SHIBLES, WARREN A. *Metaphor: An Annotated Bibliography and History.* Whitewater, Wis.: Language Press, 1971. Pp. xiv + 414. $12.50.

SLAATTE, HOWARD A. *The Paradox of Existentialist Theology.* New York: Humanities Press, 1971. Pp. xv + 254. $7.50.

SLATTERY, SISTER MARY FRANCIS. *Hazard, Form, and Value.* Detroit, Mich.: Wayne State Univ. Press, 1971. Pp. 128. $7.50.

SONTAG, FREDERICK. *How Philosophy Shapes Theology. Problems in the Philosophy of Religion.* New York: Harper & Row, 1971. Pp. xv + 495. Paper, $7.95.

Temas de Filosofía Contemporanea. II° Congreso Nacional de Filosofía. Buenos Aires: Editorial Sudamericana, 1971. Pp. 277. Paper.

WOLANDT, GERD. *Idealismus und Faktizität.* Berlin: Walter de Gruyter, 1971. Pp. xii + 287. DM. 68.—.

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POSITIVE AND NATURAL LAW REVISITED

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I

One of John Austin's most explicit statements of positivism in the definition of law and the distinction between law as it is and law as it ought to be, is found in the note at the end of Lecture V of *Province of Jurisprudence Determined.* There, Austin paraphrases Blackstone's *Commentaries* as follows:

> Sir William Blackstone, for example, says in his 'Commentaries' that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from the Divine original.[1]

Austin then feigns unclarity about the meaning of the passage in Blackstone. After giving it several interpretations with which he finds he can agree, he goes on to give the passage this last interpretation, with which he finds he cannot agree:

> But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law, which conflicts with the Divine law, is obligating or binding; in other words, that no human law which conflicts with the Divine law is a law; for a law without an obligation is a contradiction in terms ... when we say of any transaction that it is invalid or void, we mean that it is not binding: as for example, if it be a contract, we mean that the political law will not lend its sanction to enforce the contract.[2]

Austin continues to argue, in the following paragraph, that human laws which conflict with the Divine law *are* binding, because such

laws "have been and are continually enforced as laws by judicial tribunals." Central to Austin's notion of obligation is the idea of being liable to an evil in the form of a sanction, and central to his notion of legal obligation is the idea of being liable to a sanction from the political sovereign. Thus, laws contrary to the Divine law are binding because one is nevertheless liable to a sanction upon non-performance of what they require, or upon performance of what they forbid. And, as Austin has already told us, to say of a law that it is not binding is to say that "the political law will not lend its sanction...."[3] Thus,

> Being liable to evil from you if I comply not with a wish which you signify, I am bound or obliged by your command, or I lie under a duty to obey it.[4]

So, if I am liable to an evil from you in your role as my political sovereign, then I am legally obliged by your command.

The point of Austin's reply to Blackstone should now be clear. Of course, for Austin, morally pernicious laws are binding or obliging, regardless of their evil, for one still has a motive or reason for doing what they require because of the legal sanction which attaches to them. That is to say, one has a motive or reason for obedience, because one is liable to legal sanctions for disregarding them ("And if I object to the sentence, that it is contrary to the law of God... the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity.") Whereas Blackstone had argued that no man had an obligation, or motive for doing p, where p is contrary to the Divine Law, the point of Austin's rejoinder is that the man does have a reason or motive for doing p, if it is the law to do p, because the man is liable to a legal sanction upon infraction of the law, even though the man may be liable to an even more severe Divine sanction for the doing of p. Thus, "when it is said that a law ought to be disobeyed, what is meant is that we are urged to disobey it by motives more cogent and compulsory than those by which it is itself sanctioned."[5] But, for Austin, if the statute is to be law, in any event there must be some reason or motive for obeying it. Austin does in fact contend that no 'law' is binding or obligating at all, and hence not a law at all, if it lacks a sanction, for no man

[1] John Austin, *The Province of Jurisprudence Determined*, New York, 1954, p. 184.
[2] *Ibid.*, p. 185.
[3] *Ibid.*
[4] *Ibid.*, p. 14.
[5] John Austin, *op. cit.*, p. 185.
[6] *Ibid.*, pp. 27-28.

would have a reason to obey it. These are the laws, improperly so-called, of imperfect obligation. "An imperfect law... is a law which wants a sanction, and which, therefore, is not binding.... Consequently an imperfect law is not so perfectly a law, as counsel, or exhortation...."[6]

Now, it seems plausible from what we have said to extract the following two shared assumptions from the debate between Blackstone and Austin, as ones to which they both would have assented:

> (1) If anything is a law properly so-called, then it is legally binding or legally obligatory, "for a law without an obligation is a contradiction in terms...."
>
> (2) If anything is a law properly so-called, and hence is legally obligatory, then it follows logically that any man subject to the law has a reason or motive for obeying it.

For Austin, it will follow that any man has a reason for obeying the law, because the presence of a threatened sanction has been built into the very definition of law. Of course, Austin would accept that a man could have any number of other reasons for obeying the law; for instance, God might command me to obey the law. Thus, that God has commanded me to obey the law counts as a reason for obeying the law, but that I have this reason does not follow from the fact that something is the law *alone*, but only when conjoined with an additional premise that God commanded me to obey the law. Further, Austin holds that if the *only* reason I had for obeying the 'law' was that God had commanded me to do so, I would be under a Divine obligation (assuming God will punish me if I don't obey him), but not under a legal obligation. This is so because, as it were, it is not the 'law' but God who is supplying me with a motive to obey.

Thus, the argument between Blackstone and Austin seemed to be this: Blackstone held that no man had a reason for doing what was contrary to the Law of God. Austin noted that, if what is contrary to be the will of God is commanded by a positive law, then it did indeed follow that a man had a reason to do what was commanded, for the man would always have a reason of prudence for obeying the law, namely the sanction he would be liable to from the sovereign if he did not comply with the law's requirements. Whereas Blackstone argued that, in the case of an immoral 'law', the consequent of (2) is not met, Austin argues that it is. Blackstone

would no doubt have wished to restrict 'reason or motive' to moral reasons or motives, and Austin to have included what I referred to as prudential reasons or motives, but, for both, the notion of legal obligation is closely tied to the concepts of reason or motive.

It should be noted that I have not sorted out 'motives' from 'reasons', but left the wording of assumption (2) open by using the alternation 'motive or reason'. I have done this, hopefully, with impunity, as this vexed question is well beyond the scope of this paper. Austin himself probably would not have made this distinction, since clearly reasons, on his theory, collapse into motives insofar as all obligation is reduced to the threat of sanction by a superior to an inferior. Thus, even the having of moral reason, for Austin, is only the being motivated by a certain sort of threat. However, if we insist on the distinction, Austin's theory could provide us with both a reason and a motive for obeying the law. Presumably, the threat of punishment will both motivate a man into not doing an act and also constitute a reason of prudence for not doing the act. What Austin's theory could not provide, as far as I can see, are non-prudential reasons for action. Blackstone, on the other hand, claims "that human laws are of no validity if contrary to them [the laws of God]...," and presumably his point would be best put by saying that no one had a *reason* to do what was contrary to the law of God. Obviously Blackstone would admit that a man could have a motive, or be motivated, to do what was contrary to the laws of God. An interesting question is whether a man could have a reason but no motive to do what the law of God required. This last question touches on the debate over the relationship between obligation and motivation, which again is well beyond the scope of this paper. What is most important about this is to see, as I shall show, that Hart is not entitled to assumption (2) on the score of either motives or reasons.

II

The natural-positive law debate has been joined in a more contemporary vein by Lon Fuller and H. L. A. Hart. Now, we might ask with respect to them, if they also accept the presuppositions we claimed to have detected in the earlier controversy between Blackstone and Austin. I want to claim that we can reply in the affirmative

[7] Lon Fuller, "Positivism and Fidelity to Law," in *Introduction to Law,* Harvard Law Review Association, Cambridge, 1968, pp. 632-33.

with reference to Fuller and that Fuller assumes, whether rightly or wrongly, that Hart accepts these presuppositions as well. Witness, for example, the following extract from Fuller's article "Positivism and Fidelity to Law":

> Now, with Professor Hart's paper, the discussion takes a new and promising turn. It is now explicitly acknowledged on both sides that one of the chief issues is how we can best define and serve the idea of fidelity to law... If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe....
>
> If, as I believe, it is a cardinal virtue of Professor Hart's argument that it brings into the dispute the issue of fidelity to the law, its chief defect... lies in a failure to perceive and accept the implications that this enlargement of the frame of the argument necessarily entails.... Without any inquiry into the actual workings of whatever remained of a legal system under the Nazis, Professor Hart assumes that something must have persisted that still deserved the name of law in a sense that would make meaningful the idea of fidelity to law. Not that Professor Hart believes the Nazis' law should have been obeyed. Rather, he considers that a decision to disobey them represented not a mere question of prudence or courage, but a genuine moral dilemma in which the ideal of fidelity to law had to be sacrificed in favor of more fundamental goals.[7]

It seems clear from this that Fuller assumed that Hart accepts assumption (2). The issue is seen as one of defining law in such a way as to serve the idea of fidelity to law, which I take to mean that the issue is one of defining law in such a way so that it follows that we have a (moral) reason to obey it. Fuller assumes that Hart believed that even in the Nazi case there was some (moral) reason to obey the law, and hence the decision to disobey was, or would have been, the outcome of a moral dilemma. But if the person under Nazi law were in a dilemma (as the passage in Hart suggests but does not say), then it does look like even the immoral law of the Nazis somehow created a moral duty inclining toward obedience. Fuller generalizes the particular example of Nazi law, and ascribes to Hart the position that one has a (moral) reason to obey anything properly called a law:

I hope I am not being unjust to Professor Hart when I say that I can find no way of describing the dilemma as he sees it but to use some such words as the following: On the one hand, we have an amoral datum, called law, which has the peculiar quality of creating a moral duty to obey it. On the other hand, we have a moral duty to do what we think right and decent. When we are confronted by a statute we believe to be thoroughly evil, we have to choose between those two duties.

If this is the positivist position, then I have no hesitancy in rejecting it. The dilemma it states has the verbal formulation of a problem, but the problem it states makes no sense.... I do not think it is unfair to the positivistic philosophy to say that it never gives any coherent meaning to the moral obligation of fidelity to law.[8]

Here, Fuller explicitly ascribes to Hart assumption (2), for he says that Hart believes that any law "has the peculiar quality of creating a moral duty to obey it." We might mention here that it is not open to Hart to accept assumption (2), as Austin did, on the grounds that one always had a reason of prudence for obeying the law. That this is so is due to Hart's insistence that legal obligation and legal sanctions needn't always coincide. Thus, "...it is crucial for the understanding of the idea of obligation to see that in individual cases the statement that a person has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge."[9] So if Hart does accept (2), he must accept it in the sense that it follows from a man's being under a legal obligation that the man has a reason for obeying, other than the reason that he is liable to a sanction for non-compliance.

Does Hart accept (1) and (2)? Hart explicitly accepts (1), for he says in *The Concept of Law* that "all speculation about the nature of law begins with the assumption that its existence makes certain conduct obligatory."[10] Does Hart accept (2)? We can refer once again to the evidence Fuller cited. Now, although the passage gives the impression that the woman subject to Nazi law, according to Hart, faced a dilemma, all Hart actually says is that the court who tried her found itself in a moral dilemma. And, in arguing that one of the virtues of positivism is to clarify the moral issues involved

[8] *Ibid.*, p. 656.
[9] H. L. A. Hart, *The Concept of Law*, Oxford, 1961, pp. 82-83.
[10] *Ibid.*, p. 212.

[11] *Ibid.*, p. 203.
[12] H. L. A. Hart, "Positivism and the Separation of Law and Morals," in *Introduction to Law*, p. 618.

in disobedience, Hart is always careful to talk only of the situation in which we are confronted with an unjust law in the context of an otherwise just legal system.

> What these thinkers [positivists] were, in the main, concerned to promote was clarity and honesty in the formulation of the theoretical and moral issues raised by the existence of particular laws which were morally iniquitous.[11]

So perhaps Hart would have only accepted (2) if the condition were added that, as a whole, the legal system were just. On the other hand, in criticizing Radbruck, Hart says:

> For everything that he says is really dependent upon an enormous overevaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question, 'ought' this rule of law be obeyed.[12]

Presumably once again the suggestion is here that, although that something is a law is not conclusive in favor of obedience, it goes some way to incline us toward actual obedience.

The textual evidence in "The Separation of Law and Morals" appears to be inconclusive. However, Hart considers legal obligation of a piece with the general notion of obligation. And if someone has, for instance, a moral obligation to do something, then plainly, on any theory, the person would have some reason to do that thing. So can we extrapolate from what Hart has to say about the general notion of obligation and apply what we find to legal obligation? If so, we could apparently conclude that Hart did accept assumption (2) after all. In order to see if this is so, I now wish to turn to an analysis of Hart's notion of obligation, particularly as it is set out in his *The Concept of Law*. We shall trace Hart's discussion of obligation in three steps, interrupting the thread of his argument as we proceed in order to criticize: first, an examination of what Hart says about 'rule'; then, an analysis of the notion of 'obligation'; last, the ways in which rules and obligations are 'the key to the understanding' of legal systems and law.

III

Hart limits his discussion of rules to social rules, and he first undertakes to explicate the difference between (socially) rule-governed behavior and (mere) habit. He finds three marks which distinguish rule-governed behavior from habit: (I paraphrase Hart)

> (1) Where there is a rule, deviations are regarded as lapses or faults open to criticism, and threatened deviations meet with pressures for conformity.
>
> (2) Such criticism is not only in fact made, but the deviation is regarded as a *good reason* for the criticism. Thus, criticism for deviations or demands for compliance are regarded as *justified.* Regarded as such by whom? Both by the makers and receivers of the criticism, although there may be a minority "who not only break the rules but refuse to look upon it as a standard either for themselves or others."
>
> (3) But some at least must look upon the rules as providing a standard to be followed by the group. Thus, some must view the rule from an 'internal aspect'. Not only do these do as they are required each for his own part, but they have views about the doing by everyone else of what is required. These views are manifested in the criticism of lapses and demands for conformity already mentioned in (1) and (2), and in the acknowledgment of the legitimacy of such criticism and demands when received from others.[13]

But now, Hart finds, we have the tools at hand for understanding the notion of obligation, for, in the expression of such criticism, demands, and acknowledgments, a wide range of normative language is used, language which includes the words 'duty' and 'obligation'.

Thus, legal obligation for Hart is to be understood as a special form of obligation *simpliciter,* which is itself explained by the use it has in (socially) rule-governed activity. For instance,

> To understand the general idea of obligation as a necessary preliminary to understanding it in its legal form, we must turn to a different social situation which ... includes the existence of social rules.[14]

[13] See *Concept of Law, passim,* pp. 54-60, pp. 79-88.
[14] *The Concept of Law,* p. 83.
[15] *Ibid.*
[16] *Ibid.*

How is this normative language, which includes 'duty' and 'obligation', related to the rule-governed activity Hart speaks of?

> (a) "First, the existence of such rules is the normal, though unstated background or proper context ..." for the making of claims about duty or obligation.
>
> (b) ... the distinctive function of such statements is to apply such a general rule to a particular person by calling attention to the fact that his case falls under it.[15]

Of course not all rules, for instance rules of manners, are said to impose duties or obligations, for the rules and the behavior they prescribe may not be thought of as sufficiently important. Yet, when such behavior is deemed socially important, the rules are spoken of as imposing obligations and duties. Further, all such normative statements, whether about a man's obligations or duties, or more weakly, merely about what a man ought to do, "are alike in carrying an implicit reference to existing standards of conduct or are used in drawing conclusions in particular cases from a general rule." So the use of a statement of obligation is "to say that a person's case falls under such a rule."[16]

Before continuing to the third step of Hart's argument, the existence of a legal system in terms of the existence of primary and secondary rules of behavior, let us first pause to survey the ground we have covered so far. Now, in general, Hart is very careful to say that, in such rule-governed situations, people are thought of as having obligations, or are said to have them if their case falls under a rule, or that it is in such situations that one finds the characteristic use of normative language. Hart rarely, if ever, claims that, in such situations, people always do in fact have the obligations they are said to have. For instance, "Rules are conceived and spoken of as imposing obligations...." The distinction I have in mind here is this: Hart could be offering either

> (a) A theory of under what conditions people have duties and obligations

or,

> (b) A theory of when people are typically said to have duties and obligations, or the kind of situations in which normative language is typically used.

It seems plain that (a) and (b) are different theories, and that they are bound to diverge in certain cases, for people may well have duties and obligations which no one in their society believes they have, and may not have the duties and obligations the members of their society believe them to have. Is Hart offering a theory of kind (a) or kind (b)? On one hand, one is inclined to say that Hart *means* to be offering an (a)-theory. Hart takes himself to be explicating the idea of obligation, and, in particular, he certainly wants to say that men *have* legal obligations, are not just believed to have them, under certain conditions which we shall examine later. On the other hand, what Hart says does amount to an intelligible theory of kind (b), but is utterly wrong-headed as a theory of kind (a).

Why is it a wrong-headed theory if taken as a type-(a) theory? After all, no one would be likely to say that our actual duties and obligations are wholly determined by the social rules accepted at the time by our society. The ways in which accepted, public moral rules, or accepted social institutions on the one hand, and ideal moral rules, or what perfect or the best social institutions would be on the other, determine our present duties and obligations in the less than ideal moral world or less than perfect society in which we find ourselves, is surely no simple matter. We err, it seems to me, if we embrace some forms of ideal rule utilitarianism which would make that action our duty if and only if it would be prescribed by the perfect moral code, or the best social institution (e.g., the code or institution which produces more utility than any possible alternative to it). Such a view would not allow that our obligations are, *in part,* a function of the morality we now have, or the practices and institutions we now accept, imperfect though they may be; and surely our obligations are, in part, a function of these things. It is equally an error to simplify matters by thinking that our actual duties and obligations are *entirely* a function of positive morality, or the institutions and practices we now accept, for sometimes it is our duty to disobey these codes, practices, or whatever. Of course, Hart recognizes all this, for he has, in his chapter "Justice and Morality," a section on "Moral Ideals and Social Criticism" (which, I think, is inadequate).

But if it is completely implausible to think that actual duties are determined by social rules (although Bradley seemed to have held this view), there is a more plausible view that claims that at any rate, socially accepted rules can always determine our *prima facie* duties and obligations, which may or may not then be overridden by other considerations. So, confined to *prima facie* obligation, couldn't Hart be offering both a theory of when people are *said to have* obligations and when they do have *prima facie* obligations, on the grounds that one does in fact always have the (*prima facie*) obligation one's society believes that one has, or which is entailed by some socially accepted rule?

This view, that one always does have the overridable *prima facie*) obligation a socially accepted rule claims that one has, seems to me to rest, among others, on a confusion between overriding and cancelling an obligation. John Searle, in a recent book, confuses these two issues in the following way. In his book *Speech Acts,* in reply to the charge that there is a kind of conservatism in his deduction of (*prima facie*) obligations from rules, Searle replies:

> It is perfectly consistent with my account for someone to argue 'one ought never to keep promises.' Suppose for example a nihilistic anarchist argues that one ought never to keep promises because, e.g. an unseemly concern with obligation impedes self-fulfillment.... The nihilistic argument... is simply an external attack on the institution of promising. In effect, it says that the obligation to keep a promise is always overridden because of the alleged evil character of the institution. But it does not deny the point that promises obligate, it only insists that the obligation ought not to be fulfilled because of the external consideration of self-fulfillment....[17]

Although the choice of promising, in no way essential to Searle's case (he conceives of baseball in the same manner, for instance) introduces irrelevant complications, still one can detect a certain confusion in Searle's presentation of the nihilist's argument. Searle describes the example of the nihilistic anarchist as one in which a man argues that the obligation to keep a promise is always overridden. He says that the argument "Does not deny the point that promises obligate." Perhaps the nihilistic anarchist would describe his position in this way if he thought that essentially the institution was good but that it turned out that what it obligated us to do was something we ought not to do from another slightly more important point of view. But think of the case in which a man believes an

[17] John Searle, *Speech Acts,* Cambridge, 1968, pp. 188-89.

institution to be essentially repressive or degrading or evil. Here the anarchist wouldn't say that the institution *prima facie* obligates, and that the obligation is always overridden. Rather, such an institution cannot properly lay any obligation at all on us. In such a case, the obligation is thought to be cancelled or voided, not left intact but outweighed or overridden. Searle has in mind a relatively harmless nihilistic anarchist.

Now, it is a law of logic that:

(3) $(p \supset r) \supset [(p \,\&\, q) \supset r]$

That is, if one statement implies a second, then the first when conjoined with any other statement must still imply the second statement. But if because of cancelability, the rules of an institution plus the statement that the institution is grossly evil do not conjointly imply a *prima facie* obligation statement, then obviously the socially accepted rules alone cannot imply such a statement. At the very least, it looks as though a statement about the moral permissibility of the institution must be conjoined to the rules. But this maneuver would, of course, not be acceptable to Hart, who purports to establish the truth of statements of legal obligation without reference to any moral criteria.

The view I have taken of cancelability could be put this way: from the fact that the rules of an institution require the doing of an act, it never follows logically that one has a reason (*prima facie* ought) to do that act. The cancelability argument turns on the ability of certain moral facts to destroy or take away, as it were, the reason—conferring or obligating power of institutions, legal systems, rules or whatever. Sometimes of course the moral facts of the situation will only outweigh whatever reasons the institution might provide for the doing of some action it requires. For example, the law requires that we drive under a specified speed, but on some occasion we may be entitled to surpass that limit in order to meet an emergency. But some moral facts, particularly those which call into question the moral permissibility or the legitimacy of the institution itself, will have the power to cancel, and not merely outweigh, the obligations or reasons for action which the institution or legal system might have otherwise provided us with.

Cancelability in moral philosophy seems to me to have an analogy in epistemology. Normally, if an object appears red, then

[18] I am indebted to Professor Robert Nozick of Harvard University who suggested these features to me. See also his "Moral Complications and Moral Structures" in *The Natural Law Forum*, vol. 13, 1968.

we have some reason to believe that it is red. That is, normally the appearance of a thing counts as evidence for the color of the thing. Suppose that something appears red to me, but appears blue to a number of other people. The rational conclusion is that the thing is blue, for the weight of the evidence falls on the side of the thing's being blue and not on the side of the thing's being red. Still, we have some evidence, or some reason to believe, that the thing is red; the red appearance remains *evidence* that the thing is red, although not sufficient evidence to entitle us to infer that the thing is red.

On the other hand, imagine a slightly different case. The object appears red to me, and blue to a number of other people. However, we also know a number of other facts: that the others viewed the object in normal light; that when I viewed the object, strange effects occurred in the atmosphere; that these strange effects caused blue objects to appear red to everyone. Now, it seems to me that given this sort of story, we have no evidence at all that the object is red; the red appearance of things looses its evidential status (for the red color of things) under the described circumstances. Or, as we also might put it, the status of the appearance of a thing as evidence for the thing's being that color is cancelled in such a situation. This epistemological example seems to me roughly analogous to the cancelability of institutional obligations.

Although I am not prepared to offer (what I would defend as) a *criterion* with which to distinguish moral facts which cancel institutional obligations from moral facts which merely outweigh institutional obligations, still there are some features which we can point to which will help indicate whether cancelling or outweighing has transpired.[18]

a) Suppose that I exceed the speed limit to rush someone to the hospital. Was my duty to obey the speed limit cancelled or outweighed by the emergency? If we conclude that I would be obligated, other things being equal, to justify, excuse, explain, or apologize for, my speeding, then the obligation to observe the speed limit was overridden rather than cancelled. However weak, the obligation to observe the speed limit has not 'vanished', but its traces can still be detected in the duty I might have to explain or justify to the appropriate people why I did not observe the speed limit. On the other hand, consider the case in which the law forbids me to aid Jews. Suppose that on some occasion I aid a

Jew who would perish without my help. If we decide that I have no duty to justify or explain or excuse my helping the Jew, then presumably my obligation to obey this law is cancelled rather than outweighed. Of course, one can complicate this sort of case so that some excuses or explanations are in order. For example, I might inconvenience someone by aiding the Jew, and I may then have some duty to explain or justify my actions to the man I have inconvenienced. The point remains, however, that I have no duty to explain or justify my breaking this law *per se*, for example to judicial authorities of the state.

b) Imagine once again that I exceed the speed limit in order to rush someone to the hospital. Is my duty to obey the speed limit cancelled or outweighed by the emergency? It would appear that my duty to obey the speed limit is only outweighed if we conclude that it would be a morally better situation if I could both meet the emergency at hand and *not* break the speed limit. If, on the other hand, it seems to make no moral difference whether I aid the Jew and break the law forbidding the giving of aid to Jews, or I aid the Jew and somehow manage not to break that law, then the duty to obey this law is cancelled, rather than overridden. Clearly, it may easily make a difference to me which course of action I take, for it may be in my interest to aid the Jew and not break the law rather than to aid the Jew and break the law, because of the sanctions which attach to the law. But, considerations of prudence aside, the relevant question to ask is whether or not there is a moral difference between these two alternative actions.

The argument from cancelability which I have presented works, it seems to me, against the deduction of any categorical statement of even *prima facie* obligation from the rules of an institution.

So, to return now to Hart, it doesn't appear at all satisfactory to take him as offering an (a)-type theory. Perhaps it would be best to take Hart's theory of obligation as a theory of the (b)-type. How will this effect assumption (2), which we traced through Blackstone, Austin, and Fuller? Assumption (2) was:

> (2) If anything is a law properly so-called, and hence is legally obligatory, then it follows logically that any man subject to the law has a reason or motive for obeying it.

[19] *The Concept of Law*, p. 87.
[20] H. L. A. Hart, "Review of The Morality of Law by Lon L. Fuller," 78 *Harvard Law Review* (1965), p. 1281.

Speaking of traffic lights and people whose behavior they govern, Hart himself makes the following connection between *reasons* and *obligations or rules*:

> ... they look upon it the [traffic light] as a *signal for* them to stop, and so as a reason for stopping in conformity to rules which make stopping when the light is red a standard of behaviour and an obligation. To mention this is to bring into the account the way in which the group regards its own behaviour. It is to refer to the internal aspect of rules seen from their internal point of view.[19]

Thus, people who accept the rules look upon the rule as a *reason* for the doing of the action mentioned in the rules. So, parallel to the distinction we made above between (a)-type and (b)-type theories, we might distinguish between:

> (a) a theory about when people have good reasons for the doing of an action.
> (b) a theory of when a group or society believes that any of its members have good reasons, or are justified in the doing of an action.

We can already see the significant departure here from the traditional assumptions in the natural-positive law controversy. On the assumption that Hart is not holding the erroneous view that people always do have some (although perhaps not sufficiently) good reasons for doing whatever the accepted social rules prescribe, all we can ascribe *at best* to Hart is a modified version of (2):

> (2') If something is a law, then it is generally accepted by that society whose law it is that any man has some reason for obeying it.

Hart once said, in a review of Fuller's *The Morality of Law*, that "our starting points and interests in jurisprudence are so different that the author and I are fated never to understand each other's work."[20] It seems to me that the difference between (2) and (2'), if (2') could be attributed to Hart, would help explain Hart's sense of an ongoing misunderstanding between the two disputants. As it turns out, Hart doesn't even accept any thing as strong as (2'). This can best be seen if, in the next section, we continue the thread of tracing Hart's doctrines of rules, obligations, and the way in

which the existence of a legal system is explained as a conjunction of certain primary and secondary rules.

IV

In addition to primary rules regarding required or forbidden behavior, Hart introduces the notion of second-order or 'power-conferring' rules, which establish means for creating rules of the first kind. These may be either private, as in rules regarding the making of contracts, wills, etc., or they may be public, as for example rules specifying the competence of a court or composition of the legislature. One kind of second-order rule is a rule of recognition, which amounts to a second-order rule for the identifying of anything as a valid rule of the society. Here we have one of the crucial aspects of the change from a pre-legal to a legal system, for with the rule of recognition the members of a society have acquired an authoritative guide to the recognition of the relevant rules of behavior. Hence, the rule of recognition

> will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. [21]

Now, in a primitive society, say one ruled by King Rex, the rule of recognition may be quite simple: whatever actions Rex specifies are to be done. In such a simple legal system, all members of the society might accept, explicitly and consciously, the rule of recognition.

However, when we turn to complex, modern, societies, the situation becomes rather more complicated. "To insist that the state of affairs, imagineable in a simple society, always or usually exists in a complex modern state would be to insist on a fiction." It may be the case that the majority have no conception whatsoever of the legal structure of the state or the criteria for the identification of something as a valid law (i.e., what the rule of recognition *is*). For the existence of a legal system in a non-primitive society, we need to distinguish the relationship between the bulk of the citizenry to the first-order rules and the relationship of the officials to the

[21] *The Concept of Law*, p. 92.
[22] *Ibid.*, p. 111.
[23] *Ibid.*, p. 112.
[24] *Ibid.*
[25] *Ibid.*, p. 114.

public second-order rules (rule of recognition, rules of change, and rules of adjudication). As far as the former, we need only suppose that the citizens in fact generally obey the laws for whatever motive or reason. In fact, they needn't even have a reason, they may obey merely from inertia. Thus, the ordinary citizen may

> think of the rule as something demanding action from *him* under threat of penalty; he may obey it out of fear of the consequences, or from inertia, without thinking of himself or others as having an obligation to do so and without being disposed to criticize either himself or others for deviations. [22]

However, in order that a legal system exist, we must differently characterize the relation between officials and the public second-order rules: these rules

> must be regarded from the internal point of view as a public common standard of correct judicial decision, and not as something which each judge merely obeys for his own part. [23]

So "the normative use of legal language ... might be confined to the official world. In this more complex system, only officials might accept and use the system's criteria of legal validity." [24]

By this point in Hart's argument, it is quite obvious that we have come a very long way from the simple picture of social rules accepted by the members of the society. We now have two different sorts of rules: those rules governing behavior, which give rise to obligations and duties: and those rules for correctly identifying something as a law. On Hart's picture, it is not even clear that, using the rule of recognition which they accept from the internal point of view, the officials have also to regard those rules from the internal point of view which they deem 'valid' by that test. "Of course it is also true that besides these second-order rules there will be many primary rules which apply to officials in their merely personal capacity which they need only obey." [25] The rule of recognition seems only to provide criteria for calling something 'law'; that is, criteria for correct linguistic behavior. Since Hart explicitly says that officials may also, as citizens, not accept the primary rules as standards, we would have a situation in which no one (save perhaps the Sovereign) in the society even believed that a man

had some reason to obey the law (here it might be instructive to compare Kelsen's 'Grundnorm').

Not too much importance should be assigned to this point, for such a situation would become very implausible should we try to fill it out. Presumably the officials would not be coerced into using the rule of recognition, for that would not amount to their taking it as a correct standard. What kind of men would use the rule of recognition as a correct standard for the identification of something as law, but think that none of the laws so identified were correct standards of behavior for themselves or for others in the society? Would they be engaging in their judicial duties as if they were some sort of verbal game, whose only point was the proper naming of something?[26] Let us assume, then, that the officials take the laws identified as such by the rule of recognition to be standards of behavior for themselves and others. But even then all we can attribute to Hart is not (2') but (2''):

> (2'') If something is a law, and hence legally obligatory, then the officials of the system believe that a man has a reason to obey the law.

So even if one were to overlook the distinctions made above, between a man having a reason and it being believed that he has one, or even if one could argue that a man always does have some reason to do what his society generally believes he ought to do, still there is no plausibility at all to the view that a man has a reason to do what some minority of officials of the state believes he ought to do. Even if societies couldn't be wrong (as clearly they can be), there is no plausibility at all to assigning infallibility to any particular sub-group in a society.

V

So far we have been arguing that assumption (2) cannot be ascribed to Hart, for various reasons. We saw that all he could hold was that, if something were a law and hence made some conduct legally obligatory, all that followed was that the officials of the system believed that a man would have some reason to do the actions in question.

So far, we have spoken of legal obligation such that if a man has a legal obligation, then it follows that the man has some reason for obeying the law. We noted the difficulty in ascribing this position to Hart. At one point in "The Separation of Law and Morals," Hart claims that:

> ...a legal system... might apply... laws which were hideously oppressive, and might deny to a vast rightless slave population the minimum benefits of protection from violence and theft ...of course no one denied those benefits would have any reason to obey except fear and would have every moral reason to revolt.[27]

If, then, the slaves have legal obligations under this system but no "reasons to obey", I take it that here we have an explicit admission by Hart that assumption (2) does not hold for the concept of legal obligation as he explains it. Although Hart's intention in *The Concept of Law* is to explain the idea of obligation, by the time 'legal obligation' is reached, it is clear that legal obligations so explained departed in crucial ways from the idea of legal obligation found in the literature of the traditional positive-natural law debate. On the assumption that (2) would have to be part of any full-blown theory of moral obligation, that is, on the assumption that if one has a moral obligation to do something, it follows that one has some reason for doing it, it is not clear what sort of explanation Hart can offer for moral obligation. In particular, it is not clear that Hart could accept (2) for moral obligation (as he explain it), since he almost always means by 'morality' the so-called positive morality of a group. Whatever kind of obligation it is that Hart introduces, such that to say that a person has an obligation is just to say "that a person's case falls under such a rule" it is not the notion of obligation for which assumption (2) is true, and which was the notion of obligation assumed in the Austin-Blackstone debate, and by Fuller.

I think that the notion of two different senses of 'obligation', for one of which assumption (2) is true and for one of which it is not, is important enough to adopt names for the two senses. I propose that we name one of these senses 'normative'. For this sense, if it is true that a man has an obligation, then it is true that he

[26] *Ibid.*, p. 113.

[27] An interesting case which certainly appears possible is one in which the judges, perhaps egoistic anarchists, thought the laws were correct standards for others but not for themselves. What I claim is more difficult is to imagine judges who identified what were valid laws but who thought they were correct standards of behavior for no one at all in the society.

has some reason to do the action in question. The other sense I call 'descriptive'; for this sense, this entailment does not hold (although clearly this is not to say that it follows that the man does not have a reason). I choose the expression 'descriptive', for to say, in this sense, that a man has an obligation is, following Hart, to say only that a person's case falls under a social rule, or the doing of the action by that person follows from a general rule (we would have trouble spelling this out in more detail). Another way to get at this distinction is to think of the descriptive obligation as being internal to the rule and the normative obligation as external, although of course these expressions are only metaphors. I think there are some nice questions to be answered about which systems of rules have appropriate 'internal' statements of 'ought', 'obligation', associated with them and which do not, but at any rate it seems plain that there is such a use of internal, descriptive statements of obligation in rules of law.

VI

It seems then that both senses of 'obligation', the descriptive and the normative one, are useful to describe the institutional world, for we can now say, of Nazi Germany for instance, that a German may have had a legal obligation without having *any reason whatsoever* to do what he was obligated to do. Thus, in opposition to the use we have made hitherto of 'legal obligation' (using it interchangeably with 'moral duty to obey the law'), we now use 'legal obligation' in the descriptive sense, reserving 'moral duty of fidelity to the law' to speak of the normative obligation. Thus, assumption (1) is preserved, but assumption (2) is rejected, reserving 'legal obligation' for the descriptive use only. By rejecting (2) in favor of de-moralizing legality, we also should note that *some* of the debate over the definition of 'law' can be resolved. In (1), if 'obligation' were taken in the normative sense (Fuller, Blackstone), then it is plausible, indeed almost necessary, to build moral criteria into the definition of 'law'. On the other hand, if 'obligation' is taken in the descriptive sense, there no longer seems any purpose served by building in such moral minima into the definition of 'law'.

In distinguishing a legal obligation for which assumption (2) does not hold and a moral obligation of fidelity to law for which

[28] H. L. A. Hart, "The Separation of Law and Morals," p. 624.

[29] *The Concept of Law*, pp. 204-05.

an assumption like (2) does hold, in a way it might appear as if we have settled by terminological fiat the issue in favor of positivism. We should, however, be quite clear on the reasons for which we have taken this course. In general, Hart is inclined to argue that on two separate scores positivism has greater virtues than its rival. Roughly, these are:

> (1) "... to withhold legal recognition from iniquitous rules may grossly oversimplify the variety of moral issues to which they give rise." We can only become confused by refusing to call such evil rules 'law'. The issue is brought into "sharper focus" by saying: this is law but too iniquitous to be obeyed.
>
> (2) "It seems clear that nothing is to be gained in the theoretical or scientific study of law as a social phenomenon by adopting the narrower concept: it would lead us to exclude certain rules even though they exhibit all the other complex characteristics of law." If we include evil rules as laws, they can be studied by the same science that studies other kinds of laws.[28]

Thus, positivism is superior "in the way it will assist our theoretical inquiries [2], or advance and clarify our moral deliberations [1], or both."[29] But because the existence of a legal system, positively so established and without reference to moral criteria, establishes only descriptive legal obligations which a man may have no reason to obey, (1) seems like a bogus virtue of positivism. It is perhaps this alleged virtue which may have given the impression that Hart has attempted to establish, on non-moral criteria alone, the truth of normative statements of legal obligation, for only these sorts of statements have a part to play in deliberation about moral dilemmas. Indeed, insofar as Hart thinks that (1) is a virtue of positivism, it is plausible to think that he himself has not made the distinction between normative and descriptive obligation statements.

As for the second virtue, Hart claims that if we did not count evil laws as 'laws', the science of law would not be allowed to study those systems which did not, on grounds of immorality, qualify for the title of 'law'. This claim, however, seems to rest on certain methodological assumptions which anyone like Fuller, who argued for a purposive definition of 'law' might be able to dodge. For example, on an Aristotelian picture of science, one

could have a science of axes, purposively defined, which studied defective axes, i.e., axes which did not fulfill their purpose of function for one reason or another. However, there is no reason to go into side issues here. I only want to point out that it is for neither of the alleged virtues Hart has mentioned that I have opted for a descriptive sense of 'law' and 'legal obligation'.

Our adoption of a descriptive sense for 'legal obligation' rests entirely on an argument from ordinary language. We do not, it seems to me, withdraw assertions or claims of legal obligation when we come to believe that the subject of obligation had no reason to do the act in question. Thus, at least sometimes we do use 'legal obligation' in a descriptive sense. We *could* say of Nazi Germany that it was only believed that men had legal obligations under Nazi law, although they did not really have those legal obligations. That is, we could come to use 'legal obligation' as we do use 'moral obligation', for we don't say that a Southerner has a moral obligation to maintain segregation, even though his society may believe that he has. But as a matter of fact we don't speak of legal obligation in this way. We do allow that a man in Nazi Germany *had* legal obligations, and, to say this, we seem therefore to need a descriptive sense of 'obligation'.

Not very much, I think, rests on whether or not I have correctly interpreted ordinary language on this point. Even if we never use 'legal obligation' in a descriptive sense, and the awards must be given to the natural law position for having more accurately captured ordinary language, we would still have had to introduce a descriptive sense of 'obligation' as a technical concept to understand Hart's use of 'legal obligation' and the way in which it differed from Fuller's and Austin's. Finally, what is most important is that we realize that the natural-positive law debate is precisely what Hart says that it is not when he claims that "we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage."[30] This is precisely what the controversy is, or comes to in the end.

In speaking of Bentham's aims in jurisprudence, which he clearly approves, Hart says:

> On the one hand Bentham had in mind the anarchist who argues thus: "This ought not to be the law, therefore it is not and I am free not merely to censure but to disregard it."

[30] *Ibid.*

[31] H. L. A. Mart, "Positivism and The Separation of Law and Morals," pp. 597-98.

> On the other hand, he thought of the reactionary who argues: "This is the law, therefore it is what it ought to be: . . ." There are therefore two dangers between which insistence on the distinction will help us steer: the danger that law and its authority may be dissolved in man's conceptions of what law ought to be and the danger that the existing law may supplant morality as a final test of conduct and so escape criticism.[31]

The two 'dangers' between which Hart's analytic jurisprudence helps us to steer are no-change (reaction) and violent change (anarchism). Thus, Hart's legal philosophy, when it does license change, works to encourage gradual, reformist change. It does not, as he says, permit us to dissolve law, of whatever state, in man's conception of what ought to be. But why don't some legal systems, determined to be such on positive criteria, deserve to be so dissolved in our conceptions of what ought to be? And how can we be so sure that the legal systems of liberal democracies are not of this last kind, the kind that deserve to be dissolved in our conceptions of what ought to be?

We might also recall Hart's claims for analytic jurisprudence, which was supposed to place the study of law on a clear, objective, scientific basis. But if Hart were right in his claim that analytic jurisprudence avoids the pitfalls of reaction and anarchism, how could analytic jurisprudence be objective and scientific? To 'avoid' these pitfalls is to take a clear political stance with regard to certain very important questions. If Hart's statements of legal obligation are taken as descriptive, and their truth can be established on non-moral criteria alone, then the study of law perhaps is objective. But no interesting political or moral consequences follow from these descriptive statements of legal obligation, and, in particular, the existence of a legal system in the descriptive sense will not help us steer between any political or moral 'dangers' at all. On the other hand, if moral and political consequences do follow from his legal theory, in particular if analytic jurisprudence does show a path between reaction and revolution, obviously some moral or political assumptions have to be made somewhere, and the study of law, as presented and described by Hart, cannot be the objective, scientific enterprise it is claimed to be.