

# On "Levels of Rules": A Commonsense Response to Gerber

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## Introduction

In his article, "Levels of Rules and Hart's Concept of Law,"<sup>1</sup> Professor D. Gerber advances an argument that seemingly cuts to the core of H.L.A. Hart's positivist legal theory—a theory which he espouses in his book, *The Concept of Law*.<sup>2</sup> According to Hart's theory, each and every full-fledged legal system is necessarily governed by a set of both primary and secondary rules. Primary rules are those which govern the conduct of individuals within a legal system, whereas secondary rules are those which "are all *about* such [primary] rules..."<sup>3</sup> Namely, secondary rules "specify the way in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."<sup>4</sup> As a result, law, according to Hart, is simply the harmonious "union of primary and secondary rules."<sup>5</sup>

Professor Gerber, however, argues—through the use of a set of hypothetical situations—that Hart's theory of primary and secondary rules is untenable as a theory of law. First, he argues that primary and secondary rules alone are insufficient for the full-

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<sup>1</sup> Gerber, D. "Levels of Rules and Hart's Concept of Law." *Mind*, New Series, Vol. 81, No. 321 (Jan., 1972), pp. 102-105.

<sup>2</sup> Hart, H.L.A. *The Concept of Law, Second Edition*. Oxford: Clarendon Press, 1994.

<sup>3</sup> *Ibid.*, p. 92.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*, p. 107.

fledged institution of a legal system. That is, higher order rules, "tertiary rules,"<sup>6</sup> are necessary in order to govern the secondary rules, much like the secondary rules govern the primary rules under Hart's theory. As a result, the mere existence of tertiary rules implies that the governing rules of Hart's legal theory regress *ad infinitum*, resulting in a crippling uncertainty as to exactly where the line should be drawn in defining full-fledged legal systems. Second, Gerber argues that Hart's theory of primary and secondary rules, along with the theory's corresponding necessary and sufficient conditions, admits of systems of law that ultimately fail as full-fledged systems of law. In fact, the admittance of these systems of law under Hart's theory, according to Gerber, flies in the face of commonsense and sound reasoning.

The purpose of this paper is threefold. First, I will expound upon Professor Gerber's arguments against Hart's positivist legal theory, arguments bolstered by a set of unique hypothetical thought experiments. Second, I will briefly consider Theodore M. Benditt's reply to Gerber in his paper entitled, "On 'Levels of Rules and Hart's Concept of Law.'"<sup>7</sup> Lastly, I will offer a commonsense reply to Gerber in an effort to show that his unique thought experiments pose no danger to the validity of Hart's theory of primary and secondary rules.

## **1. Two Interesting Thought Experiments**

Professor Gerber begins his assault on Hart's positivist legal theory by presenting a thought experiment designed to illustrate that primary and secondary rules alone cannot account for the institution of full-fledged legal systems. According to Gerber, tertiary rules, which govern secondary rules, are often necessary in "authorizing [a] change in [a]

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<sup>6</sup> Gerber, *supra*, p. 104. Gerber refers to higher order rules, those above secondary rules, as *tertiary rules*.

<sup>7</sup> Benditt, Theodore M. "On 'Levels of Rules and Hart's Concept of Law.'" *Mind*, New Series, Vol. 83, No. 331 (Jul., 1974), pp. 422-423.

secondary rule in the same way that [a] secondary rule...authorizes changes in the primary rules."<sup>8</sup> To illustrate this point, it is first necessary to explore some of the technical concepts, specifically the secondary rules, associated with Hart's legal theory, the first of which is the *rule of recognition*.

According to Hart, the rule of recognition "specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts."<sup>9</sup> In other words, the rule of recognition specifies the authorizing features of primary rules—e.g. "the fact of [the rules] having been enacted by a specific body, or their long customary practice, or their relation to judicial decisions."<sup>10</sup> In addition to the rule of recognition, the *rule of change* authorizes the institution, removal and modification of valid primary rules while the *rule of adjudication* furnishes the method by which valid primary rules are recognized.

In addition to defining these secondary rules, it is also important to mention the conditions under which full-fledged legal systems arise. According to Hart's theory of law, there are two necessary and sufficient conditions for the existence of a full-fledged legal system. "On the one hand those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials."<sup>11</sup> In other words, a legal system's primary rules of conduct

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<sup>8</sup> Gerber, *supra*, p. 104.

<sup>9</sup> Hart, *supra*, p. 92.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, p. 113.

must be generally obeyed and the legal system's secondary rules—the rule of recognition, change, and adjudication—must be generally accepted by the system's legal officials as common standards that confer validity on the primary rules of conduct. These conditions, along with the definitions provided above, are important when considering Gerber's attack on Hart's positivist legal theory.

**a. First Hypothetical Case**

The first argument Gerber advances against Hart's theory of primary and secondary rules revolves around a thought experiment in which two rules of adjudication are in direct conflict. According to Gerber, this conflict cannot be effectively resolved by appealing to primary and secondary rules alone; instead, Hart's legal theory must make use of some tertiary rule of adjudication in order to resolve the dispute. With that said, suppose that a particular society, as the result of customary law or judicial precedent, has a longstanding rule of adjudication that reads as follows: "All juvenile court justices must be under sixty years of age."<sup>12</sup> The rule is certainly a rule of adjudication, according to Gerber, because "it partially specifies who is to be the final authority in disputes within a certain jurisdiction."<sup>13</sup> Further, suppose that one of the society's legitimately recognized legislative bodies has recently passed an act that reads: "All juvenile court justices must be *over* sixty years of age."<sup>14</sup> As a result of its passage, the legislative act is subsequently accepted by the individuals within the society, thus effectively changing the longstanding rule laid down by custom or judicial precedent. Assuming that the society's legal system is one that conforms to Hart's legal theory in all other respects, there is seemingly a irreconcilable dispute between two conflicting rules of adjudication that cannot be solved

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<sup>12</sup> Gerber, *supra*, p. 103.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

without appealing to some higher order tertiary rule. However, the society in question seems to have resolved the dispute by following the legislative act. Thus, according to Gerber, the society in the hypothetical case has appealed to a tertiary rule of adjudication in order to resolve the dispute—i.e. acts passed by legislative bodies have priority over rules formed by custom or judicial precedent.

The hypothetical thought experiment, outlined above, causes a significant problem for Hart's theory of law, according to Gerber. By necessarily appealing to tertiary rules, we can imagine a situation in which tertiary rules themselves are in dispute, requiring further appeal to higher order rules *ad infinitum*. This is a bit unsettling for Hart's positivist legal theory, a theory which claims to have defined full-fledged legal systems. The existence of tertiary rules calls into doubt this definition. For example, perhaps a system of primary rules—e.g. commands backed by threats— is sufficient, "for these primitive systems would differ from the more intricate ones only in that appeals to rules are cut off at a lower stratum in the systems."<sup>15</sup> Moreover, there are further doubts as to which level full-fledge legal systems begin, for the higher levels become less empirical and more theoretical, and thus harder to discern. The foregoing problems are potentially huge problems for Hart's theory of primary and secondary rules, problems that must be assuaged.

#### **b. Second Hypothetical Case**

The second argument Gerber advances against Hart's theory of law revolves around a thought experiment in which, under Hart's theory, the conditions of a full-fledged legal system are met by a society, though commonsense seemingly dictates that the society, in fact, does not have a full-fledged legal system. Suppose, for instance that a

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<sup>15</sup> *Ibid.*, p. 104.

particular society, as the result of customary law or judicial precedent, has a longstanding rule of adjudication that reads as follows: "All juvenile court justices must be under sixty years of age."<sup>16</sup> Further, suppose that "a scrivener mistranscrib[ed] the [rule] into a new statute book"<sup>17</sup> that is subsequently promulgated throughout the society. The new rule of adjudication reads as follows: "All juvenile court justices must be *over* sixty years of age."<sup>18</sup> Now, suppose it is also clear that "everyone knows that the [rule] was replaced by a clerical mistake, yet everyone, both populace and officials, is happy with the new law, and renders it effective despite its bastardly origins."<sup>19</sup> Clearly, the new rule is a mistake. As a result, it is seemingly invalid as a rule for the society because it was created in an unrecognized, illegitimate manner.

However, under Hart's legal theory, the new rule is valid with respect to the society's legal system because it is in harmony with the necessary and sufficient conditions of a full-fledged legal system. Namely, the rule is obeyed by individuals and accepted by legal officials as a common standard that confers validity on the primary rules of conduct. As a result of this consequence, Gerber believes that the seemingly strange result speaks to the insufficiency of Hart's legal theory. Rules that rest on mistakes, according to Gerber, cannot form the basis of a full-fledged legal system, for suppose that all of the rules in a society were formed by similar mistakes. Commonsense seems to speak to the fact that a system of law based on a mistake is no system of law at all. Thus, Hart's theory of law seems inadequate because it mischaracterizes certain systems as full-fledged legal systems, "and hence Hart is wrong in thinking that he can

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

account for the existence of a legal system in terms of primary and secondary rules alone."<sup>20</sup>

## 2. Benditt's Reply

In his paper, "On 'Levels of Rules and Hart's Concept of Law,'"<sup>21</sup> Theodore M. Benditt offers an adequate reply to Professor Gerber's attack on Hart's theory of primary and secondary rules. Benditt begins his reply by noting that the two thought experiments offered by Gerber—the hypothetical situations outlined above—inevitably set up a seemingly irreconcilable dilemma that is used to attack Hart's positivist legal theory. The dilemma is set out as follows:

Gerber asks us to imagine that all of the rules of adjudication in a community are changed in 'non-systematic' ways—that is, in ways not provided for by the rules of change of the system (e.g. by mistake in transcription), and that these changes are accepted by the official and the citizens of the community. In such a case, Gerber maintains, Hart has a dilemma: he must hold either (1) that the new rule is a rule of the system and hence that a legal system exists, which is false; or (2) that the new rule is prevented from being a rule of the system by the existence of some tertiary rule, and hence that there is a hierarchy of higher level rules whose existence must be inferred or assumed, which Hart denies.<sup>22</sup>

So, as Gerber's two hypothetical situations suggest, if the secondary rules of a particular legal system are changed in ways that are generally unrecognized by the system, but are nonetheless accepted by the individuals and officials within the system, then Hart must necessarily hold either (1) that there is a full-fledged legal system despite the egregious errors forming it or (2) that a tertiary rule prevented the illegitimate secondary rules from taking affect. By accepting the former, Hart is seemingly committed to the existence of legal systems based on systematic errors, a commitment which seemingly flies in the face of commonsense. Likewise, by accepting the latter, Hart is committed to the existence of

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<sup>20</sup> *Ibid.* p. 104.

<sup>21</sup> Benditt, *supra*.

<sup>22</sup> *Ibid.*, p. 422.

higher order rules governing the secondary rules *ad infinitum*, a commitment which seriously undermines the enterprise of defining of systems of law at all.

In formulating a response to Gerber, it becomes immediately clear that Benditt believes that "Hart is caught on neither horn of the dilemma that Gerber sets out...",<sup>23</sup> and thus "can reject the hypothetical examples which Gerber uses to exhibit the dilemma."<sup>24</sup> First and foremost, Benditt maintains that the necessary and sufficient conditions necessary for the institution of a full-fledged legal system are not fulfilled by the hypothetical cases. That is, although the new primary rule is generally accepted and obeyed meeting the first condition, the officials in Gerber's hypothetical cases never effectively accept the rule as a common public standard conferring validity on the primary rule—i.e. in the given hypothetical cases, "there is no effective acceptance; there is no criticism of deviations, and hence no internal point of view with respect to the rules."<sup>25</sup> As a result, Hart can simply reject both horns of the dilemma.

In rejecting the dilemma, Benditt notes that Hart's legal theory is certainly not committed to accepting the existence of higher level, tertiary rules. All that is required is that, "whatever the 'level' at which the rule of adjudication is authorized, the rule which authorizes its change must be at the same level."<sup>26</sup> For example, constitutional rules can only be changed by the methods proscribed in the constitution; likewise, judicial precedent can only be changed during the process of judicial adjudication. Ultimately, Benditt believes that Gerber, in using his two hypothetical cases, is simply "asking what

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<sup>23</sup> *Ibid.*, p. 423.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, p. 422.

<sup>26</sup> *Ibid.*



happens when there is doubt as to the rules of change."<sup>27</sup> Of course, Gerber answers the question by appealing to the existence of tertiary rules. However, Benditt believes that, under Hart's legal theory, the extent to which the rules of change are in doubt reflects the extent to which the existence of the legal system is in doubt, since the rules of change are closely connected to the rules of recognition.

All in all, it seems apparent that Gerber's hypothetical cases pose no risk to Hart's legal theory under Benditt's analysis, for the 'legal systems' described in the cases do not meet the necessary and sufficient conditions of a full-fledged legal system. Thus, Hart need not appeal to tertiary rules in order to save his theory of primary and secondary rules.

### **3. Instituting a Commonsense Approach**

In echoing the thoughts of Theodore M. Benditt, it is helpful in taking a commonsense approach to the hypothetical cases posed by Gerber in order to assess their impact on Hart's theory of primary and secondary rules. Recall, the first hypothetical case deals with a rule of adjudication that is accepted by the individuals and the officials within a hypothetical community, but "the officials accept the community's rules because they are changed in accordance with another rule which specifies how they may be changed."<sup>28</sup> In the second hypothetical case, "the officials accept the new rule despite its non-systematic genesis,"<sup>29</sup> for example, through an erred transcription. These cases, as will be shown in turn, pose no threat to Hart's theory of primary and secondary rules. Gerber's erred analysis lies in the fact that the cases, as posited, are insufficiently detailed to support the claims he advances against Hart's legal theory.

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<sup>27</sup> *Ibid.*

<sup>28</sup> Gerber, *supra*, p. 103.

<sup>29</sup> *Ibid.*, pp. 103-104.

### a. First Hypothetical Case

Viewing the first hypothetical case from a commonsense perspective, it is clear that it does not pose a treat to Hart's theory of primary and secondary rules. The particular society, of which the hypothetical is concerned, has a longstanding rule of adjudication established through judicial precedent. However, a legislative body within the society has recently passed a rule that is in direct conflict with the longstanding rule. Consequently, the longstanding rule is no longer followed, for the individuals and the officials within the society affirmatively accept the new rule passed by the legislature. Given the facts outlined above concerning the particular society in question, it is certainly consistent for Hart to maintain the existence of a legal system without appealing to tertiary rules, as Gerber would suggest. Of course, Hart is welcome to deny the existence of a full-fledged legal system in this case, much like Benditt would, at least as to the extent that the rules of change are uncertain. However, consider the following commonsense approach.

In the past, the officials of the society in question have certainly recognized the rule, "All juvenile court justices must be under sixty years of age."<sup>30</sup> In order to recognize this rule, however, it must have been adjudicated by a rule of adjudication that pointed to the fact that all juvenile court justices must be under sixty years of age. So, in a sense, the wording of the rule is a rule of adjudication. However, once the dispute has been adjudicated, it is recognized by legal officials, thus turning it into a rule of recognition. Likewise, by passing a statute, the legislature has already adjudicated the dispute, thus turning the rule—"All juvenile court justices must be *over* sixty years of

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<sup>30</sup> *Ibid.*, p. 103.

age"<sup>31</sup>— into a rule of recognition. As a result, the hypothetical case posed by Gerber is simply a hypothetical that posits two competing rules of recognition against one another. By following the latter rule, the officials have, in essence, used a rule of adjudication—e.g. legislative acts take precedent over judicial rulings—to effectively determine which rule of recognition should be followed. This unique process takes place, over and over, in the judicial systems of developed countries such as the United States—e.g. when different branches of government offer conflicting rules of recognition, a rule of adjudication must decide which is to be effectively recognized.

In analyzing this process, it is clear that Hart's theory of primary and secondary rules is not violated. Moreover, the description of the hypothetical is a more accurate depiction of how full-fledged legal systems operate, as opposed to the depiction posited by Gerber, especially with respect to how officials effectively recognize primary rules. Thus, Gerber's hypothetical case, poses no threat to Hart's theory of primary and secondary rules.

#### **b. Second Hypothetical Case**

Viewing the second hypothetical case from a commonsense perspective, it is clear that it does not pose a treat to Hart's theory of primary and secondary rules. The particular society, of which the hypothetical is concerned, has a longstanding rule of adjudication established through judicial precedent which reads, "All juvenile court justices must be under sixty years of age."<sup>32</sup> At some point, however, scrivener error replaced this rule with a conflicting rule of adjudication, "All juvenile court justices must

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<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

be *over* sixty years of age."<sup>33</sup> Moreover, over the course of time, all the rules of the society suffered the same fate; however, all of the new rules were effectively accepted by the individuals and the officials within the society. Seemingly, the existence of a full-fledged legal system is doubtful in this case, because the system is entirely based on a number of consecutive mistakes.

However, given the facts outlined above concerning the particular society in question, it is certainly consistent for Hart to maintain the existence of a full-fledged legal system without offending commonsense, as Gerber would suggest. Of course, Hart is welcome to deny the existence of a full-fledged legal system in this case, as well. The question concerning the existence of a legal system turns upon an ambiguity in Gerber's hypothetical case—namely, what does it mean to say that the officials have effectively recognized the new rules? If official recognition is arbitrary, then of course, there is no full-fledged legal system. However, if the decision to follow the errors—e.g. follow whatever scribes say; abide by the law as written—is systematically recognized, then the Hart is correct in asserting the existence of a full-fledged legal system in this case, without offending commonsense. Thus, it is clear that the hypothetical case poses no threat to Hart's theory of primary and secondary rules.

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<sup>33</sup> *Ibid.*