Phil 324: Law and Morality

Module 3 Reading Guide

# H.L.A. Hart, Selections from *The Concept of Law*

## § 5.1: A Fresh Start

1. “[T]he simple model of law as the sovereign’s coercive orders” that Hart refers to is—yes, that’s right—Austin’s account of law.
2. **What are the four ways in which Hart thinks Austin’s theory is inadequate?**
3. Hart then considers how Austin might respond to these objections. What are Austin’s possible responses? Why does Hart think they are not successful?
4. **What does Hart think is the “root cause of failure” of Austin’s theory?**
5. **What is Hart’s distinction between primary and secondary rules?**
6. Hart introduces his thesis in the last paragraph on p. 81: The central case of law is best understood in terms of “the combination of these two types of rules,” that is, primary and secondary rules. Like Austin, Hart is interested in analyzing the *central* case of law—there are laws that don’t fit quite nicely into his analysis, but the response is that they are the more peripheral or obscure cases and do not occupy a central place in jurisprudence.

## § 5.2: The Idea of Obligation

1. In this section, Hart elaborates on his diagnosis of the failure of Austin’s account and offers an alternative.
2. **What distinction is the gunman example supposed to illustrate?**
3. For which two reasons does Hart think legal obligations cannot be analyzed in terms of (the likelihood of) sanctions that would follow in case of noncompliance?
4. In the next couple of paragraphs, Hart tries to explain away the initial appeal of Austinian sanction-based accounts of obligation. According to Hart, Austinian accounts capture a common intuition that having an obligation is very tightly connected to the “seriousness of social pressure behind the rules” (emphasis omitted) imposing the obligation. However, the mistake of Austinian accounts, Hart thinks, is that they go too far and claim that the social pressure is *necessary* for obligations, which he argues is just false. Skim this part of the section, and resume in the middle of p. 88 where Hart explains “the internal aspect of rules.”
5. **What is the difference between the external and internal points of view?**

## § 5.3: The Elements of Law

1. In this section, Hart sets out to explain why both primary and secondary rules are necessary for an analysis of the central case of law, and he proceeds by discussing why a society can’t function properly without either kind of rules. (If you are familiar with the social contract tradition in political philosophy, think about how Hart’s discussion draws on a methodology similar to the way, say, Locke tries to justify the state by appealing to how it solves certain “inconveniences” of the state of nature.)
2. Which two conditions are necessary for the functioning of a society governed only by primary rules?
3. Hart then argues that a society governed only by primary rules can work only if it is a small, close-knit community because such a system has three “defects.” Accordingly, Hart introduces three kinds of secondary rules, each of which addresses one of the defects. This provides an argument for why all three kinds of secondary rules are necessary for an analysis of the central case of law, which, for him, concerns a larger and more complex system of law.
4. **Please complete the following table:**

|  |  |
| --- | --- |
| **Secondary rule** | **What defect does this kind of secondary rule remedy?** |
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## At the end of the section, Hart overviews the next chapter, and, once again, warns that his analysis is supposed to capture only the central case of a legal system.

## § 6.1: Rules of Recognition and Legal Validity

1. Skim pp. 100–103 until the paragraph starting with “If this use of an accepted rule of recognition . . .”
2. **When is a given rule legally valid according to Hart?**
3. Skim the discussion of efficacy from p. 103 to p. 105.
4. What does it mean to say a criterion for identifying legally valid rules is “supreme”?
5. What is the “ultimate” rule of recognition?
6. Can the ultimate rule of recognition be legally valid? Why or why not?

# Lon Fuller, Selections from *The Morality of Law*

## § 2.1: Eight Ways to Fail to Make Law

1. **What are the eight ways in which Rex has failed to make law? (Fuller will give a helpful summary later on p. 39, but try to summarize on your own first and then look at his summary to check your understanding.)**

## § 2.2: The Consequences of Failure

1. **Read only pp. 38–39 of this section: What if a legal system fails in any of the eight ways? Is it still a legal system? Is there still a moral obligation for citizens to obey its rules?**

## § 3.1: Legal Morality and Natural Law

1. **Read only the first four paragraphs of this section: How does Fuller distinguish procedural natural law (Fuller’s internal morality of law) and substantive natural law (the external morality of law, like Aquinas’)?**