
Comprehensive ID

The Natural Law Tradition

This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe in all countries, and at all times: no human laws are of any validity, if contrary to this, and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original. (Blackstone)

Legal Positivism

The Separation of Law and Morals

“The existence of law is one thing, it’s merit or demerit is another” (Austin)

The Command Theory of Law

Command

Sovereign

Habit of Obedience

Power-conferring Laws

Nullity as a Sanction

Treating nullity as a sanction is an idea from Command Theorists that attempts to encapsulate conferment of power to individuals under command theory. Issues arise when trying to understand laws that provide facilities for individuals to realize their wishes as the threat associated with not following them is not of the same nature as a criminal law, and hence requires treating the threat of nullity as a sanction. The idea is part of Hart’s larger argument against Command Theory as he explains that nullity cannot be properly assimilated into the sanctions associated with criminal law and hence Command Theory fails to encapsulate an entire type of law.

Who would be the sovereign in a representative democracy and why does this constitute a problem for the Command Theory?

Under Command Theory, the sovereign of a representative democracy would be the citizens themselves. This is a fairly nonsensical notion as the sovereign is intended to be unbounded by other authority, yet the citizens are subject to the law. Representative democracy's prove to be another corner case that does not align with the very simple and compelling argument Command Theory intends to make, furthering the fact that Command Theory fails to properly represent real legal systems.

Rex I and Rex II

Rex I and Rex II are two theoretical absolute monarchs used by Hart where Rex II is the successor of Rex I. Hart uses them to demonstrate another flaw within Command Theory, that being the habit of obedience. Hart argues that under Command Theory, it is not possible to understand how the monarchy's authority would continue after Rex I dies as none of the people have had a historical habit of obeying Rex II. This later becomes an important part of Hart's own proposed theory as he argues that this example demonstrates that alongside laws, there are also rules (in this instance a rule of succession) that represent something stronger than habits, usually backed by social pressure to dissuade deviations.

Tacit Commands

The Gunman Worry

As part of Hart's summary of his complaints with Command Theory, he returns to the gunman situation where the gunman says to a victim that they must either give the money or be killed. Hart argues that this is an exact representation of what Command Theory lays out except the gunman is addressing a large group of people who are accustomed to this behavior and surrender. It is highly implausible that law is the gunman situation scaled up and order is a simple notion of compulsion.

The Internal Attitude

Primary Rules of Obligation

Rules of etiquette Rules of more Codes of morality

Problems that arise when only in a system of PRO's. When solved in a specific way, a legal system arises.

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- Uncertainty
 - Without a codification or assignment of authority, rules act like a game of pickup where differing people have differing conceptions of the same rough rules.
 - Solved by a Rule of Recognition
 - Dispute Resolution
 - There is no mechanism of resolving any conflicts between people in a consistent manner. A system of just PRO's would lead to situations where the outcome is determined by factors such as who has more status, or who is more physically capable to fight, etc.
 - Solved by a Rule of Adjudication
 - * Outlines authoritative procedures on how to resolve disagreements about rules
 - Static Character
 - When rule's are set, there is no procedure that would provide an authoritative change to the rules. Therefore there is no avenue for modifying the pre-existing rules and leads to a static set of PRO's
 - Solved by a Rule of Change: some process that allows the change of rules
 - Secondary Rules

Secondary rules are rules about rules with the purpose of determining what primary rules of obligations are laws and which ones are not. They are a key part of Hart's conception of the law as they are his proposed answer to the question of what separates a rule from a law.

Problems of Uncertainty/Rule of Recognition

Problems of Dispute Resolution/Rules of Adjudication

Problems of Static Character/Rules of Change

Considering a society that is built entirely off of a system of primary rules of obligation, there is no procedure that would enable to modification of any rules and then its subsequent enforcement.

In Hart's theory, why can't we simply use the Secondary Rules themselves to specify who the officials in a society are?

We cant explain the authoritative legal status of a particular group of secondary rules by appeal to the legal authority of those very rules.

In Hart's theory, how is the Rule of Recognition for a particular legal system determined? Explain.

Internal Attitude of Officials

The Open Texture of Legal Language

Hart's concept of an "open texture" with legal language serves to balance the two extreme theories of adjudication: formalism and realism. Hart recognizes that formalism is an impossibility by the existence of hard cases, but that in many cases the application of law is straightforward unlike what the realists argue. The idea of the "open texture" is that legal language has a generality to it with clear application and then a fringe (what he goes on to call a "penumbra") where its application is unclear. This combines the worlds of formalism and realism as in cases where rules and their language apply clearly, judges role is then to utilize and apply the law in the manner that is outlined. In the cases where judges however "run out of law", they become the judges that legal realists think of in that they then have complete discretion over the decision.

The 'Penumbra' of Legal Rules

Hart's "no vehicles in the park" Law

Easy Cases

Hard Cases

Hard cases are cases where the application of the general terms of the law is not obvious.

Legal Indeterminacy

Extra-Legal Grounds

Judicial Discretion

A ‘Quasi-Legislative Function’ for Judges

Legal Realism/Rule Skepticism - TALKED ABOUT

Mechanical Jurisprudence - TALKED ABOUT

“[A]fter all, it is only words that the legislature utters; it is for the courts to say what those words mean; that is, it is for them to interpret legislative acts. . . .And this is the reason why legislative acts, statutes, are to be dealt with as sources of Law, and not as part of the Law itself. . . .It has sometimes been said that the Law is composed of two parts—legislative law and judge-made law—but, in truth, all the Law is judge made law.” (Gray)

This argument is part of the foundation of legal realism and skepticism where it appears that the interpretive freedom and flexibility that judges have is almost unlimited to make whatever decision they want. Therefore any formalism of law really is not valid as the conduct of citizens is shaped by the final word of judges.

“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.” (Holmes)

This is a central argument to legal realism/skepticism: those who violate the law are not going to be concerned with the axiomatic foundation of the law, the internal attitudes of citizens, primary and secondary rules, etc. They are only concerned with what the courts actually do. This is an important argument as it directly refutes the basis of Hart’s claim that rules and law that have a predictable and straightforward application in court even exist.

The ‘Bad Man’s’ Point of View

Scorer’s Discretion

Legal realists confuse finality with infallibility. Hart offers an analogy to understand the difference between his conception of law and legal realist’s version. Hart claims that his legal system and other formal frameworks are analogous to games like Baseball or Cricket and that legal realism is analogous to the game “Scorers Discretion” where the decisions are determined by the players and not the refs as in Baseball/Cricket.

Here at the margin of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function....In England this fact is often obscured by forms: for the courts often disclaim any such function and insist that the proper task of statutory interpretation and the use of precedent is, respectively, to search for the ‘intention of the legislature’ and the law that already exists. (Hart)

Legal Principles

Riggs v. Palmer (Elmer's inheritance case)

Explain (using an example) Dworkin's argument that legal principles matter even in what Hart thinks are 'easy' cases.

The snail darter case

McLoughlin

Dworkin's 'Community of Courtesy'

Intentions of the Framers

Specific Intentions

Abstract Intentions

Individual Intentions

Corporate Intentions

Conversational Interpretation

Constructive Interpretation

I've Been All Around This World

Use an example to explain the difference between interpreting a work of art conversationally and constructively.

Pre-Interpretive Stage

Interpretive Stage

Post-Interpretive Stage

Fit and Acceptability

The Chain Novel

Plessy v. Ferguson

Brown v. Board of Education of Topeka

The 8th Amendment's prohibition against "cruel and unusual" punishment

Hercules

Law as integrity is therefore more relentlessly interpretive than either conventionalism or pragmatism. These latter theories offer themselves as interpretations. They are conceptions of law that claim to show our legal practices in the best light these can bear, and they recommend, in their postinterpretive conclusions, distinct styles or programs for adjudication. But the programs they recommend are not themselves programs of interpretation: they do not ask judges deciding hard cases to carry out any further, essentially interpretive study of legal doctrine. (Dworkin)