

PHL271 Handout 4: Hart 2.0

§1 Rule-Following

Hobbes can be read as answering the following question: why must members of a society subject themselves to the constraints imposed by the social order on their individual freedom?

When applied to the law, this question becomes: *why obey the law?*

The traditional ‘Hobbesian’ answer (which may or may not track the right reading of Hobbes) is to say: we obey the law because disobedience results in punishment by the Sovereign.

Note: Hobbes’s account is more sophisticated than this story suggests; but for the moment our interest lies in the contrast between this traditional ‘Hobbesian’ story and Hart’s account of legal obligation.

§1.1 Rules Without A Sovereign

Unlike the ‘Hobbesian’, Hart doesn’t think that legal obligation—an obligation to follow the law—flows from fear of a Sovereign. Instead, he thinks of laws as rules that impose obligations on a community in part *because* the community accepts them.

What does it take for individuals or a group to accept a rule? That’s a famously hard question (see Wittgenstein 1953), yet one for which there must be some kind of answer. So we can treat such acceptance as a *primitive* in Hart’s system (i.e. as something he needn’t exhaustively explain in other terms).

Yet not every rule accepted by a group imposes an obligation.

Rules are such that deviance from the rule by an individual who accepts the rule (or who is otherwise subject to the rule) *justifies* others in pressuring or criticizing that individual until he or she falls back into line.

Hart argues that a rule generates an obligation only if deviations from the rule justify *certain kinds* of pressure or criticism. In general, such ‘rules of obligation’ manifest three features (cf. pp. 86–87 of CL):

1. *Serious Pressure*: ‘the general demand for conformity [to the rule] is insistent and the social pressure brought to bear on those who deviate or threaten to deviate is great.’
2. *Social Significance*: the rules ‘are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it.’
3. *Sacrifice*: ‘the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do.’

Note: Hart explicitly denies that the ‘pressure’ that backs a rule must come from a higher authority that isn’t itself bound by the rule. Instead the pressure comes from others who accept the rule: it is *social pressure* that may or may not take the form of physical force.

§2 Hart’s Rules

One major difference between Hart’s 1958 article and *The Concept of Law* (‘CL’) is his argument in the latter that an explanatory account of the concept of law should treat legal systems as the union of two different sets of rules:

Primary Rules (roughly): the rules that govern human conduct (cf. 91 of CL)

Secondary Rules (roughly): the rules that govern the establishment, maintenance, and alteration of primary rules (cf. p. 94 of CL)

We’re going to look at what Hart says about the nature of these rules, and why he thinks that both sorts of rules are necessary for a system of rules to constitute a legal system.

§2.1 From Primary to Secondary Rules

Human beings could exist in a system governed purely by primary rules. However Hart thinks that such a system would exhibit three features (or ‘defects’) that exclude it from being a legal system. Secondary rules are necessary in order to eliminate these problematic features. See pp. 91–99 of CL.

Here are the problematic features (or ‘defects’):

1. *Uncertainty*: given only primary rules, we have no way of settling disputes over what the rules are, or over the scope of a given rule.
2. *Static Character of the Rules*: the only way to change the primary rules is through a slow and organic shift in the conduct and dispositions of the community.
3. *Inefficiency of Diffuse Social Pressure*: disputes over whether a rule has been violated will be difficult to settle, given that rule-breakers will be answerable to the diffuse opinions of the community.

§2.2 Rule of Recognition

Central among the secondary rules is the Rule of Recognition. It solves the defect of uncertainty, and subsumes under it those secondary rules that solve the other two defects (i.e. the ‘rules of change’ and ‘rules of adjudication’ – see p. 95 and p. 97 of CL).

Rule of Recognition: a rule that provides a legal system with its criteria of legal validity (cf. p. 110 of CL)

The Rule of Recognition is ‘supreme’ in the sense that competition between this rule and any other secondary rule must always be resolved in favour of the Rule of Recognition. In this respect, the Rule stands above all other rules in the system (yet also binds, directly or indirectly, all those other rules).

Good question: given this singular feature of the Rule, what should Hart say about attempts to change the conditions of legal validity (e.g. by revolution)?

§3 Fuller’s Objections to Hart

Lon Fuller’s article in response to Hart—which you can find in LM—can be quite difficult to follow. However it’s possible to extract at least two lines of objection from his discussion. The first targets Hart’s answer to the question of ‘why should we obey the law?’ The second attacks what Fuller thinks is Hart’s unacceptable neutrality with respect to the exact character of secondary rules.

Objection 1: if law is a matter of social fact, as Hart believes, we’re left without an adequate explanation of the ideal of fidelity to law (i.e. our duty to obey the law). (Cf. p. 70, 91 of LM)

First Possible Reply: there isn’t a general moral duty to obey the law; indeed, our reasons for obeying the law might be wholly non-moral. This reply denies a central presupposition of Fuller’s objection, namely the claim that there even is an ideal of fidelity to law that requires explanation.

Hart provides this sort of response on pp. 202–203 of CL.

Second Possible Reply: suppose we accept the ideal of fidelity to the law. So we have a moral duty to obey the law. We might still insist, as Hart doubtless could, that there isn’t a deep problem about how such a duty could arise from social facts. For example, I might incur a moral duty upon making a promise; but whether or not my actions count as promising is merely a social fact.

Recall: in his 1958 discussion of the problem of wicked legal systems, Hart claims that his opponents greatly overestimate the bearing of a law’s validity on whether we ought to obey the law.

Objection 2: A legal system must exhibit the virtues of the ‘rule of law’: the laws must be minimally clear, consistent, public, etc. (cf. pp. 79-82 of LM)

Possible Reply: these features fall out of Hart’s account of rules. A rule that a community can follow must be public, minimally clear, and more-or-less consistent.

It may be that legal rules that possess these features often overlap with moral rules; but like with the minimal moral content of the law that Hart admits, this overlap likely won’t rule out the possibility of wicked legal systems—a possibility his opponents are driven to deny.