SANCTION AND OBLIGATION

H. L. A. Hart’s criticism of Austin’s theory of law is that it is essentially false to the facts. Austin asserts that “Every positive law simply and strictly so called, is set by a sovereign person, or sovereign body of persons, to a . . . person or persons in a state of subjection to its author.” Laws get their force from the threat of sanction. This view, which we may call “the gunman theory of law,” is what Hart criticizes. Too many laws, he argues, do not look like commands backed by sanctions for us to find this theory compelling.

I wish to defend Austin’s theory against Hart’s objections. In large part the defense will be that Austin would accept virtually all of Hart’s views on the structure of actual laws and would fit them easily to the gunman theory. As Kelsen wittily remarked of his own dispute with Hart, Austin might find his dispute with Hart “of a wholly novel kind” because, though Austin would agree with Hart, Hart does not agree with Austin. My central thesis is that categories of law that, it is often argued, do not fit the gunman theory are either necessary to the exercise of law under that theory or are parasitic upon it. Those that are necessary are necessary for essentially either formal or strategic reasons. For example, laws that empower judges to act are formally necessary. Laws such as those under which judges declare contracts and other promises null are generally required for strategic reasons: they are necessary for giving judges and other actors under the law a clear sense of when the law applies and when it does not.

One way to put the case for Austin is to say that his theory is motivated by concern with explanation of how the law works. Therefore he writes of the “province of jurisprudence.” Hart’s later concern is with definition. Therefore he writes of the “concept of law.” Since Austin does not explicitly avow his purpose as one of giving an explanatory theory, one may suppose that I tendentiously wish to do something with his project that is not his purpose. But I think that an effort to see how Austin’s categories are related to distinctions that fit his apparent explanation of how the law works clarifies Hart’s debate with him and suggests that much of the debate is a matter of definitional quibbles that do not cut to the central features of Austin’s theory. In particular, in an explanatory theory we would need to be centrally concerned with the strategic nature of many aspects of the law. It is a striking feature of Austin’s work that he seems generally alert to
strategic issues. He does not fail to recognize the existence of the categories of law that Hart says do not fit the gunman theory. Rather, he simply labels them as something other than "laws properly so called," a phrase that, with its variants, he uses to the point of tedium.4

Hart’s critique of Austin

Hart’s chief objections to Austin’s theory are the following:

1. Although “of all varieties of law, a criminal statute, forbidding or enjoining certain actions under penalty, most resembles orders backed by threats given by one person to others, such a statute nonetheless differs from such orders in the important respect that it commonly applies to those who enact it and not merely to others.”

2. There “are other varieties of law, notably those conferring legal powers to adjudicate or legislate (public powers) or to create or vary legal relations (private powers) which cannot, without absurdity, be construed as orders backed by threats.”

3. There “are legal rules which differ from orders in their mode of origin, because they are not brought into being by anything analogous to explicit prescription.”

4. “Finally, the analysis of law in terms of the sovereign, habitually obeyed and necessarily exempt from all legal limitation, fails to account for the continuity of legislative authority characteristic of a modern legal system, and the sovereign person or persons cannot be identified with either the electorate or the legislature of a modern state.”

Let us briefly consider these in order.

1. Against Austin’s thesis that the sovereign is somehow above the law, Hart notes that “many a law is now made which imposes legal obligations on the makers of the law.”5

Austins’s claim is, of course, not a normative but a positive claim. He supposes that I cannot be bound by my own threat against myself. Hence, my threat to sanction myself should I not do what I promise myself now to do cannot be taken seriously in the way that my threat to sanction my son if he does not keep his promise to me may be. This is a view that is not original with Austin but that is shared by many others before him, including Locke, Hobbes, Grotius, and Hume.6 Hobbes states the view with special force. No man, he says, can “be oblig’d to himself, for the same Party being both the obliged, and the Obliger, and the Obliger having power to release the obliged, it were meerly in vain for a man to be obliged to himself, because he can release himself at his own pleasure; and he that can do this, is already actually free.” Oliver Cromwell is supposed to have said of the trial of Charles I that “there was no law except that of force by which an offence could be attributed to the sovereign, the anointed king, the source of justice.”7 Typically, Austin simply takes this view for granted, as when he notes that “A man is no more able to confer a right on himself, than he is able to impose on himself a law or duty.”8

Since Austin’s view seems unexceptionable it is odd that Hart’s complaint also seems sound. Alas, however, it is no complaint against Austin’s view. It is a fallacy of composition to suppose that Austin’s view implies the contrary of Hart’s correct observation that a law may impose “legal obligations on the makers of the law.” Austin is quite clear about the distinction between a sovereign body and an individual member of the sovereign body and about the fallacious conclusions one can reach if one confuses the two.9 What a law cannot do is impose legal obligations on the sovereign body that makes it. It can impose legal obligation on some or every person who is party to that sovereign body. For example, the United States Senate can and recently almost did sanction one of its members (by expulsion) for breaking an ordinary law and a court sent that senator to jail. But the Senate can no more bind itself as a body than I can bind myself by an act of present will. I can arrange matters in such a way that if I do not do what I now wish to bind myself to do I will suffer significant, even severe costs. (This is much of the point of entering contracts.) The Senate cannot do the equivalent of this, although it can arrange matters in such a way that individual senators will be visited with severe costs if they subsequently try to get the Senate to renege on its supposed intentions. But neither I nor the Senate can simply constrain ourselves in the compelling way the Senate can help to constrain me or its own members. Unlike Austin, Hobbes may be ambiguous on this point. He declares it a seditious opinion adversary “to Civil Society, . . . That they who bear Rule are Subject also to the Civil Laws.”10 He evidently means this to be an empirical proposition, which, alas, his subsequent argument does not support. Its widespread acceptance presumably underlies laws that protect members of many legislative bodies against arrest for certain crimes during periods when their legislatures are in session.

Hart’s analogy of what he calls the “self-binding quality of legislative enactment” to promising11 is misleading in the following sense. An individual creates an obligation of sorts to someone else when the individual enters a promise. But one cannot meaningfully enter into a promise with only oneself. The Senate does not promise itself to sanction itself or to make itself subject to the laws that apply to individuals. It merely passes laws (in conjunction with the House of Representatives and the President) that govern senators as well as other subjects irrespective of whether individual
senators or other subjects wish to be governed by the laws. It cannot pass
laws that will be effective in governing the Senate if the Senate does not wish
to abide by them.

2. Hart’s second objection is that there are other varieties of law than
commands backed by sanction. In particular there are laws creating public
or private powers.

First, consider laws creating public powers, such as those that define
the powers of judges and legislators. The former are so obviously necessary
to the effective application of laws and the latter so obviously necessary to
the creation of laws of the Austinian variety that one suspects that, consist-
tent with Kelsen’s witticism above, Austin would accept Hart’s addendum
here without objection. Such laws are formally necessary to a system of
commands backed by sanctions. For example, laws which define the powers
of a judge are clearly necessary to law as such a system: unless there are
judges and others empowered to deliver sanctions under relevant circum-
cstances there can be no point in threatening them. In a moderately large
society the sovereign as gunman must have agents.

Laws that create private powers are another and, to the typical citizen,
larger matter. Austin seems oblivious of the significance of such laws,
which, in fairness, have grown enormously in scope and pervasiveness since
his time. Hart presumably includes in this category a large part of what are
often called the facilitative branches of the law, including not merely laws
governing contracts, corporations, and marriages but also those laws
regulating large classes of social interaction, such as the use of highways,
airways, and of various dumping grounds for private waste. As if this were
not already an ungainly category, it should perhaps also include that vast
array of legislative and administrative actions intended to foster the
economic well being of the larger community and of specific classes of in-
dividuals. Thus it includes welfare programs and “erecting and maintaining
those public works, which, though they may be in the highest degree ad-
vantageous to a great society, are, however, of such a nature, that the profit
could never repay the expence to any individual or small number of in-
dividuals.”¹¹⁴ The volume of whatever else a legislative body in a modern
nation does is small by comparison with the volume of activity in this last
addition to Hart’s category.

Somehow, the views of the lunatic fringe of the American right and of
many libertarians notwithstanding, the image of a gangster pointing a gun
at my forehead does not seem to fit any part of this large category of laws.
Will the image fit if we correct it by replacing the threat of a single gangster
with the threat of all against all? Oddly, I think it often will. Many of the
problems regulated by the wide variety of laws in this category have the
benefit-cost structure of the Prisoner’s Dilemma. It is an obvious and well-
known fact of large-number Prisoner’s Dilemmas that they can be
cooperatively resolved by voting government the power to sanction those
who fail to cooperate. Many of the problems in Hart’s second category are
conspicuously problems in the collective provision of goods whose benefits
can be enjoyed even by those who do not contribute to their provision and
whose provision is therefore undercut by the incentive to take a free ride.
Absent such self-serving incentives, we might often be able collectively to
provide ourselves goods without any apparent threat of sanction.

To some extent, laws creating private powers are perhaps parasitic on
more conspicuously Austinian branches of law. Once a legal system is in
place, its powers of sanction may be made available to accomplish other pur-
poses such as the enforcement of contracts. In Hart’s words, laws can “pro-
vide individuals with facilities for realizing their wishes, by conferring legal
powers upon them to create, by certain specified procedures and subject to
certain conditions, structures of rights and duties within the coercive
framework of the law.”¹¹⁵ One could, not too fancifully, argue that these
laws simply have such forms as: Do not violate a contract which you have
properly executed or you will be subject to relevant sanctions; Do not
violate the terms of your marriage agreement . . . ; etc. Whatever their
form, such is the force of such laws.

But even more forcefully, one may say that many of these laws are for-
mally related to, not merely parasitic upon, laws that have the form of com-
mands backed by sanctions. Laws against theft depend on definitions of
what counts as theft, hence of what counts as property, hence of what
counts as a valid transfer of property. Contracts, wills, and other related
“acts-in-the-law” will have to be defined if laws governing property are to
have any meaning. Moreover, the definitions of these terms will have to be
quite explicit if judges and others are to deal properly with them. Hence,
much of the law will be apparently definitional, but the definitions will be in
the service of enforcement of those parts of the law that are straightfor-
wardly commands backed by sanctions. For example, laws specifying what
makes a document a valid will are formally and strategically necessary to
clarify what it is that judges are to enforce. Some aspects of these laws are
formally necessary to define what counts as a valid transfer; some, such as
requirements for an arbitrarily fixed number of witnesses, are strategically
necessary to insure that relevant parties did in fact intend the actions that
would transfer the property at issue and that everyone knows what was in-
tended.

The point of the law of contracts or of inheritance is to enable in-
dividuals to achieve determinate ends by providing for sanctions against
anyone who would upset their intended plans. That is of course also precisely
time of the simplest laws of property, that is, laws against theft.
Although the fundamental character of the law may be coercive, it may
work so well with its coercion that actual acts of coercion recede from view.
It would be odd to conclude then that it was no longer coercive, that it was
no longer based on sanction.
(Admittedly, many of the laws one might assign to Hart’s non-
Austrian category are not simply intended to effect the collective provision
of goods of general interest or to facilitate the complex plans of individuals.
Many of them, such as laws against so-called victimless crimes, may be
morally perversions of the legislative process, and many are intended
openly to benefit one group of people at the expense of another. In the case
of such laws, surely the image of the state as a gangster with a gun is not
far-fetched. Here, however, the fact that an apparatus for making and enforc-
ing law exists gives opportunity for special interests to manipulate the appa-
Russo’s reason: that the laws are backed by the threat of strong
3. Against Austin’s claim that laws must take the form of commands
Hart notes that customary laws do not originate in commands from the
sovereign. There are no explicit prescriptions for these laws.
The problem of determining the force of certain laws and even of
aspects of perhaps all laws may be clarified by seeing in what sense laws or
aspects of them may be conventionally defined. Here I wish to use the term
convention in a relatively technical sense having to do with strategic interac-
tions that “enforce” particular outcomes over others. This is not the ordi-
nary language usage that concerns cultural habits or norms but rather the
technical usage elaborated by Hume and Lewis.16 The fundamental insight
of their analysis of convention is that specific practices may arise not by ex-
plcit agreement but by tacit coordination. In this Lewis finds against
Quine’s objection to the view that language arises by convention: if there is
no language, Quine supposed, there can be no way to agree on starting one
by setting up initial rules.17
Similarly, when legislators draft laws and when courts try cases under
those laws, there is nothing better than conventional agreement on the con-
tent of the phrases of the laws. Even the simplest, most direct of laws re-
quires a heavy burden of conventional interpretation to establish its mean-
ning. For example, few terms are as old as “murder” and yet it undergoes
heavy interpretation when a case of presumed murder is tried even when
there is general agreement on most of the so-called facts of the case. There
is simply no way to avoid the conventional element in legal vocabulary just as
there is no way to avoid it in ordinary language.
It does no one much good to try to foist an interpretation on a phrase
that will not be accepted by relevant others. Of course there may be value in
trying to convince others that there are grounds for interpreting a phrase in
a way that had not occurred to them at first in a particular context. If the ef-
sort succeeds, it succeeds because it impresses relevant others. But if the
relevant others do not accept a novel interpretation of a phrase it does no
one any good to insist upon it: one must live within the confines of conven-
tional interpretations just as one must live with the rule of driving on the
right (or left). Young children, whom Lewis Carroll understood so well,
sometimes insist that when they use a certain word they mean something
other than what the general population means by it. Part of growing up is
learning to live with the necessities imposed by conventions in such matters.
A sovereign, whether corporate or individual, will commonly find it
sensible to establish the content of laws by convention rather than by care-
full explicit prescription just because any law must be framed in
linguistic terms whose meaning must be largely a matter of convention.
Moreover, if the making of laws is to be delegated in part, as typically it is
and perhaps must be, the role of convention may loom larger, since the
coherence of a body of laws will be conventionally determined in the in-
teractions between various delegate lawmakers.
This was the central problem of the common law and it is a central
problem of agency or regulatory law today. Indeed, regulatory agencies are
used today much the way common law courts that actively made the law
were used in earlier days. Yet it would generally be odd to argue that
regulatory agencies do not issue commands backed by sanctions when they
issue many regulatory rules. A major constraint on agency rule makers is
imposed by the need to make new rules fit with old rules to achieve a
reasonable degree of consistency and by the need to make them fit the
regulatory mandate to a reasonable degree. Both these tests are essentially
tests of convention: tests of what the language should be construed to mean
in practice.
Hart criticizes those positive law theorists who suppose that an instance
of such delegated law making as in the common law or, one might addi-
tionally suppose, in regulatory rule making is a “tacit order.”18 He
presumes that they simply miss the nature of certain laws. But the criticism
must be far more fundamental than this. Every law in any reasonably com-
plex system is essentially a tacit order in the sense that its content cannot be specified without a heavy burden of delegated interpretation. But if this is so fundamentally in the nature of law and language more generally, it is not clear that there is any force to the notion of a tacit as opposed to an explicit order. Whether the task of defining the content of laws is delegated to courts or to agencies, in the end the laws are forceful only if they are backed by sanctions.

4. Hart argues that the notion of a sovereign habitually obeyed does not fit the way law works in a modern society.

Here one must grant at the outset that Hart’s general criticism of Austin’s notion of habitual obedience as flawed is correct. However, I think it arguable that Austin’s problem here is of the weakness of conceptual categories available to him and his own failure to grasp his problem in the right terms. When he discusses habit and habitual obedience he sounds like an early-day behavioralist, and indeed that is evidently his purpose. Almost always when he uses the notion of habit, however, he uses it in a context in which what seems to be at issue is the force of convention in regulating behavior. He wishes to avoid intentional terms as much as possible and would therefore not recur to such notions as Hart’s “internal aspect of rules.” What he does recur to is the system of incentives that impinge on people’s choices. He avoids most of the normative concern that Hart sees as central to the law by addressing how the law works through incentives, especially through sanctions in the case of positive law or laws properly so called, but also through the incentives inherent in conventional orderings of life and practices in much of the background condition of the law.

Hart says that “A social rule 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.” As I will discuss more fully below, Hart supposes that it is not merely the case that one must do certain things, such as report for conscription into the military, or suffer sanctions. Rather, one has an obligation to do so. Hence, one may feel virtually certain that one faces no sanction because one has fled the country or bribed relevant officials, but still one is obligated.

In Austin’s discussions there is no need for a normative notion of obligation or of Hart’s internal aspect of rules. He recognizes the force of conventions in restricting behavior for those who wish to avoid heavy costs. It is just this force which makes a population obey a new monarch or new legislature. One can say that there is a habit of obedience as Austin does. But the better way to put the case is to note, as Hume does, that we have established a convention governing succession of, say, the monarch. Against that convention, it does no one much good to protest alone and to try to go against the law as though it must be reconstructed de novo. Because virtually everyone coordinates on the expectation that matters will continue as before if succession follows relevant patterns (those that were followed before), the convention of continuity is forceful and anyone who tried to go against it would lose.

Much of his discussion of this criticism of Austin’s theory seems for Hart to be particularly apt for a modern legal system whose complexity does not seem to fit the gunnam theory. But Hart also imagines a simple society in which Rex I has come to be habitually obeyed and who is succeeded upon his death by Rex II. He says, “if we have nothing more to go on than the fact of obedience To Rex I and the likelihood that he would continue to be obeyed, we shall not be able to say of Rex II’s first order, as we could have said of Rex I’s last order, that it was given by one who was sovereign and was therefore law. There is as yet no established habit of obedience to Rex II.” Here, the notion of habit is clearly wrong if all that is meant is the ordinary language sense of that term. If we substitute Hume’s notion of convention, especially as elaborated by Lewis, for habit, however, we have a perspicuous account of what typically takes place. If Rex II was the obvious choice on which the populace could coordinate for a successor to Rex I, then Rex II should generally be obeyed. If not, then not, at least not until Rex II succeeded in establishing his own capacity to visit sanctions on those who disobeyed. This is, in fact, the analysis of succession that Austin gives in his account of the instability of succession of Roman emperors. “Every successive Emperor acquired by a mode of acquisition which was purely anomalous or accidental: which had not been predetermined by any law or custom, or by any positive law or rule of positive morality.”

Oddly, Hart’s criticism as it applies to a “Modern legal system” does not seem to carry the force it carries against the simple kingdom of Rex I and II just because the power of convention in motivating our expectations and our behavior in a complex legal system in which various personnel turn over at various times is obvious. Conventions might be less stable in less articulated legal systems so that revolutionary responses to changes in personnel might be more common in them. But conventions such as that governing the line of succession to the monarchy may nevertheless play a strong role even in simple legal systems.

In this context, what Austin’s theory requires is constructive criticism. Hart’s dismissal of it overlooks its explanatory force. Focussing on the strategic nature of the interaction between sovereign and subjects as Austin does clarifies the nature of law by forcing us to understand how it works. The account as spelled out somewhat indirectly above parallels Hart’s but puts the critique of Austin in terms of types of conventions rather than types
of rules. That the accounts are parallel—indeed, are largely equivalent—should be clear from the nature of a conventional resolution of a coordination problem. The resolution is to hit upon a practice or rule which all or nearly all follow so that all have incentive to continue to follow it. Hart's account from rules perhaps sounds rather more formal than that from convention. But in fact Hart's account was written at the high tide of the Wittgensteinian influence in understanding social rules as spontaneous, informal practices rather than as deliberate, formal constructs. Of course, a convention may be more readily maintained and followed if there is a clearly articulated, even posted, rule to coordinate behavior and choices. Hence the account from convention can yield a system as formal as any rule-governed system. And, as already noted, even the most formal rule-governed system must build on social conventions of the meanings of the terms in its rules.

Despite the similarities of the accounts from convention and from rules, the former, because of its emphasis on informal practices, has much to recommend it. It focusses on the strategic origins and supports of the law and therefore lends itself easily to explaining how the law works. Hart's account from rules tends to focus our attention on definition—admittedly the purpose avowed in the title of his book—rather than on explanation. The definitional enterprise runs against the fact that, as with many social concepts, law is a family-resemblance term or category. This is so because what counts as law in a given time and place is fundamentally a matter of convention.

**Legal Obligation**

If what counts as law is a matter of convention, what do we make of that central issue in law, the problem of obligation? Can obligation, too, be a matter of convention? The answer turns on what obligation is supposed to mean. Hart sensibly argues that we should keep clear the difference between asserting that someone is *obliged* to do something and asserting that the person *has an obligation* to do it. In the former case one has pressing incentive to do it; in the latter one has normative reason for doing it. Generally we might agree with Barry's Hobbes that obligation arises by "covenants, contracts, and the like." That is, if I am obligated, I must somehow have agreed to be.

Since one can be obliged by sanctions, one can clearly be obliged by the force of conventions. For example, anyone driving in the United States who does not wish to be harmed in the process is obliged to drive on the right hand side of the road. Can we trick up my convenantal agreement by conven-
correlative moral right to obedience. In social situations of this sort (of which political society is the most complex example) the obligation to obey the rules is something distinct from whatever other moral reasons there may be for obedience in terms of good consequences (e.g., the prevention of suffering); the obligation is due to the co-operating members of the society as such and not because they are human beings on whom it would be wrong to inflict suffering.23

This is one of the most influential passages in modern social philosophy. On its argument rests much of Rawls's notion of justice as fairness and, hence, much of his later theory of justice.24 (The one major work which it seems not to have influenced is Hart's own later Concept of Law—a point to which I will return below.) I will refer to the argument of this passage as the argument (for obligation) from fairness because "the obligation is due to the co-operating members of the society as such." If fairness seems too expansive a term for Hart's "mutuality of restrictions," the latter phrase could be substituted without affecting the argument.

On Hart's view in the passage quoted above obligation has a conventional character because it depends on coordination in the following sense. To argue against the fairness of going along with extant institutional arrangements it will not suffice to claim that one has a better arrangement to which one would sooner have agreed. If our society has already coordinated on one institutional form we may not easily be able to switch to a slightly better form. Hence, rather than calling on tacit consent to justify obedience to the extant form we can call on an amalgam of Rawls's two notions of fairness: fairness ex ante and ex post, contractually from behind the veil and experientially from ongoing relationships. We cannot justify undoing current arrangements to go behind the veil to renegotiate at every turn so we cannot justify ignoring the ongoing relationships of others in determining our own behavior in congress with those others.

Furthermore, fairness seems to apply only to ongoing relationships, not to those which are once only or terminal. Yet, one of the aspects of facilitative branches of law—such as contract law—is to render certain relationships ongoing by including the larger society, or its legal institutions, as a party.25 We bring the state in because we cannot simply depend on each other. A quasi-contractual relationship which is ongoing in its own right, such as one between two neighbors, may not require the apparatus of the law to enforce deals made within it. For once-only exchanges, the overlay of contract law enables each party to take the other's bargain at its asserted value. Hence, what must obligate us to keep a contract on the argument from fairness, is, in part, the fact that, in a sense, sponsored by the state, with which we have an ongoing relationship. We may also be morally obligated by our actual consent to the terms of the contract, but that is a matter largely outside the law. Our legal obligation turns on our relationship to the state.

How general is the notion of obligation based in fairness? Suppose it applies law by law. The argument from fairness will work for those many laws that are like parking laws in that they stipulate sanctions in the form of fines or towing for those who take advantage of the generally better behavior of others. These miscreants do not inflict harm on any particular other person when, say, they park overtime at meters. Other laws stipulate sanctions for those who do harm particular others, either from viciousness (self-interested or otherwise) or from misjudgment, as the driver who passes on a curve may foolishly think it safe to do so. (Here the sanction may be ex ante in the sense that it may be applied even to those who have not, as yet, actually harmed anyone. But of course the sanction is meant to deter rather than merely to exact a kind of revenge.) While the former category of laws may sensibly be seen as based on fairness, the latter may not. To drive in the wrong lane while passing on a curve does not strike us as simply unfair—rather it strikes us foremost as generally stupid and, if it is done for the pleasure of taking risks, even vicious. If one wished to commit suicide, driving in the wrong lane might then not be stupid but it would surely be vicious. In certain respects a murderer seems to fall in the category of the driver who passes on curves. Both are people the rest of us would sooner not meet. For them, our view of the relevant laws is that of Austin: it is a command backed by the threat of severe sanctions. We hope the threat will deter.

Can murderers and those who drive in the wrong lane for the pleasure of the risk be construed as obligated out of fairness to the rest of us to desist from their vicious actions? Not if they are to weigh their actions under each particular law. To say that I am obligated not to murder you or to burgle your home because it would be unfair of me to take advantage of our ongoing "joint enterprise"—which generally benefits me—is to ground the fairness argument in the whole system, not in its various separate laws. That is to say that I am obligated to obey all my society's laws because I benefit from the general organization of the society under law.

The objection to this way of deriving obligation is perhaps too obvious to require belaboring. If my obligation is based on the fairness of cooperating in the whole social arrangement, am I obligated if the whole social arrangement is unfair? And what now is the measure of fairness? When values and statuses diverge very far, fairness at the level of the whole system cannot be simply to reciprocate since certain classes get far more than they give. More generally, in such contexts fairness cannot even be agreeably defined.26 And in any case fairness finally involves substantive results at this level so that Hart would be on dubious ground to claim that
obligations from fairness "arise out of special relationships between human beings and not out of the character of the action to be done or its effects."\textsuperscript{10} Too many special relationships involve roles of subordination for their parties to view them as fair.

Perhaps, since he does not rely on the account of obligation from fairness in his later Concept of Law, we may suppose that Hart has tacitly abdicated from his earlier view. If so, he has come halfway toward Austin's position. Hart's earlier view was that we could be morally obligated by actions independently of our consenting. His later view is that some of us simply do feel obligated. Some people view legal rules from what Hart calls their internal aspect. This people "accept and voluntarily cooperate in maintaining the rules, and so see their own and other person's behaviour in terms of the rules."\textsuperscript{11} Surely he is right and surely the internalization of legal norms is a fact of no little importance in explaining the successful workings of legal systems—a point that Austin accepts, although he uses the language of positive morality and laws improperly so called to label such internalization.

Austin's more general view, of course, is that we are obligated because we are under threat of sanction. We would benefit from speaking here of being obliged, as Hart suggests, and from keeping stronger, moral notions of obligation outside the discussion of the content of the law, as Austin insists we do. Then, with both Austin and the later Hart, we might readily agree that if many people just do feel obligated under the law, the use of sanctions might be less frequently necessary and, therefore, more fully effective. Without the voluntary cooperation of some, "thus creating authority, the coercive power of law and government cannot be established"\textsuperscript{12}—or even, we might suppose, maintained. If our system invites a sense of obligation it can use its sanctions more effectively, perhaps both for good and for ill, but especially we might hope against those, such as murderers, who are very weakly bound to our joint enterprise.

But if we argue this way, we largely accept Austin's view that the basis of law is the threat of sanctions because we render the notion of legal obligation a matter of sociological fact. I think we should accept this conclusion. That an ordinary language analysis suggests that the notion of obligation is strongly associated with law should be taken as evidence of the sociology of the norm, not of the logic of the association. Sanctions are an inherent part of law and legal systems; legal obligation is a norm of individuals, not of legal systems.

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\textbf{SANCTION AND OBLIGATION}

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\item 4. Austin, \textit{Providence}, p. 135 and passim.
\item 5. Hart, \textit{Concept}, p. 77.
\item 6. Ibid., p. 42.
\item 10. Austin, \textit{Province}, p. 284.
\item 11. Ibid., p. 274.
\item 15. Hart, \textit{Concept}, p. 27.
\item 17. Lewis, \textit{Convention}, p. 2.
\item 19. Ibid., p. 55.
\item 22. Austin, \textit{Province}, p. 152.
\item 26. Ibid., p. 185.