Legal Validity and Legal Obligation

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I. Introduction

Does a person have a legal obligation to obey an unjust law? According to some, call them positivists, the answer is clearly affirmative: so long as the unjust law is a valid law, one has a legal obligation to obey it—although this does not entail that one has a moral obligation to obey it. According to others, call them the natural law school, the answer is clearly negative: since an unjust law is not truly a valid law, one clearly has no obligation (legal or moral) to obey it. This disagreement is not just a matter of word usage, for there are ground level issues at stake here regarding the choice of the basic elements required for analyzing these two key jurisprudential concepts of legal validity and legal obligation.

Positivist analyses of legal concepts are, by reason of their concern with the accurate and "pure" definition of the positive law, severely restricted in their choice of analytical tools, forswearing even a covert reference to the principles of justice and morality. Accordingly, John Austin¹ attempted to provide a descriptive, value-free analysis of the concepts of legal validity and legal obligation by breaking them down into such allegedly neutral elements as "sovereign," "command," "sanction," etc. Austin analyzed legal obligation or duty in terms of legal validity, legal validity in terms of the commands of a sovereign, commands in terms of the expression of a desire that people behave in a certain way, and sovereign partly in terms of having the power and will to enforce commands by applying sanctions in the event of disobedience, and partly in terms of being habitually obeyed by most people in the society while not being in a habit of obedience to the commands of any other individual or group. Convinced that value considerations fall outside "the province of jurisprudence," Austin wanted his entire analysis to be uncontaminated by any notions of justice or morality. By contrast, the natural law view traditionally provides a value-charged treatment of legal validity and legal obliga-

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¹ John Austin, The Province of Jurisprudence Determined (1832).
tion, insisting that no analysis of these concepts can be adequate unless it appeals, explicitly and unashamedly, to principles of justice and morality.

Beneath this disagreement about the admissibility of value-charged notions into the province of jurisprudence, the positivists and natural law analyses of legal validity and legal obligation share two unnoticed, but very important assumptions: both assume (1) that the same analytical tools are needed for the analysis of legal obligation as for the analysis of legal validity, and (2) that legal validity entails legal obligation, i.e., to establish the legal validity of a law (such as the criminal law proscription against murder) is to establish that one has a legal obligation to obey that law.

The aim here is twofold: to discredit both these assumptions, and then to suggest that the abandonment of them yields a coherent position with a number of theoretical and practical advantages. The ultimate aim is to suggest a reconciliation of the positivist and natural law impasse by accounting for what both sides seem to have wanted to say—allowing the positivists their descriptive, uncontaminated account of legal validity, and yet accommodating the natural law insistence that value-charged reference to the principles of justice and morality has a legitimate place in the province of jurisprudence. The method of discrediting the above-mentioned assumptions will be a detailed discussion of H.L.A. Hart's *The Concept of Law,* hailed by many as one of the most important contributions to legal philosophy in this century. I choose this work as my vehicle partly because of its importance: it is widely read, highly praised, and a most lucid and helpful contribution to the literature. More importantly, though, I focus upon Hart's book because I believe it is defective, and because the defect is traceable to the two assumptions mentioned above. My quarry is not Hart, it is these twin assumptions held by Hart and virtually everyone else; I wish to draw attention to these assumptions not only because

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4. Pace Summers, who states, "the work is on the whole very well done; thus the critic must often be reduced to comments that to some may seem insignificant." *Supra* note 3, at 638.
they create havoc in Hart's particular legal theory, but mainly because they are a liability to legal theory in general.

II. Traditional Positivist Elements in Hart's Legal Theory

Although Hart expresses dissatisfaction with the adequacy of existing positivist analyses (Austin's and Kelsen's in particular), he remains a willing member of the positivist tradition. Sharing the positivist aversion to any value-charged, natural law analysis of legal validity and legal obligation, Hart supplies a new, presumably descriptive set of analytical elements: the notion of rule following, the distinction between primary and secondary rules, and the internal point of view. Despite his disputes with previous positivist analyses, it can be seen that Hart adheres to two central positivist doctrines: that legal validity establishes legal obligation and that a "wider" concept of legal validity (according to which duly passed, and upheld, laws are "valid" even if they are outrageously unjust or immoral) is to be preferred.

As a prelude, it is instructive to recognize that Hart holds the positivist view that one has a legal obligation to obey an unjust law. According to positivist doctrine, every valid law, i.e., a law which has been duly passed by the legislature, signed by the executive, and (even, perhaps) upheld by the courts, imposes a legal obligation. This positivist doctrine is implied by the two doctrines attributed to Hart in this section: given the positivist preference for a "wider" view of legal validity, and given the doctrine that legal validity establishes legal obligation, it follows that one has a legal obligation to obey even those valid laws which are unjust. Thus it is a matter of more than passing interest to trace the way in which the doctrine that legal validity establishes legal obligation appears in Hart's system.

5. Since 'the positivist tradition' can designate a wide variety of claims and viewpoints, it might help to pin this phrase down to some extent. I accept Hart's own characterization: "Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so." Pp. 181-182. In a note, Hart says that Bentham, Austin and Kelsen all contend "that there is no necessary connexion between law and morals, or law as it is and law as it ought to be." P. 253. In addition, Hart ascribes to positivism the related contention (made, he says, by Bentham, Austin and Kelsen) "that the analysis or study of meanings of legal concepts is an important study to be distinguished from . . . the critical appraisal of law in terms of morals, social aims, functions, &c." Id. When the positivist tradition is characterized in this way, Hart himself qualifies as a positivist. See pp. 181-207 and his Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 599-602, 606-15, 621-24 (1958).

6. Again, I am content to follow Hart, who stipulates that according to "the classical theories of Natural Law . . . there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid." P. 182.
A. Legal Validity Establishes Legal Obligation

Though Hart never explicitly articulates this doctrine, it is discoverable in the very wording of his central distinction between primary rules “of obligation” and secondary rules of recognition, change and adjudication. Primary rules of obligation require human beings “to do or abstain from certain actions, whether they wish to or not”7 (the prohibitions of the criminal law, for example, are primary rules of obligation). Secondary rules of recognition, change and adjudication, on the other hand, “provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations”8 (the laws regarding contracts and wills are secondary rules, as are laws establishing legislative and judicial procedures, rules of succession, etc.). Hart makes the “general claim that in the combination of these two types of rule there lies ... ‘the key to the science of jurisprudence.’”9 With this key Hart believes he has unlocked the notion of legal validity: “To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition.”

A small, primitive society “closely knit by ties of kinship, common sentiment, and belief” might be imagined to live by primary rules alone, though this “simplest form of social structure” would display certain crippling defects.10 At this stage in legal evolution, Hart suggests, “there might be nothing corresponding to the clear distinction made, in more developed societies, between legal and moral rules [of obligation].”11 But the introduction of secondary rules of recognition, change and adjudication brings the society “from the pre-legal into the legal world,”12 wherein “the primary rules of obligation identified

8. P. 79.
9. Id. Or again, “the main theme of this book” is that the “union [of primary and secondary rules] may be justly regarded as the ‘essence’ of law,” P. 151. Similarly, this union reveals the “heart of a legal system.” P. 95. In this article, I shall not subject this distinction to scrutiny; although in need of further clarification, the distinction is a basically sound contribution to the literature of legal philosophy. For some critical discussion see Summers, Singer and Cohen, supra note 3.
10. P. 100. Hart also suggests this point earlier: “in the simple operation of identifying a given rule as possessing the required feature of being an item on an authoritative list of rules we have the germ of the idea of legal validity.” P. 98.
12. P. 165 (emphasis added).
through the official system are now set apart from other [moral, non-legal] rules, which continue to exist side by side with those officially recognized. Thus in a modern legal system we have two sorts of rules of obligation: “legal” ones (“the primary rules of obligation identified through the official system”) and “non-legal” ones (“indeed in all communities which reach this [legal] stage, there are many types of social rule and standard lying outside the legal system”). It is clearly fair to infer from this that the “legal” rules of obligation (the primary rules of obligation identified through the official system) impose legal obligation, i.e., that legal validity establishes legal obligation.

A non-legal rule of obligation can be made a legal rule of obligation if the appropriate officials make the relevant manipulations in accordance with the system’s secondary rules. A system is not limited merely to officially baptizing non-legal rules as “legal,” though, for the secondary rules also empower officials to create a legal rule of obligation ex nihilo. These new creations might even, on occasion, run counter to prevalent social practices and attitudes, and also counter to enlightened moral judgment; nonetheless, so long as they are deemed valid according to the secondary rules of recognition and adjudication, they remain legal rules of obligation. In Hart’s system, therefore, a legal rule of obligation (imposing legal obligations) is created whenever the relevant officials make the appropriate manipulations under the secondary rules of the legal system. This clearly suggests the positivists’ affirmative answer to our question, “Does a person have a legal obligation to obey an unjust (but valid) law?”

B. The Preference for a Wider Concept of Legal Validity

Hart’s parting shots are fired on the traditional battlefield of the positivists and natural lawyers: is it the case “that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice”? Or, put more simply: are unjust but validly enacted laws “laws”? The natural law view says they are not, the positivists say they are. Hart agrees with the latter, emphasizing that this is not a mere verbal matter.

15. Id.
16. Id.
18. Before he turns to the final chapter, which discusses international law.
20. See pp. 8, 152, 203-07.
Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage. For what really is at stake is the comparative merit of a wider and a narrower concept or way of classifying rules, which belong to a system of rules generally effective in social life. If we are to make a reasoned choice between these concepts, it must be because one is superior to the other in the way in which it will assist our theoretical inquiries, or advance and clarify our moral deliberations, or both.\(^{21}\)

Hart believes the wider (positivist) way of classifying laws offers both theoretical and practical advantages. Theoretically, “nothing is to be gained” from following the narrower concept; “nothing, surely, but confusion could follow” from it, and “certainly no history or other form of legal study has found it profitable to do this.”\(^{22}\) This is because the narrower concept “would lead us to exclude certain rules [namely, those which “offend against a society’s own morality or against what we may hold to be an enlightened or true morality”] even though they exhibit all the other complex characteristics of law”; such a procedure “must inevitably split, in a confusing way, our effort to understand both the development and potentialities of the specific method of social control to be seen in a system of primary and secondary rules. Study of its use involves study of its abuse.”\(^{23}\)

Nor does Hart see any “practical merits” in the narrower concept. First, it seems unlikely to lead to “a stiffening of resistance to evil.”\(^{24}\) For, after all, whenever they can control the legal machinery, “Wicked men will enact wicked rules which others will enforce.”\(^{25}\) Second, Hart believes the most effective weapon “in confronting the official abuse of power” is the traditional positivistic doctrine that, though legal validity may entail binding legal obligation, this does not entail overriding moral obligation. He asserts that “the certification of something as legally valid is not conclusive of the question of obedience,” because the demands of the legal system “must in the end be submitted to a moral scrutiny”; or again, “there is something outside the official system, by reference to which in the last resort the individual must solve his problems of obedience.”\(^{26}\) Third, Hart regards the narrower concept’s “refusal, made once and for all, to recognize evil laws as valid

\(^{21}\) Pp. 204-05.
\(^{22}\) P. 205.
\(^{23}\) Id.
\(^{24}\) Id.
\(^{25}\) P. 206.
\(^{26}\) Id. (emphasis added).
for any purpose” as defective because it “may grossly oversimplify” the variety of “delicate and complex moral issues” created by “iniquitous rules.”

In these passages Hart does not explicitly discuss “legal obligation,” but only “legal validity.” As noted, what he here says about “the question of obedience” clearly indicates that “obedience” in this context refers to moral obligation. Nonetheless, these passages do implicitly carry a significant claim about legal obligation, given Hart’s view (already noted above) that legal validity establishes legal obligation: in opting for a “wider” concept of legal validity, Hart opts for a “wider” concept of legal obligation. This leads once again to the conclusion that Hart would give an affirmative answer to our question, “Does a person have a legal obligation to obey an unjust law?”

It is important to note that Hart’s preference for a “wider” concept of legal validity is not primarily an empirical matter; it is certainly not to be construed as a denial of the historical influence of morality upon the law:

[I]t cannot seriously be disputed that the development of law, at all times and places, has in fact been profoundly influenced both by the conventional morality and ideals of particular social groups, and also by forms of enlightened moral criticism urged by individuals, whose moral horizon has transcended the morality currently accepted.

Hart cautions, though, that “it is possible to take this truth illicitly, as a warrant for a different proposition” (which he nevertheless concedes “may, in some sense, be true”) “that a legal system must exhibit some specific conformity with morality or justice, or must rest on a widely diffused conviction that there is a moral obligation to obey it.”

From such historical connections between law and morals, Hart argues “it does not follow . . . that the criteria of legal validity of particular laws used in a legal system must include, tacitly if not explicitly, a reference to morality or justice.” The criteria of legal validity are found, according to Hart, in the secondary rules of recognition, change and adjudication, not in the conformity of particular laws—or even of the legal system as a whole—to principles of justice or morality. Again and again, Hart insists that “municipal legal sys-

28. P. 181 (emphasis added).
29. Id.
30. Id.
tems, with their characteristic structure of primary and secondary rules, have long endured though they have flouted . . . principles of justice,”31 and that though there are certain (minimal) “requirements of justice which lawyers term principles of legality” these are “unfortunately compatible with very great iniquity.”32 Nonetheless, the valid primary rules of such systems, even though iniquitously flouting the principles of justice, presumably impose legal obligations.

III. The Internal Point of View and Legal Validity

As already mentioned, Hart believes the traditional positivist analyses of law are unacceptable, primarily because they lack certain tools which he deems essential for an adequate jurisprudential analysis. One such tool traditional positivism lacks is what Hart calls “the internal point of view,” which he presents in terms of his distinction between group habits, wherein there is “mere convergence in behavior between members of a social group . . . (all may regularly drink tea at breakfast or go weekly to the cinema),”33 and social rules (e.g., the rule that the male head is to be bared upon entering a church, the rules of games such as chess and cricket, the rules of grammar and of etiquette, etc.).34 This distinction between group habits and social rules, which Hart says is “crucial for the understanding of law,”35 is traceable to three characteristics of social rules:

[1] where there is such a [social] rule deviations are generally regarded as lapses or faults open to criticism, and threatened deviations meet with pressure for conformity, though the forms of criticism and pressure differ with different types of rule.

[2] where there are such rules, not only is such criticism in fact made but deviation from the standard is generally accepted as a good reason for making it. Criticism for deviation is regarded as legitimate or justified in this sense, as are demands for compliance with the standard when deviation is threatened. Moreover, except by a minority of hardened offenders, such criticism and demands are generally regarded as legitimate, or made with good reason, both by those who make them and those to whom they are made.

[3] the internal aspect of rules . . . [I]f a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule

31. P. 201.
33. P. 9.
34. Pp. 9-11, 53-60.
35. P. 11.
has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record.\textsuperscript{86}

The last characteristic, the internal aspect of rules, clearly one of the most important components of Hart's analysis of law, is further characterized as follows:

What is necessary is that [1] there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that [2] this should display itself in [i] criticism (including self-criticism), [ii] demands for conformity, and [iii] in acknowledgments that such criticism and demands are justified, [3] all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'.\textsuperscript{37}

It is important to emphasize that this "critical reflective attitude" is directed towards certain patterns of behavior: the behavior in question is thus seen and criticized in terms of certain rules or norms. There is no suggestion that the internal point of view involves any particular approval of the rules themselves, which might be expressed in what I shall call the "value" or "approval" terminology of 'excellent', 'worthy of support', 'good', 'valuable', etc. There is a significant difference between this "value" terminology which attaches to rules and what Hart calls the "normative terminology" ('ought', 'must', 'should', 'right', 'wrong') which attaches to behavior falling under the rules.\textsuperscript{38}

People who have this "critical reflective attitude" exhibit what Hart later dubs "the internal point of view," which he contrasts with "the external point of view" that reflects the positivists' concern with sheer behavioral phenomena such as "habits of conformity" to laws, and the likelihood of sanctions being imposed. According to Hart, if an observer of social behavior "really keeps austerely" to the "extreme" external point of view,

and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all . . . . Instead, it will be in terms of observable regularities of conduct, predictions, probabilities, and signs. For such an observer, deviations by a member of the group from normal conduct will be a

\textsuperscript{36} Pp. 54-55.

\textsuperscript{37} P. 56 (numbering inserted).

\textsuperscript{38} See pp. 57-58 infra, discussing the distinction between the internal and value points of view.
sign that hostile reaction is likely to follow, and nothing more. His view will be like the view of one who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop.39

An observer from the extreme external point of view would thus be unable to distinguish between group habits and social rules: although he would be able to note the characteristic shared by group habits and social rules alike (namely, the external aspect of the group's regular uniform behavior), he would be totally unaware, by definition, of the crucial characteristic which distinguishes social rules from group habits (namely, that social rules are rule-governed and therefore have an *internal aspect*). An analysis of the group habit/social rule distinction consequently requires the introduction of a number of related analytical elements: the notion of rule-following, the internal aspect of rules, and the internal point of view. An analysis of social rules also yields the distinction between primary rules and secondary rules of recognition, change and adjudication—for even such a game as baseball, with its umpires, rule book and rule book writers, provides quite a complex network of secondary rules. The analytical elements Hart uses for his own final analysis of legal validity—such elements as the notion of rule-following, the internal aspect of rules, the internal point of view, and the distinction between primary and secondary rules—are thus discoverable in (derivable from) the mere distinction between group habits and social rules.40

Throughout the earlier parts of *The Concept of Law*, Hart insists that the traditional positivist analysis of legal obligation and legal validity is inadequate because being external, it systematically excludes (or “define[s] . . . out of existence”)41 any reference to “the internal point of view.” Accordingly, he asserts that the notions of

40. In a summation near the end of the book, Hart makes essentially the same point: Thus we found it necessary to distinguish from the idea of a general habit that of a social rule, and to emphasize the internal aspect of rules manifested in their use as guiding and critical standards of conduct. We then distinguished among rules between primary rules of obligation and secondary rules of recognition, change, and adjudication. The main theme of this book is that so many of the distinctive operations of the law, and so many of the ideas which constitute the framework of legal thought, require for their elucidation reference to one or both of these two types of rule, that their union may be justly regarded as the ‘essence’ of law . . . . Our justification for assigning to the union of primary and secondary rules this central place is not that they will there do the work of a dictionary, but that they have great explanatory power.
41. P. 88.
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"legislation, jurisdiction, validity and, generally, of legal powers, private and public" demand a reference to the internal point of view for their analysis."42 These claims by Hart seem self-evidently true, given the above contrast between the extreme external point of view and the internal point of view. An arid analysis from an extreme external point of view which only noted people's behavior in the crudest way, being unable by definition to note the reasons and the rules (primary and secondary) behind the behavior, would obviously be inadequate. So understood, Hart's disenchantment with analyses from the external point of view is clearly understandable.

Not only is it important to distinguish the internal point of view from the extreme external point of view which includes too little, but it is also important not to build too much into the internal point of view. Playing chess (speaking correctly, behaving with proper manners, etc.), after all, does not require approval of the rules, morally or otherwise; one only needs to recognize that there are certain rules and follow them. Although Hart devotes a great deal of space to distinguishing the internal from the extreme external point of view, he is not so careful to draw boundaries on the other side of the internal point of view, distinguishing it from what I shall call the "value" or approval point of view. Nonetheless, he does give a few hints. He cautions, for instance, that the "critical reflective attitude" which is necessary for the internal point of view must not be "misrepresented as a mere matter of 'feelings'."43 Even more to the point, in a later discussion of legal validity, Hart explicitly distinguishes (1) "an external46 statement of fact which an observer of the system might make even if he did not accept it" (e.g., to say that in England courts, officials and private persons use as the ultimate rule of recognition the rule that what the Queen in Parliament enacts is law) from (2) "an internal

42. P. 56.
43. P. 56. Hart is quite insistent on this point:
No doubt, where rules are generally accepted by a social group and generally supported by social criticism and pressure for conformity, individuals may often have psychological experiences analogous to those of restriction or compulsion. When they say they 'feel bound' to behave in certain ways they may indeed refer to these experiences. But such feelings are neither necessary nor sufficient for the existence of "binding" rules. There is no contradiction in saying that people accept certain rules but experience no such feelings of compulsion.

44. Pp. 104-05.
45. This, please note, cannot refer to a statement from the extreme external point of view, which by definition is unable to acknowledge even that other people accept and follow certain rules. Instead it is a statement from what might be called the "moderate" external point of view, whereby "the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which they are concerned with them from the internal point of view." P. 87. Cf. p. 244.
statement of law asserting the validity of a rule of the system” (e.g., to say that “a particular enactment is valid, because it satisfies the rule that what the Queen in Parliament enacts is law”), which is also distin-
guished from (3) “a statement of value” (e.g., to say that “the rule of recognition of the system is an excellent one and the system based on it is one worthy of support”). This distinction between “internal” statements and “value” statements is further reflected in the type of vocabulary suitable to each. We have already seen that Hart’s internal point of view uses the “normative” terminology of ‘ought’, ‘must’, ‘should’, ‘right’ and ‘wrong’ to speak about behavior falling under the rules; by contrast, the value or approval point of view may use all these normative terms to talk about behavior falling under the rules and also use the “value” terminology of ‘excellent’, ‘worthy of support’, and, presumably, ‘good’, ‘valuable’, ‘bad’, ‘evil’, etc. to talk about the rules themselves.

It is not hard to see why Hart would want to keep all value or approval elements out of the internal point of view. The principle of parsimony of analytical elements demands it: the internal point of view does not need to have elements of value and approval built into it in order to yield, in combination with the notion of law as the union of primary and secondary rules, Hart’s analysis of legal validity. The distinction between the internal and value or approval points of view, therefore, serves to exclude unnecessary analytical elements. Even more important, to admit notions of value or approval into the internal point of view would contaminate Hart’s analysis with the sort of elements explicitly ruled out by his preference for the “wider” sense of legal validity. To be consistent with the positivist program he must exclude value elements from his analysis of legal validity, and the distinction between the internal and value points of view explicitly assures this exclusion.

IV. Incoherencies in Hart’s Analysis of Legal Obligation

An analysis of legal obligation is implicit in the above discussion: given Hart’s analysis of legal validity in terms of certain analytical elements (the distinction between group habits and social rules, the notion of the internal point of view, and the distinction between primary and secondary rules), and given his acceptance of the positivist doctrine that

46. See p. 55 supra.
legal validity establishes legal obligation, one would expect him to insert a sentence stipulating simply that legal obligation is to be analyzed in the same way, and with the same analytical tools, as legal validity. But he does not do this. Although it is not at all clear precisely what he does do, one thing is certain—instead of a single sentence, Hart devotes ten pages to what he calls "The Idea of Obligation." In these pages Hart (A) suggests that "to understand the general idea of obligation" is a necessary preliminary to understanding it in its legal form, and (B) adopts a particular method of analyzing the concept of obligation, which method leads him to introduce some new analytical elements—notably, the distinction between being obliged and having an obligation, and the distinction between social rules which do impose obligations or duties (e.g., "rules which restrict the free use of violence" and "rules which require honesty or truth or require the keeping of promises") and those which do not (e.g., "rules of etiquette or correct speech").

Although no one seems to have noticed it (none of Hart's critics, friend or foe, nor even Hart himself), The Concept of Law thus presents two quite different methods for analyzing the concept of legal obligation: first, a traditional positivist analysis of legal obligation in terms of (i.e., with the same analytical elements used for) legal validity; and second, the analysis of legal obligation in terms of "the general idea of obligation." The hard fact, however, is that Hart is not, qua positivist, entitled to employ the latter method for analyzing legal obligation. Strictly speaking, this whole section on "The Idea of Obligation" is unnecessary for a positivist analysis of legal obligation; an adequate positivist analysis of obligation in its legal form is available in terms of the analytical elements used in analyzing legal validity (namely, the distinction between group habits and social rules, the internal point of view, and the distinction between primary and secondary rules). The positivist doctrine that legal validity establishes legal obligation irreparably cuts the connection between "the general idea of obligation" and "its legal form," rendering false the claim that understanding the general idea of legal obligation is a necessary preliminary to understanding obligation in its legal form. Since we can analyze and understand the

47. "The Idea of Obligation" is the title of the second of three sections in Chapter Five, which is titled "Law as the Union of Primary and Secondary Rules."
48. P. 83 (emphasis added).
50. P. 85.
51. P. 83.
“wider” concept of legal validity without reference to “the general idea of obligation” we can also, presumably, understand and analyze the (“wider”) concept of legal obligation without such a reference. Consequently, to add more analytical elements, which is what Hart does in these ten pages, is to violate the dictum to eschew excess analytical elements. More important, though, I shall argue that Hart’s reference to “the general idea of obligation” compromises his positivist position by importing value-charged elements into his analysis.

The remedy would seem to be obvious: simply delete the offensive ten pages. This would be a serious mistake, however, not simply because Hart obviously thinks it important to use the method of analysis presented in these pages, nor even because this method is interesting on its own merits and yields interesting analytical elements, but mainly because these pages point the way to a much more adequate method of analyzing legal obligation than is to be found in the traditional positivist analysis in terms of legal validity. Accordingly, in the next section I shall suggest a way to save Hart’s method of analyzing legal obligation in terms of the general idea of obligation. First, though, we must acquire a better idea of this method of analysis.

As already noted, Hart adopts a particular method of analyzing the concept of obligation in his section on “The Idea of Obligation,” and that method leads him to introduce some new analytical elements. One of these new elements is the distinction between being obliged and having an obligation, which is illustrated in what Hart calls “the gunman situation”:

A orders B to hand over his money and threatens to shoot him if he does not comply. . . . The plausibility of the claim that the gunman situation displays the meaning of obligation lies in the fact that it is certainly one in which we would say that B, if he obeyed, was ‘obliged’ to hand over his money. It is, however, equally certain that we should misdescribe the situation if we said, on these facts, that B ‘had an obligation’ or a ‘duty’ to hand over the money. . . . There is a difference . . . between the assertion that someone was obliged [his emphasis] to do something and the assertion that he had an obligation [his emphasis] to do it.

The broad outlines of this obliged/obligation distinction should be fairly clear from the above, without going into further detail. What

52. The feasibility of this remedy is confirmed by consulting the text. The flow of argument from the first section to the third (and last) section of Chapter Five (“Law as the Union of Primary and Secondary Rules”) would not be impaired, and perhaps even enhanced, by the simple removal of section two on “The Idea of Obligation.”
53. P. 80 (emphasis added, unless otherwise noted).
might not be so clear, however, is that Hart establishes this distinction by appealing to our intuitions regarding the application of the general concept of obligation (or, if you will, he points to the use of 'obligation' and other terms). Thus the above passage includes such locutions (emphasized above) as: 'The plausibility of the claim that . . . displays the meaning of obligation lies in the fact that . . .', 'certainly . . . we would say . . .', 'equally certain . . . we should misdescribe . . . if we said . . .', 'There is a difference . . . between the assertion . . . and the assertion . . .'. A steady stream of such appeals characterizes Hart's continued discussion of this obliged/obligation distinction. These are clearly not presented as inferences derivable from some basic set of axioms nor as arbitrary, dogmatic stipulations of Hart's own idiosyncratic jargon; instead, they are appeals to the reader's own, independent, pre-formed intuitions about the idea of obligation (or, about the use of 'obligation' and other terms). Hart's entire argument here consists of this sort of appeal to the reader's (linguistic) intuitions, a familiar type of argument in contemporary, ordinary language philosophy.

The other major distinction in "The Idea of Obligation" is established by the same kind of appeal:

[Though a grasp of the elements generally differentiating social rules from mere habits is certainly indispensable for understanding the notion of obligation or duty, it is not sufficient by itself.

The statement that someone has or is under an obligation does indeed imply the existence of rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation. 'He ought to have' and 'He had an obligation to' are not always interchangeable expressions, even though they 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. Rules of etiquette or correct speech are certainly rules: they are more than convergent habits or regularities of behaviour; they are taught and efforts are made

54. The following long list of passages is drawn from a paragraph less than a page in length: 'It seems clear that we should not think of B as obliged to . . . if . . .'; 'Nor perhaps should we say that B was obliged, if . . .'; 'though such references to . . . are implicit in this notion, the statement that a person was obliged to obey someone is . . .'; 'But the statement that someone had an obligation to do something is of a very different type', 'the facts about B's action and . . . though sufficient to warrant the statement that B was obliged . . . are not sufficient to warrant the statement that he had an obligation', 'facts of this sort . . . are not necessary for the truth of a statement that a person had an obligation to do something', 'the statement that a person had an obligation . . . remains true even if . . .'; 'whereas the statement that he had this obligation is quite independent of . . . the statement that someone was obliged to do something, normally carries the implication that . . .'. Pp. 80-81.
to maintain them; they are used in criticizing our own and other
people's behaviour in the characteristic normative vocabulary.
'You ought to take your hat off', 'It is wrong to say "you was"'.
But to use in connexion with rules of this kind the words 'obligation'
or 'duty' would be misleading and not merely stylistically odd. It would misdescribe a social situation; for though the line
separating [I] rules of obligation from [II] others is at points a
vague one, yet the main rationale of the distinction is fairly clear.55

It is not necessary to repeat the phrases which appeal to the reader's
intuitions about the idea of obligation (or about the use of 'obligation'
and other terms), for Hart's method of argument should by now be
clear enough. What now demands our attention is the distinction, made
explicitly in the last sentence quoted but implicit in the whole passage,
separating [I] "rules of obligation," presumably these are social rules
or practices which impose obligation (where the use of 'obligation'
or 'duty' does not "mislead" or "misdescribe") from [II] "others,"
presumably social rules or practices which do not impose obligation
(apparently, where the use of 'obligation' or 'duty' would "mislead"
and "misdescribe"). Examples of the latter sort of social rules are rules
of etiquette or correct speech; examples of the former, Hart later in-
dicates, are rules "which restrict the free use of violence" and "rules
which require honesty or truth or require the keeping of promises."56

Three preliminary points need to be kept in mind regarding this dis-
tinction, in Chapter Five, between what I shall call [I] obligation rules
and [II] non-obligation rules. First, it is a distinction which is made
within the domain of another distinction—Chapter Four's distinction
between group habits and social rules. In effect, Chapter Five tells us
there are two sorts of social rules: obligation rules and non-obligation
rules. Second, we have already seen that Hart uses the group habit/
social rule distinction to generate the key analytical elements for ana-
lyzing legal validity: the internal point of view and the distinction be-
tween primary and secondary rules. Third, it must again be repeated
that this Chapter Five distinction seems unnecessary for the analysis
of legal obligation, in light of Hart's acceptance of the positivist doc-
trine that legal validity establishes legal obligation.

Not only is the distinction between obligation rules and non-ob-
ligation rules unnecessary, and hence counter to the positivists' attempt
to omit unnecessary analytical elements, but it seems to be ultimately

56. P. 85.
irreconcilable with the positivist insistence that analyses of legal concepts make no value-charged appeals. Conveniently enough, the evidence that this distinction does indeed make a nonpositivistic appeal, i.e., that it covertly smuggles in the value point of view, is discoverable in the way Hart draws it. He says that three factors “distinguish rules of obligation from other rules”:

[a] the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. . . . What 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;

[b] the rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it;

[c] 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.67

This three-fold characterization of the discussion between obligation rules and non-obligation rules, however, seriously undercuts Hart’s analysis of the idea of obligation because it inadvertently injects certain value or approval elements into statements of obligation. In presenting these three characteristics, Hart adopts a kind of “external” point of view: he makes the (outsider’s) observation that rules are thought of, or are spoken of, as giving rise to obligation when (a) the rules are supported by a general, insistent demand for conformity, and great social pressure is brought to bear upon those who deviate from the rules, (b) the rules are thought of as necessary to the maintenance of social life or, at least, to some highly prized feature of it, and (c) the rules are thought of as characteristically involving sacrifice or renunciation. An outsider could, of course, note that others regard (value,

67. Pp. 84-85. I do not here intend to question the aptness and accuracy of this characterization of the idea of obligation, although this has, with some justice, been disputed. Richard Bernstein argues both that these three characteristics are not sufficient to establish obligation (among the social elite, for example, rules of etiquette might be very seriously supported) and that they are not necessary (“does the acceptance of . . . a noxious rule by even a majority of the community impose an obligation on any individual? . . . Frequently, the seriousness of social pressure behind the rules must be challenged if we are to live up to our obligations”). Professor Hart on Rules of Obligation, 73 Mind 563, 564-65 (1964).
approve of) the rules in such a way without himself sharing that approval—he might think of them as silly, or even as evil.\textsuperscript{58} This suggests an ambiguity in statements of the form ‘A has an obligation to do x’: on the one hand, the statement might be made from the “outside” and simply mean something like ‘the rules are generally thought (by others) so important, necessary, valuable, etc., that it is generally insisted not merely that A ought to do x but that A has an obligation or duty to do x’; on the other hand, it might be made from the “inside” and mean something like ‘I approve of and agree with the general insistence that the rules are so important, necessary, valuable, etc., that A not only ought to do x but that A has an obligation or duty to do x’. Similarly, the question ‘A has an obligation to do x, don’t you think?’ makes an ambiguous appeal: on the one hand, it might simply make an “outsider’s” appeal and mean something like ‘don’t you (fellow outsider) observe that the rules are generally thought (by others) so important, necessary, valuable, etc., that it is generally insisted not merely that A ought to do x but that A has an obligation or duty to do x?’; on the other hand, it might make an “insider’s” appeal and mean something like ‘don’t you agree with the rest of us that the rules are so important, necessary, valuable, etc., that A not only ought to do x but that A has an obligation or duty to do x?’

Clearly no one could make an “inside” obligation assertion or could answer (affirmatively or negatively) an “insider’s” appeal about the ascription of obligation without necessarily making some value judgments of his own regarding the importance, necessity and value of the relevant social rules. What has been called the value or approval point of view, then, would seem to be inextricably involved in anyone’s (inside) assertion of obligation and in anyone’s replies to (insiders’) appeals regarding the assertion of obligation. By contrast, one’s own value judgments about the social rules are clearly not involved when one makes an “outside” obligation assertion or when one answers (affirmatively or negatively) an “outsider’s” appeal about the ascription of obligation. Nonetheless, “outside” obligation statements do involve what Hart calls the internal point of view, simply because all rule-aware statements about social rules necessarily involve the internal point of view.

\textsuperscript{58} Hart himself recognizes that allegiance to a legal system might be based on such diverse considerations as “calculations of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do. There is indeed no reason why those who accept the authority of the system should not examine their conscience and decide that, morally, they ought not to accept it, yet for a variety of reasons continue to do so.” Pp. 198-99.
Two questions thus arise: what sorts of assertions and appeals does Hart use? and what sorts ought he to use? By now, the answer to the latter question should be clear: Hart ought to use only “outside” obligation assertions and he ought to make only “outsider” appeals. Otherwise his obligation assertions would become necessarily infected with his own value point of view and his appeals would activate the reader’s value point of view—all of which would compromise, as has already been indicated, his attempt to provide a neutral, value-free, positivist analysis of legal concepts. He cannot, after all, provide a value-free analysis of legal obligation if he first insists that the analysis of the idea of obligation is a “necessary preliminary” to such an analysis and then contaminates the preliminary analysis with appeals to his own, and his readers’, value judgments.

Although Hart should restrict himself to “outside” assertions and appeals, this is not, it seems, what he does. We have already noted, for instance, that he establishes the obliged/obligation distinction by means of appeals to the reader’s (value-charged?) intuitions regarding obligation ascription: ‘certainly . . . we would say’, ‘equally certain . . . we should misdescribe . . . if we said . . .’. These certainly look like insiders’ appeals, especially in the absence of any explicit attempt to show they are not. Furthermore, those same passages seem to contain “inside” assertions about obligation: ‘the statement that someone had an obligation to do something is of a very different type . . .’, ‘the facts about B’s action and . . . though sufficient to warrant the statement that B was obliged . . . are not sufficient to warrant the statement that he had an obligation’, ‘the statement that a person had an obligation . . . remains true even if . . .’, and so forth. And elsewhere we find Hart making the seemingly “inside” assertion that “To promise is to say something which creates an obligation for the promisor . . .”

59. See p. 58 supra.
60. See pp. 60-62 supra.
61. P. 42. This ambiguity between inside and outside assertions and appeals about obligations points up, in turn, a corresponding ambiguity in Hart’s notion of “the internal point of view.” Regarding the group habit/social rule distinction in Chapter Four, we have seen that all value elements should be, can be, and are excluded from the internal point of view. And they could even remain excluded in Chapter Five’s distinction between social rules which impose obligation and those which do not, if the internal point of view were restricted to “outside” assertions and appeals about obligation. But it is not; in crucial passages value elements seem to be smuggled into the internal point of view by inadvertently associating it with “inside” obligation assertions and appeals. In the following quote, for example, ‘[O]’ notes the (value-tainted) use of “internal point of view” which is “required” for the analysis of obligation, as distinct from non-obligation, rules; ‘[R]’ notes the (untainted) use which points merely to the group habit/social rule distinction; and ‘[?]’ notes an uncertain use.

Under the simple régime of primary rules the internal point of view [O] is manifested
It might seem tempting to eliminate whatever value judgments are implicit in Hart's ("inside") assertions and appeals about obligation by turning them into explicitly "outside" assertions and appeals—converting all instances of 'we would say' into 'they would say', and changing 'to promise is to say something which creates an obligation for the promisor . . .' into 'to promise is to say something which is generally believed to create an obligation for the promisor . . .', etc. By purifying in this way, it would probably be possible to keep Hart's analysis of the idea of obligation consistent with his positivist program (which would not, however, alter the fact that such an analysis is unnecessary in the first place). Nevertheless, this tactic would be ultimately unsatisfactory; if we were to turn Hart's entire analysis of the idea of obligation into an "outside" analysis, much of worth would be lost and many new problems would arise. A strict diet of "outside" assertions and appeals about obligation would be clinical in tone and empirical in nature; everything would suddenly turn upon sociological facts and methods, not upon conceptual or philosophical issues. The discussion would be confined to documented description of existing prescriptions, leaving no place for the sort of undocumented (because "inside") assertions and appeals about the idea of obligation, and about the ordinary use of 'obligation' which characterize Hart's discussion. All this raises many larger issues about the nature and the role of philosophical analysis in general, and of the analysis of moral concepts in particular. I cannot, of course, pursue such complicated matters here, but must be content with suggesting that when ordinary language analysis is used for explicating moral discourse, the analysis seems destined to be somewhat value-tinged, i.e., to be marked by various "inside" appeals and assertions.

There is, perhaps, an historical explanation for Hart's presentation of two ultimately irreconcilable methods of analyzing legal obligation (in terms of the doctrine that legal validity establishes legal obligation, in its simplest form, in the use of those rules as the basis of criticism, and as the justification of demands for conformity, social pressure, and punishment. Reference to this most elementary manifestation of the internal point of view [O] is required for the analysis of the basic concepts of obligation and duty. With the addition to the system of secondary rules, the range of what is said and done from the internal point of view [?] is much extended and diversified. With this extension comes a whole set of new concepts and they demand a reference to the internal point of view [R] for their analysis. These include the notions of legislation, jurisdiction, validity and, generally, of legal powers, private and public.

P. 96 (emphasis and notations added).

62. These "outside" assertions and appeals might go under the label "moderate external" (see note 45 supra) or, perhaps, be described as "rule-aware (internal) statements about others' value-approval attitudes."
on the one hand, and in terms of the general idea of obligation, on the other). The first method, which is the traditional positivist method of analyzing legal obligation, is inherited from John Austin, the nineteenth century positivist. The second method, which uses the techniques of modern, ordinary language philosophers, clearly owes much to Hart’s relationship with, among others, J. L. Austin. Although Hart’s combination of these two separate methods of analysis generally produces illuminating results, when he turns to the analysis of the concept of legal obligation there arise irresolvable (though unintended and apparently unnoticed) tensions between Hart the descendant of John Austin and Hart the colleague of J. L. Austin. The positivist search for pure, value-free analytical elements was of no particular importance to J. L. Austin, and there is no especial reason to expect, or to require, an ordinary language analysis of terms in moral discourse (such as ‘obligation’, etc.) to eschew value-tinged assertions and appeals. Although this makes Hart’s discussion of legal obligation incoherent, we shall see that this incoherency can be remedied. We shall also see that the method of analyzing legal obligation in terms of an ordinary language analysis of the use of ‘obligation’ (or, of the general idea of obligation) is superior to the traditional positivist method of analyzing legal obligation in terms of legal validity.

V. Towards a More Adequate View

Whenever an incoherency appears in a position, a number of alternative moves are possible: simply renounce the entire position, abandon or amend one of the claims explicitly leading to the incoherency, or dig about for any possible underlying, unnoticed and expendable dogmas contributing to the incoherency. In this case the latter course is the fruitful one, and I shall argue that the above incoherency in Hart’s position is ultimately traceable to the positivist doctrines that the analysis of legal obligation requires the same analytical tools as the analysis of legal validity, and that legal validity establishes legal obligation. Hopefully, this venture, which like all philosophical diagnoses and prescriptions is conjectural and uncertain, will help point the way out of the positivist/natural law impasse which has too long dominated and hampered legal philosophy.

We have been discussing three of Hart’s central doctrines: (1) the
preference for a "wider" view of legal validity, (2) the belief that legal validity establishes legal obligation, and (3) the claim that understanding the idea of obligation is a necessary preliminary to understanding legal obligation. The first two are traditional, orthodox positivist doctrines; the third is not. Although Hart's attempt to introduce the third doctrine into his system is a step in the right direction, it is too timid a step. He underestimates the cohesiveness of the traditional positivist position: the first and second doctrines, which together imply a "wider" view of legal obligation, are incompatible with the third, as we have seen. Consequently, if Hart wishes to retain the latter, he must reject one of the first two doctrines. Which one? In light of the remarkable fact that Hart accepts the second doctrine without any argument at all, whereas he gives rather lengthy arguments for the first, the second doctrine seems most expendable. The likeliest strategy, therefore, is to amend Hart's position by asserting (A) that the analysis of legal obligation requires different analytical elements than does the analysis of the ("wider") concept of legal validity and (B) that legal validity does not establish legal obligation.

According to this amended position, legal validity would only establish "legally obliged" (namely, one should expect the authorities to apply sanctions if they catch him deviating from the rule, or law, in question), but it would not necessarily establish legal obligation. The difference between legally obliged and legal obligation is that the former can be analyzed with pure, value-free elements, but the latter cannot; whereas the analysis of the concept of being legally obliged demands reference to the (value-free) internal point of view, the analysis of legal obligation demands reference to the internal and to the value points of view—it necessarily involves "inside" assertions and appeals about obligation. At this point it becomes coherent, appropriate and useful to assert (even from the "inside") that obligations are imposed by those rules which are strongly approved, highly valued and seriously supported by most people. An analysis of legal obligation (but not of legally obliged) would be inadequate if it omitted mention of this.

An adequate analysis of legal obligation requires even more: it must

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64. I am here using a somewhat wider notion of being "obliged" than can be found in the gunman situation, which is characterized by the total absence of rules. After all, the notion of being obliged, as distinct from having an obligation, is also intelligible—and even helpful—in rule-governed contexts. Imagine, for example, the gunman, without his gun and wearing a business suit, explaining to a shopkeeper the rather elaborate procedures for making monthly protection payments—or else.
also account for the intelligibility of declaring that these “approved”
and valued rules may be wrong—even though they are supported by
a wide majority. Simply because many, or even most, people think
certain rules are good guides to conduct does not necessarily mean
that declarations to the contrary are unintelligible, or even false.
Recognizing this, Hart distinguished between “accepted” (or “shared”
or “conventional”) morality, “private” morality, and “enlightened”
morality—all of which aim at the “true” morality. Although most
of the earlier discussions in The Concept of Law only discuss “accepted” or “shared” or “conventional” morality, Hart is aware that “morality has its private aspect” and that there can be “moral principles or moral ideals which may govern an individual’s life, but which he does not share with any considerable number of those with whom he lives.”

In addition to scattered references to “private” morality, Hart occasionally alludes to “enlightened” and “true” morality: he suggests, for example, that valid laws may “offend against a society’s own morality or against what we may hold to be an enlightened or true morality”; similarly, if there are indeed certain basic protections and freedoms to which everyone in a legal system is entitled, then “the enlightened morality which recognizes these rights has special credentials as the true morality, and is not just one among many possible moralities.” Hart thus offers quite a complex matrix which can be used in the analysis of legal obligation.

The difference between the concepts of being legally obliged and
having a legal obligation may be characterized in terms of this matrix:
the analysis of the concept of legal obligation, unlike the analysis of the
concept of being legally obliged, “demands” reference to the “true”
principles of morality and justice, as glimpsed through the spectacles of
“accepted,” “enlightened,” and “private” morality. The tasks of de-

65. See pp. 164-65, 176-81, 201-07.
66. Bernstein seems to overlook this when he suggests Hart fails to recognize that
“there is nothing self-contradictory about claiming that an obligation exists even when
the general demand for conformity is not insistent and there is little or no social pressure
brought to bear on those who deviate or threaten to deviate.” Supra note 57, at 564.
67. P. 179.
68. P. 165.
69. P. 205 (emphasis added).
70. P. 201 (emphasis added).
71. I believe this separation of “legal obligation” from “legally obliged” provides what
some of Hart’s more distinguished critics feel is lacking in his position. See, for example,
Dworkin’s call for a treatment of “principles” as well as “rules”: “I call a ‘principle’ a
standard that is to be observed . . . because it is a requirement of justice or fairness or
Similarly, see Singer’s claim that Hart’s “analytical” jurisprudence “needs to be supple-
mented by an approach from the point of view of what I prefer to call ‘normative
veloping criteria for identifying and evaluating these moralities and of exploring the interrelations between them far exceed the limits of this study. The point to be made here is that this task is a necessary one in analyzing the concept of legal obligation—though not in analyzing the concept of legal validity and its correlate concept of being legally obliged. Consequently, quite different criteria are involved in the application of these two concepts. On the one hand, to apply the concept of being legally obliged (or, to assert that one is legally obliged by a given law) simply involves the (value-free) recognition that the law in question is valid, \( i.e., \) that the law passes all the tests provided by the rule of recognition, and that the law will be enforced. On the other hand, to apply the concept of legal obligation (or, to assert, from the "inside," that a given law imposes a legal obligation) involves the (value-charged) recognition that the law conforms to the "true" principles of justice and morality, that it serves the public interest, the general welfare, etc.

The positivist might object that the above distinction between legally obliged and legal obligation is an unnecessarily redundant mirror of the positivists' traditional distinction between legal obligation and moral obligation. In answer to this, I believe it can be shown that the concept of moral obligation is distinct from the concept of legal obligation. (That it is distinct from legally obliged is obvious: neither entails the other, and many of the analytical tools required for the analysis of either one are not required for the analysis of the other.) Clearly, moral obligation does not entail legal obligation, for we have many moral obligations that are not legal obligations. Nor does legal obligation entail moral obligation, as is illustrated by the possibility that one might, on occasion and in exceptional circumstances, have a moral obligation to violate a legal obligation, \( e.g., \) to break the speed limit in rushing to the hospital, or, perhaps, to steal a rich man's loaf of bread to feed a starving family, or, possibly, to remain with one's ailing mother despite the call of the draft board. Consider the latter case: assume the son knows his mother has a terminal illness which will end her life before the courts will manage to send him to prison; assume further that he regards as just and necessary (1) the government's general right to draft citizens for military duty, (2) its specific current draft procedures, and (3) its current military operations. In light of such considerations as these, he freely concedes that he is not just legally obliged to cooperate with the

\[ \text{Supra note 3, at 220.} \]
Legal Validity and Legal Obligation
draft, but also that he has a legal obligation to do so. Still, quite dif-
ferent considerations lead him to conclude that he has an overriding
obligation to ignore the draft call, thereby remaining with his helpless
mother during her last months. Both sets of considerations, those regard-
ing his legal obligations and those regarding his moral obligation, appeal
to the "true" principles of morality, justice and fairness; but they do so
in different ways and with different things in mind.

The difference between moral and legal obligation appears in other
contexts, too. The above draft example concerns a situation where one
recognizes he is legally obliged and has a legal obligation to obey a law,
yet decides he has a moral obligation to disobey it. The distinction be-
tween legal obligation and moral obligation is also visible in situations
where one recognizes he is legally obliged, denies he has any legal obli-
gation, yet believes he has a moral obligation to behave in a certain way.
This occurs in the area of "private" morality where one's view of his
morals coincides with the strictures of the law (which prohibit, say, alcohol, adultery, abortion, incest, marijuana or homosex-
uality) yet one denies that he has any corresponding legal obligation
because such matters are not, in the words of the Wolfenden Report,
"the law's business." In all such cases we find one set of considerations
leading to the conclusion that one has no legal obligation to behave in
the way prescribed by a particular law (though the validity of the law
means one is legally obliged to do so), while another set of considerations
leads to the conclusion that one nonetheless has a moral obligation so
to behave.

Or again, it is often suggested that the conscientious objector's re-
fusal to serve in the armed forces has only to do with his own view of his
moral obligations. And this is true, but it is not all of the truth; in addi-
tion to the dimension of personal moral obligation the question of con-
scientious objection also embraces a dimension of legal obligation.
Imagine, for instance, that our draft law had no provisions for con-
scientious objection (or imagine a bill in Congress proposing to elim-
inate all such provisions). What would we want to say about such a
(proposed) draft law? Many things, but surely not that it was just a

72. It also includes the case, for example, of the intimidated family man who, reason-
ing that his family responsibilities impose upon him a moral obligation to avoid the
threatened sanctions, "knuckles under" and does what the law orders (wears a yellow
star, pays the war tax, etc.), nonetheless maintaining that the particular law in question
does not impose any legal obligation because it undermines certain principles of justice
and morality.

73. Report of the Committee on Homosexual Offenses and Prostitution, Comm.
No. 247, at 24 (1957).
matter of certain young men's view of their personal moral obligations. Clearly, there is more to the question than the very real and very important dimension of moral obligation; there is also the dimension of legal obligation which involves different sorts of considerations—considerations which confront a much wider audience than the immediate group of prospective conscientious objectors faced by the draft. In such a matter the question of legal obligation, unlike the question of moral obligation, confronts everyone (the officials in their respective chambers as well as the man on the street), exposing as inexcusably obtuse and evasive, at best, the suggestion that this matter is confined to the personal moral obligation of certain young men. It would also, obviously, be unsatisfactory to defer to the existing positive law, for that would only speak to the question of one's being legally obliged—which we have seen is quite different from the question of legal obligation.

At least two things are thus clear. First, those who are not officials are qualified and entitled to deliberate about questions of legal obligation; some ordinary man on the street might, on occasion, even have keener insight into such a question than the judge in his chambers. (Both officials and non-officials may have a moral obligation to deliberate about questions of legal obligation, which is not to say that their deliberations are about moral—instead of legal—obligation.) Second, no official is an infallible oracle for settling questions of legal obligation; an official might be wrong, after all, when he asserts that A has a legal obligation to do x. Indeed the theory proposed here reminds us that when officials make, amend, or interpret a rule they do not necessarily create a legal obligation; unless the resulting rules accord with principles of justice and morality, they merely make the affected citizens legally obliged—for legal obligation is not solely a matter of coercion, threat, force and sanctions. 74

Nonetheless, quite a helpful glimpse of those things relevant to the question of legal obligation is obtainable if we try to picture the careful, conscientious and competent deliberations of officials in a legal system. It is generally believed, for instance, that the legislator's reasons for introducing, supporting or opposing an item of legislation, or a judge's reasons for dissenting or for overruling well-established precedent, are not supposed to turn upon personal needs and wants (concern for an

74. Although this theory could not (nor, so far as I can see, could any other) pass Hart's test of stopping incorrigibly wicked men from enacting wicked legislation (see p. 52 supra), most legal systems boast at least a few officials who are not incorrigibly wicked (they may, for instance, be well-meaning but corrigible), and these officials might well find the distinction between legally obliged and legal obligation rather helpful.
ail ing mother, a pay-off, etc.), nor upon the needs and wants of a small but influential interest group (or even, it would seem, of a temporarily hysterical, repression-minded majority), nor upon the mere flip of a coin. Instead, we expect such officials to deliberate about questions of the public interest, the general welfare, the principles of justice and morality.

There is, of course, no mechanical test for answering such questions, although we can give at least a partial list of the factors relevant to such an answer. Whenever a conflict arises between the interests of the state and the interests of an individual, for example, the existing positive law must be considered (though not necessarily perpetuated), along with the political, legal and cultural traditions of the people involved. In the United States, accordingly, we give considerable weight to questions of due process, equal protection and individual liberty. Also, the various needs, wants and moral beliefs of the majority must be given substantial weight, as well as the needs, wants and moral beliefs of minority groups—all of which must be seen in the context of the economic, social and technological structure of the society. These are some, at least, of the factors involved in determining legal obligation. I do not intend to offer, nor do I believe it especially fruitful to seek, an a priori, universally applicable formula for measuring the weight of these respective considerations, balancing them against each other, and identifying the most satisfactory solution to each specific problem. The point here is more modest: simply that any adequate analysis of the concept of legal obligation must refer to these factors. They often make questions of legal obligation extremely difficult, but not always. It is quite clear, for instance, that we have a legal obligation (i.e., we are not merely legally obliged) not to rape, steal, murder, etc. Other questions of legal obligation, however, are not so easily settled, not even when the highest court announces its view on the matter (though the Supreme Court’s verdict does, of course, settle the questions of legal validity and of being legally obliged). This difficulty is just one of the frustrating facts of the world, and is not lessened—indeed it is aggravated—by the positivists’ attempt to shove all questions about justice and morality “outside” the province of jurisprudence.

One of the most important tasks facing any legal theory is the task of distinguishing three concepts: the concept of being legally obliged, the concept of legal obligation, and the concept of moral obligation. The view here proposed preserves each of these as distinct. These concepts do not, after all, entail each other: to establish that a law is legally valid (that is, that one is legally obliged) does not entail that it imposes a legal
or moral obligation; similarly, to establish that one has a legal obligation to act in a certain manner does not entail that one is legally obliged to do so, nor even that one has a corresponding (binding) moral obligation; or again, to establish that one has a moral obligation does not entail that one is legally obliged or that one has a corresponding legal obligation. Furthermore, these three concepts are distinct, I believe, because a different set of considerations seems necessary for analyzing and applying each of them. While the elements discoverable in the group habit/social rule distinction suffice for an adequate analysis and application of a "wider" concept of legal validity (and its correlate concept of being legally obliged), it is necessary to add to these the elements discoverable in the general idea of obligation for an adequate analysis and application of the concept of legal obligation; and even different considerations (or, at the least, a different method for balancing the same sort of considerations) seem to be required for the analysis and application of the concept of moral obligation. Perhaps the most serious flaw in the positivist position is the failure to note these differences: thinking (wrongly) that all considerations about obligation are the same, and reasoning (correctly) that moral obligation falls outside the province of jurisprudence, positivists end up (mistakenly) banishing the above-mentioned considerations relevant to legal obligation from the province of jurisprudence.

We have seen that Hart subscribes to the positivist orthodoxy of collapsing the notion of legal obligation into the notion of being legally obliged—despite his emphasis upon the distinction between the general (non-legal) notions of being obliged and having an obligation. This collapse, however, traps Hart in serious, fundamental incoherencies: he provides a method of analyzing legal obligation which is not only unnecessary, given his positivistic program, but is ultimately irreconcilable with that program; furthermore, although he stresses the importance of distinguishing between the general (non-legal) notions of being obliged and having an obligation, he provides no correlate distinction for the legal sphere. If the distinction between legal obligation and legally obliged were preserved in Hart's system, though, these incoherencies would be removed.

In addition to this curative power for Hart's system, the distinction between being legally obliged and having a legal obligation suggests a possible, and very plausible, reconciliation of the positivist and natural

75. Mere *prima facie* moral obligations, I mean to suggest, are not binding moral obligations.
law impasse, still accounting for what both sides seem to have wanted to say. On the one hand, the view I am proposing agrees with the natural law insistence that the principles of justice and morality have a legitimate place (as analytical tools) in the province of jurisprudence, though my view assigns them to a particular place—the analysis of legal obligation. The natural law view cannot make such a pin-point assignment, since it fails to draw the distinction between legal obligation and legal validity. On the other hand, the proposed view accommodates the positivist insistence that it is possible to give an adequate, clear, hard-headed, account of legal validity, free of any appeal to the principles of justice and morality; my view, however, adds that legal validity only establishes that one is legally obligated and that an adequate analysis of legal obligation must appeal to the principles of justice and morality. The positivist position can neither appreciate nor imitate this move, since it fails to distinguish between legally obliged and legal obligation.
Student Contributors to This Issue

Stephen M. Shapiro, Toward a Uniform Valuation of the Religion Guarantees
Stephen R. Munzer, Causation and Liability in Private Actions For Proxy Violations
Daniel J. Steinbock, Announcement in Police Entries