

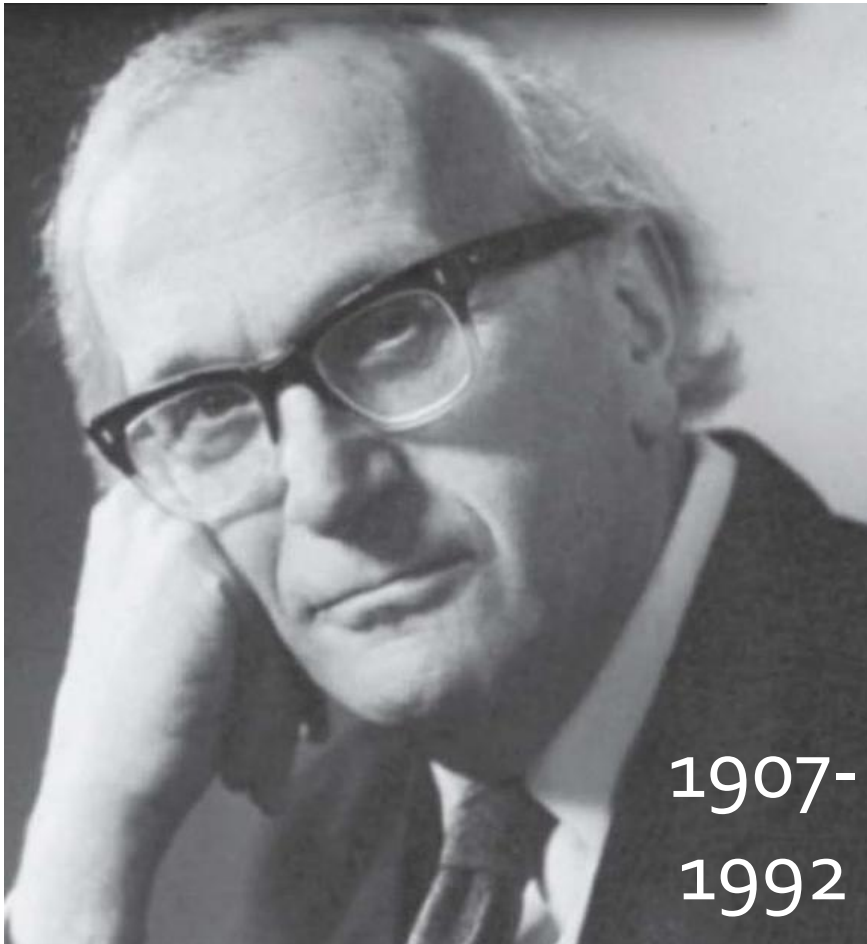
H.L.A. Hart

**“Positivism and the Separation of
Law and Morals” (1958)**

Outline

1. Who was H.L.A. Hart?
2. What Positivism does and does not Claim
3. The Confusion of Competing Theories
4. A Progressive Theory
5. Objections to Positivism
 - Objection I: Positivism Affirms the Command Theory
 - Objection II: Positivists are Formalists
 - Objection III: Positivism Leads to Injustice
6. The Necessary Morality of a Legal System

Who was H.L.A. Hart?



1907-
1992

1907 Born into a Jewish family in London

1929 Graduates from Oxford

1932-1940 Works as a successful lawyer

1940 Works with British Military Intelligence during WWII

1945 Begins teaching philosophy at Oxford

1952 Becomes Professor of Jurisprudence at Oxford

What Positivism Claims

Positivism is a theory that insists on the separation of two basic questions:

1. Is X a law?
2. Is X moral?

Separation Thesis: “The existence of law is one thing; its merit or demerit is another.” (p. 596)
—John Austin

What Positivism doesn't Claim

1. Positivism does not deny that morality has influenced law or that law has influenced morality (p. 598).
2. Nor does positivism deny that moral principles might be introduced into a legal system (p. 599).

The Confusion of Competing Theories

What both Bentham and Austin were anxious to assert were the following two simple things: first, in the absence of an expressed constitutional or legal provision, it could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.

(p. 599)

The Confusion of Competing Theories

The separation thesis enables positivists to steer a middle path between two kinds of confusion:

Anarchism: If something is immoral/unjust, it cannot be law.

Quietism: If something is law, it cannot be immoral/unjust.

A Progressive Theory

So Bentham and Austin were not dry analysts fiddling with verbal distinctions while cities burned, but were the vanguard of a movement which laboured with passionate intensity and much success to bring about a better society and better laws. Why then did they insist on the separation of law as it is and law as it ought to be?

(p. 596)

Let's catch our breath.

Positivism...

- is a general theory of law
- is rooted in the separation thesis
- claims to identify law without appealing to any moral claims
- claims to be a theory of law for social reformers

Three Objections to Legal Positivism

1. Positivism affirms the **command theory** (pp. 601-606)
2. Positivism is **formalism** (pp. 606-615)
3. Positivism leads to **extreme injustice** (pp. 615-621)

NOTE: Hart will respond to each of these objections by defending the separation thesis.

Objection I:

Positivism Affirms the Command Theory

“What is a command? It is simply an expression by one person of the **desire** that another person should do or abstain from some action, accompanied by a **threat of punishment** which is likely to follow disobedience. Commands are laws if two conditions are satisfied: first, they must be **general**; second, they must be commanded by what (as both Bentham and Austin claimed) exists in every political society whatever its constitutional form, namely, a person or a group of persons who are in receipt of habitual obedience from most of the society but pay no such obedience to others. These persons are its **sovereign**.”

(pp. 602-603)

3 Reasons for Rejecting the Command Theory

1. It doesn't fit modern democratic societies.
2. Not all laws are commands imposed by the sovereign.
3. ***Most important*:** "Law is not the gunman writ large, and legal order is surely not to be thus simply identified with compulsion." (p. 603)

So, the command theory is inadequate, but its inadequacy does not establish the falsity of the separation thesis (p. 606).

Objection II: Positivism is Formalism

Formalism: the view that law involves the mechanical application of rules to facts.

Example: “No vehicles in the park.”

Core vs. Penumbra

Objection III:

Positivism Leads to Injustice

Recall Radbruch's claim that positivism is a dangerous doctrine.

How does the separation thesis enable Hart's response?

- "For everything that [Radbruch] says is really dependent upon an enormous overvaluation of the importance of the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: 'Ought this rule of law to be obeyed?' Surely the truly liberal answer to any sinister use of the slogan 'law is law' or of the distinction between law and morals is, 'Very well, but that does not conclude the question. Law is not morality; do not let it supplant morality.'" (p. 618)

Attack on Radbruch

1. The 'stark nonsense' objection (p. 616)
2. The 'terrible history' objection (p. 618)
3. The 'disputable philosophy' objection (pp. 620-1)

The Grudge Informer

- Read this passage (bottom of p. 618-top of 621) again when we get to Fuller.

The Minimum Morality of a Legal System

So far, Hart has argued that **particular laws** need not be moral to be valid. Now he asks, does a **legal system** have a moral core?

Qualified “yes.”

- Human vulnerabilities might generate rules common to all legal systems that overlap with morality.
- Law involves general rules, which implies a principle of *procedural* justice: treating like cases alike.