have in obeying them, cannot characterize the attitude of the courts to the rules with which they operate as courts. This is most patently the case with the ultimate rule of recognition in terms of which the validity of other rules is assessed.<sup>52</sup>

Hart's position thus appears to be that secondary rules must be regarded as obligatory social rules by most of the officials of a legal system.

However, the basic secondary rules do not necessarily satisfy Hart's second criterion even with respect to the officials of a legal system; it is not necessary that officials believe that their particular basic secondary rules—rules of recognition and rules of adjudication—are necessary to maintain social life. For example, a legal system could be hypothesized in which judges evenhandedly enforce the law as it is identified by the ultimate rule of recognition, although they do not believe that the *particular* rule of recognition employed by their legal system is the best possible rule. The judges may believe that some rule is essential to the satisfactory maintenance of social life, but they would not have to be entirely committed to the content of their own rule. Nevertheless, assuming that they do not actively disapprove of their society's ultimate rule of recognition, the judges would conscientiously do their jobs. Their allegiance to the system might be based on calculations of long-term self-interest, disinterest, an unreflecting, inherited attitude, or the wish to conform.<sup>53</sup> In such a legal system Hart's second criterion for obligation-imposing secondary rules would clearly not be met; the ultimate rule would not be thought necessary to the maintenance of social life. An identical argument could be made to show that rules of adjudication—Hart's other basic type of secondary rule—do not satisfy his second criteria. Hart's basic secondary rules, rules that distinguish a legal from a nonlegal system, thus do not necessarily satisfy all of his three criteria for obligation-imposing social rules. If these two types of secondary rules cannot always satisfy Hart's criteria, then no secondary rule can be counted on to do so, for a statement of legal obligation can presumably be immediately derived from a primary rule that fails to satisfy the three criteria<sup>54</sup> and depends only on these two basic secondary rules for its meaning and effect.

Because there can be no assurance that either a criteria-meeting

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52. *Id.* at 112. It is the *particular* secondary rules of a system that Hart is talking about in this passage, and not the belief that there must be such rules.

53. *See id.* at 198.

54. *See* text at notes 24-43 *supra*.

primary rule or a criteria-meeting secondary rule is presupposed by every statement of legal obligation, Hart's general analysis of obligation is either inconsistent with his analysis of legal obligation or both analyses are incorrect. However, since Hart's distinction between primary and secondary rules is in no way dependent upon his claim that all statements of obligation must presuppose an obligation-imposing social rule, at least one of his conflicting analyses may be accepted if the other is rejected.

Stripped of reliance on the criteria for social rules of obligation, Hart's analysis of legal obligation says simply that legal obligations arise from the application of primary rules to particular circumstances. Primary rules are identified as legal rules by the secondary rules of the legal system. In other words, people are legally obligated to do whatever the applicable law tells them to do. This is hardly a startling claim. The particular importance of Hart's contribution lies in his development of the distinction between primary and secondary rules; that is, in his effort to clarify what the concept of law *is*, rather than in his claim that the law is legally obligatory.<sup>55</sup> If it can be shown that it is Hart's general analysis of obligation that is faulty, then his important discussion of primary and secondary rules has not been weakened. Hart's general analysis of obligation may be tested by considering whether his analysis of moral obligation is both adequate and consistent with his general analysis.

Although Hart's conception of legal obligation may not be uniformly accepted, it is much more widely recognized than his analysis of moral obligation,<sup>56</sup> which diverges significantly from traditional philosophical views. The usual view is that people are morally obligated to do whatever morality prescribes.<sup>57</sup> The interesting questions are what it means to say that something is morally prescribed and how the morally prescribed course is determined in a given situation. These questions are clearly analogous to the questions about the law that Hart explores in his analysis of legal obligation.<sup>58</sup> Yet he does not discuss them in his consideration of moral obligation.<sup>59</sup>

55. The debate between legal positivists and natural law theorists as to what is properly considered to be "law" gathers much of its force from the fact that adherents of both views believe that the determination of legal obligation hinges on the outcome. For an excellent and concise account of the central issue in the debate, see H. HART, *supra* note 3, at 203-07.

56. See Hacker, *Sanction Theories of Duty*, in OXFORD ESSAYS IN JURISPRUDENCE 167 (A. Simpson ed. 1973). Cf. J. RAZ, CONCEPT OF A LEGAL SYSTEM 149-54 (1970).

57. E.g., R. BRANDT, ETHICAL THEORY 353-68 (1959); W. FRANKENA, ETHICS 12-60 (1973).

58. See H. HART, *supra* note 3, at 77-96. An analogy may be suggested between moral obligation and prescription and legal obligation and prescription. The analogy is not perfect, however, because in the law it is possible to discover what the law prescribes without reference to beliefs about obligation.

59. *Id.* at 18-25, 79-88.

Hart is not concerned with all of what is commonly called "morality," but only with that part of morality that is reflected in social rules: "The area of morality I am attempting to delineate is that of principles which would lose their moral force unless they were widely accepted in a particular social group."<sup>60</sup> He insists that it makes no sense to talk about having a moral obligation to do something *unless* the act in question is required by some widely accepted rule of morality. He believes that it is inappropriate to apply the concept of moral obligation to one whose criterion of moral goodness is different from what the social rules of morality prescribe:

Surely when we are moved by moral repugnance and shrink from some squalid action the situation is ill-conveyed by saying that here we are acknowledging a *duty*; and surely it is at least misleading to say that we have acknowledged (or recognized) an *obligation* when in difficult circumstances, not provided for by anything that could reasonably be called a rule, we think out the consequences of alternative lines of conduct and decide what on the whole is best to do.<sup>61</sup>

For Hart, then, the important part of the analysis of moral obligation is distinguishing social rules of morality from other social rules, and from other moral principles. Hart believes that statements of moral obligation, like all statements of obligation, must presuppose the existence of social rules that meet his three criteria: They must be supported by serious social pressure; they must be thought necessary to the satisfactory maintenance of social life or some highly valued feature of it; and compliance with them should ordinarily entail personal sacrifice.<sup>62</sup> Thus, Hart's analysis of moral obligation is consistent with his analysis of obligation in general.

He believes, however, that social rules of morality can be distinguished from other social rules by "four cardinal related features."<sup>63</sup> First, all social rules of morality are regarded by the group that holds them as being of great importance. Second, social rules of morality, unlike legal rules, are immune from deliberate change. Moral rules cannot be promulgated or repealed through procedural means. In this respect they are like traditions, because they exist in a society at a given time and cannot willfully be changed.<sup>64</sup> The third distinguishing feature is that social rules of morality are supported by a characteristic form of moral pressure that relies primarily on "emphatic reminders of what the rules demand, appeals to conscience,

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60. Hart, *Legal and Moral Obligation*, *supra* note 4, at 101.

61. *Id.* at 82.

62. H. HART, *supra* note 3, at 79-88. See text at notes 10-14 *supra*.

63. H. HART, *supra* note 3, at 169. Social rules of morality must also satisfy Hart's three characteristics of obligation-imposing social rules. *Id.*

64. See *id.* at 171-73.

and . . . the operation of guilt and remorse."<sup>65</sup> Although the law is often supported by the threat of physical sanction, social rules of morality cannot be exclusively so supported. Finally, the lack of intention to disobey social rules of morality is generally regarded as an excuse for noncompliance with them. Thus, " 'I could not help it' is always an excuse."<sup>66</sup> This of course is very different from the law; the requirement of *mens rea* varies greatly from one legal rule to another, and some acts will be legally proscribed no matter what the intention behind them.<sup>67</sup> Hart believes that these four features collectively distinguish social rules of morality from other social rules, and social rules of morality can be distinguished from other rules of morality by the three criteria that Hart claims must be satisfied by all obligation-imposing social rules. Thus, according to Hart, only those rules that have all of the "four cardinal features" and meet his three criteria can give rise to moral obligations.<sup>68</sup>

As has been noted, Hart's analysis of moral obligation differs from the analyses of most other moral philosophers in its exclusive concern with moral rules that are commonly accepted in a society. Hart recognizes this departure, but he argues that most philosophers have obscured crucial differences among the various moral phenomena by their "extension" of the terms "obligation" and "duty" to cover the whole range of morally prescribed behavior.<sup>69</sup> It is probably true that there has not been sufficient development within moral philosophy of the differences between what Hart calls "the actual morality of a social group"<sup>70</sup> and moral standards that are in some sense independent of social mores. However, it does not necessarily follow that this failure is the result of an unwarranted extension of the concept of obligation to cover all morally prescribed behavior, or that the concept ought properly be applied only to the morality of a social group.

Hart gives two reasons for his claim that the extension of the term "obligation" is indeed responsible for what he sees as the flaws in the analyses of other moral philosophers. The first and most important reason is his belief that he can suggest a general analysis of the concept of obligation that can encompass both legal and moral obligation. He believes that his general analysis is possible *only* because he has properly limited the concept of moral obligation to the morality of a social group. However, it has already been shown that either his general analysis of obligation is incompatible with his

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65. *Id.* at 175-76.

66. *Id.* at 174.

67. *See id.* at 174.

68. *See id.* at 173-75.

69. Hart, *Legal and Moral Obligation*, *supra* note 4, at 100-07.

70. *Id.* at 100.

analysis of legal obligation, or, in so far as they are compatible, his analysis of legal obligation is inadequate.

Hart's second reason for rejecting the extension of the term "obligation" beyond the morality of a social group is much less significant. He claims that the use of the word "obligation" in ordinary language more closely reflects his analysis of moral obligation than it does that of most moral philosophers.<sup>71</sup> His claim is that "moral obligation" in ordinary language is generally confined to the sphere of morality he calls "the actual morality of a social group." But Hart intends his analysis of moral obligation to be metaethically neutral,<sup>72</sup> or, in this connection, that it make no assumptions about what moral goodness is. For example, he says that "the claim that morality has these four features is neutral between rival philosophical theories as to its *status* or 'fundamental' character."<sup>73</sup> However, if one takes the common metaethical position that there is more to moral goodness than simple accord with and adherence to the socially accepted moral rules of a society, one finds that Hart's view of moral obligation creates some curious consequences. Presumably an individual might believe that in some circumstances the morally right thing to do is different from the act prescribed by the socially accepted moral rule. But, according to Hart's analysis, a person in such a situation would properly have to say both that he is morally obligated to perform a certain action and that he believes that action to be morally wrong! He would be "morally obligated," as Hart uses the term, if

71. "Something more, I hope, than a blind wish to adhere to our common speech prompts the protest that it is absurd to speak of having a moral *duty* not to kill another human being, or an *obligation* not to torture a child." *Id.* at 82. "Outside philosophy, the expressions 'obligation' and 'duty' . . . are not used indifferently for all forms of moral judgment." *Id.* at 100. See also Hart, *Are There Any Natural Rights?*, 64 *PHILOSOPHICAL REV.* 175, 179 n.7 (1955). What Hart says in the first passage seems to conflict with his claim in *The Concept of Law* that "there are both general obligations which all normal adults are conceived as having throughout life (e.g., to abstain from violence) and special obligations which any such member may incur by entering into special relations with others (e.g., obligations to keep promises or return services rendered)." H. HART, *supra* note 3, at 167. Presumably both the killing of others and the torturing of children would be cases of violent behavior that all are obligated not to do.

72. As usually conceived, meta-ethics asks the following questions. (1) What is the meaning or definition of ethical terms or concepts like "right," "wrong," "good," "bad"? Or, what is the nature, meaning, or function of judgments in which these and similar terms or concepts occur? Or, what are the rules for the use of such terms and sentences? (2) How are moral uses of such terms to be distinguished from nonmoral ones? What is the meaning of "moral" as contrasted with "non-moral"? (3) What is the analysis or meaning of related terms or concepts like "action," "conscience," "free will," "intention," "promising," "excusing," "motive," "responsibility," "reason," "voluntary"? (4) Can ethical and value judgments be proved, justified, or shown valid? If so, how and in what sense? Or, what is the logic of moral reasoning and of reasoning about values? Of these (1) and (4) are the more standard problems of meta-ethics; but (2) and (3) have been receiving much attention lately.

W. FRANKENA, *supra* note 57, at 96.

73. H. HART, *supra* note 3, at 164.



the action were required by a moral rule that had Hart's "four cardinal features" and met Hart's three criteria. Yet, by his own standards of moral goodness, he could believe that the action was morally wrong. This analysis does not reflect the usage of the word "obligation" in ordinary language.

Thus, Hart's criticism that other philosophers have made an unwarranted extension of the concept of obligation to cover all areas of morality is not convincing. Because his analysis of the general concept of obligation fails to elucidate his analysis of legal obligation, and because the two reasons that he advances for his unusual limitation on the scope of moral obligation are unpersuasive, Hart's analysis of the general concept is exceedingly suspect.

Perhaps a reason can be suggested for these problems in Hart's analysis. In an effort to find a common core for legal and moral obligation Hart focuses on the one formal feature that law and morals appear to share: rules that require and/or forbid specific behavior. The trouble begins when he sets out to provide specific characteristics that describe the obligation-imposing rules of both law and morality. On the one hand, he cannot satisfactorily reconcile his view of law as a system of primary and secondary rules with his analysis of obligation-imposing social rules. On the other hand, he seems to forget that moral rules have metaethical foundations by which they are justified and the meanings of their terms clarified. There is no reason to believe that the role of metaethics in the determination of moral obligation is any less important than, although it is undoubtedly different from, the role of secondary rules in the determination of legal obligation. Unfortunately, it is terribly hard to discover the foundations of morality. That is what much of moral philosophy is all about.