Lectures

2. Unit 1: Introduction & Fuller – “The Case of the Speluncean Explorers” (Jan 13–15)

Core thesis: Extreme hypothetical reveals deep divides in legal reasoning; no single “correct” answer—law blends rules, morality, consequences, and interpretation. Key contrasting judges (organize essays around these four views): True judge (positivist/formalist): strict letter of statute. Natural-law judge: unjust “law” is no law. Utilitarian judge: greatest happiness / least suffering. Interpretive judge: purpose and spirit of law.

High-level takeaway: Law is not mechanical; judges inevitably import philosophy.

3. Unit 2: Natural Law Tradition – Kretzmann, “Lex Iniusta Non Est Lex” (Jan 20–23)

Core thesis: Unjust law is not truly law (Aquinas-derived: law must be ordered to common good, promulgated, etc.). Key concepts: Validity vs. obligatoriness; “no law” vs. “bad law” distinction. Comparison anchor: Direct foil to positivism (Bentham/Hart: a valid law can still be unjust and still bind).

4. Unit 3: Utilitarian Positivism – Bentham, Principles of Morals and Legislation (Jan 25–30)

Core thesis: Law’s purpose = maximize utility (pleasure – pain); legislation as social engineering. Key concepts: Principle of utility, hedonic calculus, sovereign commands, separation of law-as-it-is from law-as-it-ought-to-be. Bridge to next: Bentham = classical positivist foundation for Hart.

5. Unit 4: Modern Positivism – Hart, “Law as the Union of Primary and Secondary Rules” (Feb 1–6)

Core thesis: Law = system of rules, not commands (rejects Austin/Bentham sovereign model). Primary rules: duty-imposing (what citizens must do). Secondary rules: power-conferring (rule of recognition, rule of change, rule of adjudication).

Key test: Rule of recognition (what officials accept as valid law). Strengths: Explains legal systems in modern states; internal point of view. Classic comparison: Hart vs. Dworkin (rules vs. principles).

6. Unit 5: Dworkin’s Interpretivism (Feb 8–13)

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Readings: “The Model of Rules” + “Integrity in Law”. Core theses: Rules alone insufficient; law includes principles (weighted, not all-or-nothing). Law as integrity: best constructive interpretation that fits past decisions and justifies them in moral light (“law as a chain novel”).

Key critique of Hart: “semantic sting” – positivists wrong about criteria of legality. Essay-ready contrast table (memorize structure):AspectHart (Positivism)Dworkin (Interpretivism)Nature of lawRules + social factPrinciples + moral fitJudicial roleApply valid rulesInterpret for integrityLaw-moralitySeparableInseparable in hard cases

7. Unit 6: Legal Realism – Holmes & Frank (Feb 17? per schedule alignment)

Holmes, “The Path of the Law”: Law = prediction of what courts will do (“bad man” view). Focus on consequences, not logic or morality. Frank, “Legal Realism”: Rule skepticism + fact skepticism; judges decide first, rationalize later; law is uncertain and human. High-level role: Bridge from positivism to CLS; law is not a closed system of rules.

8. Unit 7: Critical Legal Studies (CLS) (Feb 20 per syllabus.html)

Core thesis: Law is politics/indeterminacy masked as neutral; serves dominant power structures (race, class, gender). Key moves: Trashing (indeterminacy of doctrine), deconstruction, alternative narratives. Relation to prior units: Radical extension of Realism + Marxist/feminist critique of Hart/Dworkin “liberal” assumptions.

9. Unit 8: Plato, Crito (Feb 22–27 – likely on Quiz)

Core thesis: Socrates must obey Athens’ laws (social contract, gratitude, consistency arguments). Key arguments: Personified Laws speech; harm to the city; better to suffer injustice than commit it. Essay hook: Does Crito support natural-law obligation or positivist duty to obey any law? Link to Kretzmann (“unjust law”) and CLS (law as power).

What is Law?

Jurisprudence is a theory about the ontological nature of law.

Some important questions include:

- How do we answer this question?
  - With a Definition?
  - A Description of the word law?
  - A historical analysis of the ways in which this term was used?

Is Law . . . and if so . . .:

- a set of practices?
  - Which ones count as law?
  - Who decides?

- Who's practices count?

Overview

- Setting: Court of Law, year 4299
- Theme: The Speluncean explorers have been tried for the murder of Roger Whetmore and found guilty. Five chief justices give their opinions on the case and whether or not the judgment is just.
- Hook: Two points of interest, the opinions of the justices and the justification they use in this opinion.

Background

- Key history: The explorers were all members of the Speluncean explorer society. They were trapped during one of their expeditions by large boulders blocking their exit from a cave they were exploring. Initially the explorers had been in contact with the outside world and their potential rescurers. However, this communication had become disrupted shortly after bein informed that it was likely they would die of starvation before their rescue. Upon their eventual rescue, it was learned that this party had survived, possibly because of the murder and cannibilization of one of their members, Mr. Roger Whetmore. Further it was learned that it was initially Whetmore's idea that they pick lots to decide whose flesh should serve as sustinance for the remaining members, although shortly before lots were drawn, Whetmore had withdrawn his support from this idea implying that he did not consent to this arrangement. His lot in turn, was cast for him.

- Important factions: Truepenny, Foster, Tatting, Keen, Handy.

Major conflicts

Natural Law

Legal Positivism

Legal Realism and Scepticism

Interpretationist theories

When trying to develop a theory of law:

- Obligation is important
- Normativity, when deciding what to do, we ask "what counts", or what is "entitled" to count.
  - Concerning the normative account, when we speak of normativity, we will ask whether there are behaviors that are normative prior to our choices.
- Law == criteria of right judgment in conduct, action
- Acts as a standard for human conduct: enables judgments such as good; bad, right; wrong; desirable; undesirable; decent or unworth.

The judges include:

Truepenny, CJ

Foster, J

Keen, J.

Handy, J.

Tatting, J.

Core thesis: Extreme hypothetical reveals deep divides in legal reasoning; no single “correct” answer—law blends rules, morality, consequences, and interpretation.

Key contrasting judges (organize essays around these four views):

- True judge (positivist/formalist): strict letter of statute.
- Natural-law judge: unjust “law” is no law.
- Utilitarian judge: greatest happiness / least suffering.
- Interpretive judge: purpose and spirit of law.

High-level takeaway: Law is not mechanical; judges inevitably import philosophy, beliefs, opinions, morals, etc.

Truepenny, CJ

Is in favor of the court’s decision. Ruling of the court should be upheld, namely against murder, while clemency should be offered to the defendants recognizing the extreme circumstances and choices they were faced with.

- But distinguishes between spirit and letter of the law.
- Letter: “Whoever shall willfully take the life of another shall be punished by death.” Spirit?
- Obligation vs. normativity.
    - Does the law give us reason to perform, or refrain from performing a given action?
    - Does the law count as a measure for assessing whether an action was good, bad, desirable, unworthy, right, wrong?

Foster, J

> For us to assert that the law we uphold and expound compels us to a conclusion we are ashamed of, and from which we can only escape by appealing to a dispensation resting within the personal whim of the Executive, seems to me to amount to an admission that the law of this Commonwealth no longer pretends to incorporate justice. (**full49?**)

- How? Law is grounded in spirit, “possibility of men’s coexistence in society”. When possibility is impossible, then positive law is no longer applicable.

> When the assumption that men live together loses its truth, as it obviously did in this extraordinary situation where life only became possible by the taking of a life, then the basic principles underlying our whole legal order have lost their meaning and force. (**full49?**)

Consider two important distinctions: Established law, principles grounding established law.

- Law is grounded in contracts and agreements.
- Ancient: Original contract
- Skeptics: However, there is no evidence to support the claim that law is settled agreement.
- Moralists: However, if there is no evidence, then there is no evidence justifying the powers of government including the taking of lives.

Instead however, there is an original charter and all settled law points 'back' to it.

> We know as a matter of historical truth that our government was founded upon a contract or free accord of men. The archaeological proof is conclusive that in the first period following the Great Spiral the survivors of that holocaust voluntarily came together and drew up a charter of government. Sophistical writers have raised questions as to the power of those remote contractors to bind future generations, but the fact remains that our government traces itself back in an unbroken line to that original charter. (**full49?**)

Rule of Law Argument

1. Governments have certain powers.
2. These powers are grounded in the original compact: agreement to ensure the possibility of coexistence.
3. If there is no precedent available to ensure peaceful cooperation, then the original contract is impossible.
4. When the original contract is impossible, then governmental powers are not justified.
5. The original contract is impossible.
6. Therefore current laws are not applicable.
7. As such, defendants are innocent.

Rule of Law Counter Argument

1. Governments have certain powers.
2. These powers are grounded in the original compact: agreement to ensure the possibility of coexistence.
3. If there is no precedent available to ensure peaceful cooperation, then the original contract is impossible.
4. When the original contract is impossible, then governmental powers are not justified.
5. [counter] original contract is possible.
6. Self-defense example:

> When the rationale of the excuse of self-defense is thus explained, it becomes apparent that precisely the same reasoning is applicable to the case at bar. If in the future any group of men ever find themselves in the

> tragic predicament of these defendants, we may be sure that their decision whether to live or die will not be controlled by the contents of our criminal code. (**full49?**)

7. Law would be ignored leading to impossibility of peaceful coexistence.
8. Therefore current laws are not applicable.
9. Defendants are innocent.

Keen, J.

Handy, J.

Tatting, J.

Counter to State of Nature / Rule of Law Argument

1. The defendants were merely protecting their own lives.
2. In a state of nature, this is a justified and legal action.
3. Therefore, Whetmore with a revolver protecting his own life is unjustified killing (murder).
4. 2 and 3 == contradiction.
5. Argument from state of nature is a contradiction.

Counter to Counter Argument

1. Law ensures peaceful cooperation.
2. When peaceful cooperation is impossible, then no law is justified.

Why?

1. Laws have purposes, positive effect and negative effect.
2. Positive effect, ensure peaceful cooperation
3. Negative effect, self-defense

Utilitarian Positivism – Bentham, Principles of Morals and Legislation (Jan 25–30)

Core thesis: Law's purpose = maximize utility (pleasure – pain); legislation as social engineering.

Key concepts: Principle of utility, hedonic calculus, sovereign commands, separation of law-as-it-is from law-as-it-ought-to-be.

Bridge to next: Bentham = classical positivist foundation for Hart.

Legal Positivism

John Austin:

> A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. [The Province of Jurisprudence Determined, selections from Lectures I and VI, 1832]

But notice Bentham's formulation:

The Principle of Utility

> Nature has placed mankind under the governance of two sovereign masters, *pain*, and *pleasure*.

- Every action either promotes pleasure, or mitigates pain.
- Therefore, we evaluate all action by its ability to promote pleasure or mitigate pain.

> An action then may be said to be conformable to the principle of utility, or, for shortness sake, to utility, (meaning with respect to the community at large) when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.

Of Principles Adverse to that of Utility

Other possible determinates of actions:

- Asceticism
- Principle of Sympathy and Antipathy

Asceticism

Come in Two Kinds

- Moralists
- Religionists

- like utility, guise through which we might approve or disapprove actions
- actions that diminish happiness are good, actions that promote pain good
- actions promote happiness are bad, actions that diminish pain are good

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> By the principle of asceticism I mean that principle, which, like the principle of utility, approves or disapproves of any action, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question; but in an inverse manner: approving of actions in as far as they tend to diminish his happiness; disapproving of them in as far as they tend to augment it. (Principles of Morals and Legislation)

Four Sources of Pleasure, Pain, and Sanction

Sources of Pleasures and Pains

1. Physical
2. Political
3. Moral
4. And Religious

- Physical pains are often natural, i.e., car accidents.
- But, pains from a judge, sovereign, supreme ruling power are synonymous with political sanction

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But . . .

> If at the hands of such chance persons in the community, as the party in question may happen in the course of his life to have concerns with, according to each man's spontaneous disposition, and not according to any settled or concerted rule, it may be said to issue from the *moral* or *popular sanction*. [Of Morals, 28]

Superior or invisible being, = religious sanction

- Of the Four Sanctions or Sources of Pain and Pleasure
- Value of a Lot of Pleasure or Pain, How to be Measured
- Pleasures and Pains, Their Kinds
- Of Circumstances Influencing Sensibility

Of Human Actions in General

What is the purpose of Government?

> The business of government is to promote the happiness of the society, by punishing and rewarding. [61]

Contrast with Aquinas:

- Law = rule and measure of acts whereby man is induced to act or restrained from acting

But for what?

> Now the first principle in practical matters, which are the object of the practical reason, is the last end, and the last end of human life is bliss or happiness, as stated above. Consdquently, the law must needs regard principally the relationship to happiness. [Aquinas, ST I-II, Q. 90, 2nd]

Moving On

The proper objectives of law is to promote happiness. This can be found in:

> Concrete manifestations of happiness, for example, may be found in personal security and reduced crime rates, enhanced health and declining death rates, broader opportunities for education, the reduction of diseases caused by sewage pollution, and so on. (**crim26?**)

Of the Limits of the Penal Branch of Jurisprudence

What can the law forbid?

Consider:

- Seat belt laws
- Laws against suicide
- Laws against incest

Kinds of Legal Matter

- Criminal
- Civil

Two kinds of Legislation

- Moral (Private Ethics)
- Civil (Community), Penal (Penalties)

How do we distinguish between the limits of law, matters of public and private.

Ethics == the art of directing men's actions to the production of the greatest possible quantify of happiness, on the part of those whose interest is in view.

Directing to action = Coercion

> What then are the actions which it can be in a man's power to direct? They must be either his own actions, or those of other agents. Ethics, in as far as it is the art of directing a man's own actions, may be styled the

> *art of self-government*, or *private ethics*.

- What is coercion?
- Who can be coerced?
- How can they be coerced?

Exclusive Positivism and Inclusive Positivism

- Rules of recognition
  - determine certain facts or events
  - taken to yield established ways for creating, modifying, and annuling legal standards

Exclusive Source of Law

> The kind of exclusive positivism I have in mind would baasically hold that legal validity is exhausted by reference to the conventional sources of law: all law is source based, and anything which is not souce based is not laww.

Inclusive Source of Law

- Law can include considerations of morality
- i.e., Ronald Dworkin “maintains that the dependence of legal validity on moral jconsiderations is an essential feature of law which basically derives from law’s profound interpretative nature

Limits of Civil and Penal Law

- Legislation and Private ethics

Some preliminaries, II-IV

- Ethics: art of directing men’s happiness to the production of the greatest possible quantity of happiness

Two kinds of action:

- His or her own: private ethics, art of self-government
- Those of other agents:

> What other agents then are there, which, at the same time that they are under the influence of man’s direction, are susceptible of happiness. They are of two sorts:

1. Other human beings who are styled persons.

2. Other animals, which, on account of their interests having been neglected by the insensibility of the ancient jurists, stand degraded into the class of things.

The Art of Government and Private Government (Education)

Who is responsible for directing others toward happiness?

> As to other human beings, the art of directing their actions to the above end is what we mean, or at least, we *ought* to mean, by the art of government: which, in as far as the measures it displays itself in are of a permanent nature, is generally distinguished by the name of ***legislation***: as it is by that of ***administration***, when they are of a temporary nature, determined by the occurrences of the day.

- education for children
- best administered “in virtue of some ***private*** relationship”.
- Private vs. Public education

Duties and Obligations

- To one’s self in the pursuit of happiness
- To other’s in ***their*** pursuit of happiness

Obligations depend in part on effects of one’s behavior:

- behavior that effects the agent (Prudence)
- behavior which effects someone other than the agent (duty to one’s neighbor)

Of that which affects the neighbor, we have:

- Probity, forbearing to diminish another’s happiness
- Beneficence, seek to increase another’s happiness
    - Selfish motives, love of reputation for self
    - selfless motives sympathy for others

Both private ethics and legislation

- Directed at happiness
- Happiness of every member

Where is the difference?

> In that the acts which they ought to be conversant about, though in a great measure, are not perfectly and throughout the same. There is no case in which a private man ought not to direct his own conduct to the production of his own happiness, and of that of his fellow-creatures: but there are cases in which the legislator ought not (in a direct way at least, and by means of punishment applied immediately to particular individual acts) to attempt to direct the conduct of the several other members of the community. Every act which promises to be beneficial upon the whole to the community (himself included) each individual ought to perform of himself: but it is not every such act that the legislator ought to compel him to perform. Every

> act which promises to be pernicious upon the whole to the community (himself included) each individual ought to abstain from of him: but it is not every such act that the legislator ought to compel him to abstain from.

Positive and Negative Injunctions, Rights and Obligations

> The business is to give an idea of the cases in which ethics ought, and in which legislation ought not (in a direct manner at least) to interfere. If legislation interferes in a direct manner, it must be by punishment. Now the cases in which punishment, meaning the punishment of the political sanction, ought not to be inflicted, have been already stated. [227]

Four Cases of Punishment

1. Where it would be groundless
2. Where it would be inefficacious
3. Where it would be unprofitable
4. Where it would be needless

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1. In actions that are not morally wrong
2. Two classes of ineffective laws:

- Bad timing, *ex-post-facto*
- Unadvertised law

3. Where the action could not be prevented by a commandment

- Small children
- Mental health
- Inebriation

When the punishment is more evil than the crime

> 1, The evil of coercion, including constraint or restraint, according as the act commanded is of the positive kind or the negative. 2. The evil of apprehension. 3. The evil of sufferance. 4. The derivative evils resulting to persons in connection with those by whom the three above-mentioned original evils are sustained.

Subordinate Ends

Civil Law

- Security
- Subsistence
- Abundance
- Equality

> As we have seen, security is maintained by laws that protect property and the expectations derived from ownership, and uphold the contracts that facilitate the trade in goods and services. Subsistence and abundance are also derived from this source. When an overall abundance exists but not all enjoy the necessary means of subsistence, then legislative intervention may be conducted in accordance with the "disappointment-prevention principle", such as when the state takes ownership of an estate for which there is no legitimate heir (122–23), or when a tax on income or property can be introduced without materially detracting from a person's expectations, and the funds accrued used to provide food and basic services to those in need.

E.g.,

- Post-Feudal Europe
- More equal distribution of property
- Slow progress towards equality

However

> The important caveat Bentham introduced to justify his optimism is the proviso that government must not impede this tendency by allowing monopolies, putting "shackles" on trade and industry, or placing obstacles in the path of the division of property on inheritance. (**crim26?**)

Not strictly wealth redistribution:

- No monopolies but . . . No shackles on trade and industry
- Free division of property / inheritance

> Bentham believed that facilitating individuals in the pursuit of their interests in a free market is what government should do, because this is the proven best way to maximise the public good. Where laissez-faire does not produce the best result, however, the legislator must act in other direct and indirect ways to produce the optimal outcome. (**crim26?**)

Penal Law

- Directed at deterrence
- Moral Reformation
- Compensation
- Must be appropriate between crimes and punishments

Sources

Modern Positivism – Hart, "Law as the Union of Primary and Secondary Rules" (Feb 1–6)

Core thesis: Law = system of rules, not commands (rejects Austin/Bentham sovereign model).

Primary rules: duty-imposing (what citizens must do).

Secondary rules: power-conferring (rule of recognition, rule of change, rule of adjudication).

Key test: Rule of recognition (what officials accept as valid law).

Strengths: Explains legal systems in modern states; internal point of view.

Classic comparison: Hart vs. Dworkin (rules vs. principles).

Recap of Previous Topics

- **Kretzmann's Lex Iniusta Non Est Lex**: Natural law perspective – unjust laws are not true laws.
- **Fuller's Case of the Speluncean Explorers**: Hypothetical case exploring judicial philosophies, including positivism, natural law, and purposivism.
- **Bentham's Principles of Morals**: Utilitarian foundation for positivism – laws based on utility, separation of law from morality.

Brief high-level recap to connect to today's topics on legal positivism and its critiques.

Introduction to HLA Hart

- HLA Hart (1907–1992): British legal philosopher.
- Key work: *The Concept of Law* (1961).
- Builds on Bentham's positivism but refines it.
- Addresses limitations in command theories (e.g., Austin's sovereign commands).

Hart advances positivism by introducing a more sophisticated structure of legal systems.

Hart's Primary Rules

Some prerequisites:

1. Penal law = Just distribution of proposed threats backed by sanctions
2. Legislative and Administrative rules for creating legal entities.
3. Rules vs. Orders distinction
4. Sovereign vs. Legislative authority

- **Definition**: Rules that impose duties or obligations directly on individuals (e.g., "Do not steal").
- **Characteristics**:
  - Oblige behavior.
  - Often backed by sanctions.

- **Limitations**: In primitive societies, primary rules alone lead to issues like uncertainty, static nature, and inefficiency in disputes.

Primary rules are the basic content of law, similar to Bentham's utility-driven commands.

Hart's Secondary Rules

- **Definition**: Rules about rules – meta-rules that address deficiencies in primary rules.
- **Types**:
  - **Rule of Recognition**: Identifies what counts as valid law (e.g., constitution).
  - **Rules of Change**: Allow creation, modification, or repeal of primary rules (e.g., legislative procedures).
  - **Rules of Adjudication**: Empower officials to resolve disputes (e.g., courts).

Secondary rules provide the framework for a mature legal system, distinguishing law from mere habits.

Union of Primary and Secondary Rules

- **Core Idea**: Law is the union of primary (content) and secondary (structure) rules.
- **Advantages**:
  - Solves problems in primitive rule systems.
  - Explains legal validity without relying on morality (contra natural law like Kretzmann).
- **Connection to Speluncean Explorers**: Judges apply secondary rules to interpret primary ones.

This model separates "is" (positive law) from "ought" (morality), echoing Bentham.

Legal Obligation

- Legal Obligation: beliefs and motivations regarding punishment are not sufficient
- Being Obliged: beliefs and motivations are sufficient

For instance, military service.

Introduction to Ronald Dworkin

- Ronald Dworkin (1931–2013): American legal philosopher.
- Key work: *The Model of Rules* (1967), part of *Taking Rights Seriously*.
- Critiques legal positivism, including Hart's model.
- Argues positivism is incomplete for hard cases.

Dworkin challenges the rule-based view, introducing principles for judicial decision-making.

Dworkin’s Rules vs. Principles

- **Rules**: All-or-nothing; apply strictly if conditions met (e.g., Hart’s primary/secondary rules).
- **Principles**: Weigh and balance; have dimension of weight (e.g., justice, fairness).
- **Key Distinction**:
  - Rules are like recipes; principles guide discretion.
- **Critique of Hart**: Positivism focuses on rules but ignores principles in adjudication.

Links to Speluncean Explorers: Different judges weigh principles differently in the cave dilemma.

Dworkin’s Model of Rules

- **Positivism’s Flaw**: Treats law as only explicit rules; fails in ambiguous cases.
- **Alternative**: Law includes rules + principles + policies.
- **Hercules Judge**: Ideal judge interprets law as a coherent whole, fitting principles.
- **Implications**: Blurs separation of law and morality (contra Bentham/Hart, closer to natural law elements).

Dworkin argues for interpretive approach, where morality informs legal validity in hard cases.

Comparison: Hart vs. Dworkin

Aspect	Hart (Positivism)	Dworkin (Interpretivism)
Law’s Nature	Rules (primary + secondary)	Rules + principles
Validity	Rule of recognition (pedigree)	Best fit with moral principles
Hard Cases	Judicial discretion (open texture)	Principled interpretation
Morality	Separated from law	Integrated into interpretation

High-level contrast building on Bentham’s positivism and Fuller’s exploratory case.

Connections to Prior Topics

- **Bentham**: Hart refines utilitarian positivism; Dworkin critiques its moral detachment.
- **Kretzmann**: Dworkin’s principles echo natural law’s moral criteria.
- **Speluncean Explorers**: Illustrates Hart’s rules in action and Dworkin’s need for principles.

Ties back for course continuity.

Discussion Questions

- How does Hart's model address limitations in Bentham's theory?
- In what ways does Dworkin extend or challenge the Speluncean judges' approaches?
- Can unjust laws (per Kretzmann) exist under Hart vs. Dworkin?

Encourage high-level organization of ideas for class discussion.

References

- Hart, H.L.A. *The Concept of Law* (1961).
- Dworkin, Ronald. *Taking Rights Seriously* (1977).
- Fuller, Lon L. "The Case of the Speluncean Explorers" (1949).

High-level sources for further reading.

Oliver Wendell Holmes

- The study of law is the study of predicting what to expect in the court of law
- And knowing what the court's expectations are to avoid punishment
- We want to be able to make predictions

Duties and Obligations

- Legal Duty is the prediction of what would happen in the court of law.

> a legal duty is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this way or that way by judgment of the court; and so of a legal right. [3]

- Law is the guise through which we develop our moral judgments.
  - Encoded with moral language.
  - Uses rights and duties with malice and intent (moral agency).
- But the power of enforcement is not coextensive with any system of morals.
- Rather the study of law is about prediction:

> The prophesies of what courts will do in fact, and nothing more pretentious, are what I mean by the law.

- Certain actions are correlated with certain consequences.

Two Accounts of Malevolent Motive

- Traditional: The defendent being exonorated because he did not possess malice (moral sense).
- Modern: The defendent is not exonorated because he caused harm (legal sense).

> Signifies the tendency of his conduct under known circumstances was very plainly to cause the plantiff harm [12].

Lecture Notes – Oliver Wendell Holmes and Jerome Frank, Legal Realism

• American Legal Realism is a critical position in legal theory inspired by the work of John Chapman Gray and Oliver Wendell Holmes.

o A bit of background on Holmes: he was a legal scholar and US Supreme Court Justice. He was also a founding member, with William James, Charles Sanders Peirce and Chauncy Wright, of the Metaphysical Club, which was a group that met at Harvard in 1872. It was in this club that the position that developed into American Pragmatism was first developed. (Also the subject of a wonderful book by Louis Menand.)

▪ These early pragmatists were metaphysical quietists. ▪ Committed to the idea that if something doesn't make a difference in practice, then it's not worth talking about. Differences/distinctions that don't make a difference in practice are no differences/distinctions at all.

▪ Peirce's pragmatic maxim: • "Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of those effects is the whole of our conception of the object." (EP1: 132)

▪ James called his pragmatism "radical empiricism" • 'the only things that shall be debatable among philosophers shall be things definable in terms drawn from experience' ▪ We can see these ideas imprinted on Holmes's thought about "the law." • "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." • The law is nothing more than its practical effects, and those are affected on others by the courts. • Holmes argues for this position on an empirical basis rather than on conceptual grounds, as Hart, Austin, and the Natural Lawyers defended their positions.

• He sought to understand both how law shows up in the experience of those who it affects and how judges actually arrived at their decisions.

o How do those who are governed actually experience the law?

▪ They experience it as an imposition of public force:

• "You can see very plainly that a bad man has as much reason as a good one for wishing to avoid an encounter with the public force, and therefore you can see the practical importance of the distinction between morality and law. A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."

• Holmes, then, maintains the separability thesis, but he does so on empirical grounds

o He is not a cynic, however…his purpose is to contend that if one wants to study and practice the law, one must look at it from a business-like perspective, and this means seeing it as distinct from law.

• Though law is, he says, "the witness and external deposit of our moral lives."

▪ So, then, we can make our inquiry more precise by asking how the bad man experiences the law.

• He wants to know what he can get away with, what he can do without incurring the imposition of public force. • "But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money."

• The bad man is concerned with law as a prediction of likely consequences, and since those consequences are determined by the court, he is concerned with law merely as a prediction of how the courts will decide.

o Holmes examples: contract

• How would Hart respond to this understanding of law as a prediction of what the courts will decide???

▪ In the making of such predictions (and in the deciding of cases) we do well to not confuse the moral use of terms and their legal use:

• Example of Malice

o In morality, malice requires ill intent

o In law, it need not, though it may.

▪ "I think that the law regards the infliction of temporal damage by a responsible person as actionable, if under the circumstances known to him the danger of his act is manifest according to common experience, or according to his own experience if it is more than common, except in cases where upon special grounds of policy the law refuses to protect the plaintiff or grants a privilege to the defendant. I think that commonly malice, intent, and negligence mean only that the danger was manifest to a greater or less degree, under the circumstances known to the actor, although in some cases of privilege malice may mean an actual malevolent motive, and such a motive may take away a permission knowingly to inflict harm, which otherwise would be granted on this or that ground of dominant public good." • Example of Contracts: o In morals, contracts or promises are dependent on the internal state of the persons' minds.

o In law, contracts are purely formal. Whatever the court determines one to be contractually obligated to on the basis of the executed contract is what one is obligated to no matter the internal state of one's mind.

o How do (and should) judges decide cases?

▪ We tend to think that judges apply the law, but legal realists think that judges are mostly in the business of making law.

▪ Why?

• the class of available legal materials is insufficient to logically entail a unique legal outcome in most cases worth litigating at the appellate level (the Local Indeterminacy Thesis);

• in such cases, judges make new law in deciding legal disputes through the exercise of a lawmaking discretion (the Discretion Thesis); and

• judicial decisions in indeterminate cases are influenced by the judge's political and moral convictions, not by legal considerations.

▪ Examine this passage (p 466)

• Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.

▪ Judges, Holmes thinks, ought to be more explicit about these hidden drivers of their decisions, and ought to be clear that they make decisions with social advantage in mind.

▪ This would allow for a re-examination of history and tradition in the law.

• Turn to p. 470.

• Example of whether we can know that the criminal law does more good than harm in present circumstances.

As the following quote shows, Bonaventure was not only committed to theology, but philosophy which according to him, was to better understand the beliefs he held. It is important to note, that philosophy was important even for what he considered matters of faith, which at times, is thought to be immune from the critical reflections that philosophy enables.

> And so, if the writings of the philosophers are sometimes of much value in understanding truth and refuting errors, we are not departing from the purity of faith if we at times study them, especially since there are many questions of faith which cannot be settled without recourse to them. (trans. Monti 1994: 53)

From 1243 to 1248, Bonaventure studied theology at the university of Paris. During the course of his studies, he worked with the Fransiscans, a group of Catholic organizations founded by St. Fransis of Assisi, named for the town in Italy where he was born in the year 1209. At the University of Paris, Bonaventure became a *Formed Bachelor* which meant that he would take on the academic roles of lecturing, getting involved in *the* disputes, a class of philosophical questions rooted in theology, and preaching. While a formed bachelor, not yet a master, the university's masters and its students when on strike, leading to them becoming expelled. During this conflict, Bonaventure would be elected to the Fransiscan Chair in theology though he would only teach at the Fransiscan convent which was not recognized by the University.

There would be some controversy surrounding this since, though the duties Bonaventure performed where those of a Master, he was not recognized as one until 1256 by order of Pope Alexander IV. During this time however, Bonaventure was a prolific scholar producing many texts including his *Reduction of Arts to Theology* which is a reflection on theological sermons as a genre of art.

> The same mode of reasoning is found in On Retracing the Arts to Theology. Here "reduction" consists in developing analogies that move the mind from the liberal arts to theology and back again. Bonaventure

> argues for each point by combining one claim based on reason with another based on revelation, as though they were wall and buttress of the cathedral of theology. Philosophical reasoning, then, is an absolutely integral part of Bonaventure's faith-based theology.[1](https://plato.stanford.edu/entries/bonaventure/#BonaIlluArgu)

There are objects we access through our senses. Importantly for Bonaventure, these objects always point towards their source of being, God. But it is not merely the objects in themselves, but rather our apprehension of their "weight, number, and measure" Stanford Encyclopedia of Philosophy, that causes us to contemplate their "measure, beauty, and order" and to *delight* in this aspect of all that is created.

> The world as it is revealed to us through the senses provides the means for our re-entering ourselves and ascending to higher things. Furthermore, the senses themselves are equally signs of higher things.

> exercising their powers of intellect and will, intellectual creatures discover the highest and most perfect object of their powers in the Divine Source of their being, since God is the First or Highest Truth and the First or Chief Good. Accordingly, intellectual creatures have God as their ultimate object, whereas all creatures have God as their Cause. Consequently, intellectual creatures show themselves to be "images" and "likenesses" of God, while they show that all creatures are "shadows" and "vestiges" of God.

> The resolution of all our items of simple apprehension into the concept of being is metaphysically and epistemologically crucial: metaphysically, it opens up a route of argumentation that leads to the existence of God; epistemologically, such a resolution means that behind all, even the most determinate and specific, conceptions of things lies a transcendental awareness of being that informs all of our knowledge.

CLS

Scholars try to establish the illegitimacy of the legal order by debunking law's pretensions to determinacy, neutrality, and objectivity.

Shaped by:

- Marxist
- Realist tradition
- Deconstruction
- Feminism
- Environmentalism
- Anti-racism

The central attack of CLS is formalism:

> "the idea that there is an autonomous and neutral mode of 'legal' reasoning and rationality through which legal specialists apply doctrine in concrete cases to reach results that are independent of the specialists'

> ethical ideals and political purposes." [J. Paul Oetken: Form and Substance in Critical Legal Studies, p. 2211]

Cls argues that instead law is indeterminate: legal rules and arguments fail to compel or justify definite answers in legal disputes.

> A primary concern of CLS is to demonstrate how language and other formal structures are used in subtle, unconscious ways to channel our thought into dominant patterns, to mystify us. [J. Paul Oetken: Form and Substance in Critical Legal Studies, p. 2213]

Rhetorical Modes and Substantive Issues in the Law

What is the nature and interconnection of the different rhetorical modes found in American private law opinions, articles, and treatises?

- Formal dimensions of rules and standards
- Substantive dimensions of individualism and altruism

Two modes for dealing with questions of the form in which legal solutions to the substantive problems:

- Formal Rules: uses clearly defined, highly administrable, general rules
- Informal Standards: uses equitable standards that produce ad hoc decisions with little precedential (precedent) value.

As Such:

1. Altruist views on substantive private law issues lead to willingness to resort to standards in administration.
2. Individualism harmonizes with an insistence on rigid rules rigidly applied (formal modes).
3. Substantive and formal conflict in private law and cannot be reduced to disagreement about how to apply some neutral calculus that will "maximize the total satisfactions of valid human wants".
4. Therefore, we are divided among ourselves and also within ourselves between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.

Sections I and II

1. Jurisprudence of Rules
    1. Dimensions of Form
    2. Relationships between formal dimensions
2. Types of relationships between form and substance
    1. Contextualization
    2. Form as Substance
    3. Altruism and Individualism

- Problem of choice between rules and standards as the form for legal directives.
- Collecting and organizing the wide variety of arguments that have been found persuasive in different areas of legal study.

Sections III and IV

- Develops a dichotomy of individualism and altruism
- Hopes to bring a measure of order to the chaotic mass of “policies” lawyers
- Policies can be used in justifying particular legal rules.

Sections V, VI, and VII

- Argues that the formal and substantive dichotomies are in fact aspects of a single conflict.
- Whose history is briefly traced through a hundred and fifty years of dispute
- Including moral, economic, and political.

Section VIII

Outlines the contradictory sets of fundamental premises that underlie this conflict.

Section IX

Conclusion

Section I: The Jurisprudence of Rules

A. “Three” Dimensions for Describing Legal directives:

1. Formal Realizability vs. Standards, principles, policies: The quality of “ruleness” in a legal directive vs. substantive objectives
2. Generality vs. particularity, e.g., rule setting age of legal majority at 21 vs. rule setting age of capacity to contract at 21.
    1. Particularity - Rules: A directive that requires response
    2. Particularity - Standards, principle or policy: substantive objective of legal order. E.g., good faith, due care, fairness
    3. Generality - wide scope intended to deal with many different fact situations
    4. General rule over or under inclusive, than particular; multiplication of particular rules undermines their realizability (too many questions); general rules should reduce judicial lawmaking; application of standard to fact produces narrow rule.
3. Formalities vs. rules designed to deter harmful behavior
    1. Sanctions: Institutions designed to prevent morally wrong or unwanted behaviors
    2. Formalities: Institutions designed to facilitate legal ordering “In every case, the formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored.”

3. How do we apply the two concepts?

B. Relationship between Formal Dimensions (rules as formalities)

1. Directives to deter wrongdoing
    1. Rules vs Standards: Mechanical vs. biased arbitrariness
    2. Rules: standards deter both desirable and undesirable conduct
    3. Standards can be paper tigers
    4. Rules can alert to potential danger of sanction
2. Formalities: general rules can be over and under inclusive
    1. Casting formalities as rules: “the application of the rule should only very rarely lead to the nullification of the intent of the parties.”
    2. Critique of the argument for rules, two assumptions: ” If the argument for rules is to work, we must anticipate that private parties will in fact respond to the threat of the sanction of nullity by learning to operate the system.”; ” that legal directives that looked general and formally realizable were in fact indeterminate.”

- Extreme, formally recognizable rule: directive to an official that requires him to respond to presence together or each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.
- Standard or principle or policy: E.g., good faith, due care, fairness, unconscionably, unjust enrichment, and reasonableness.

Notebook Export form-and-substance-in-private-law-adjudication duncankennedy.net Citation (Chicago Style): duncankennedy.net. form-and-substance-in-private-law-adjudication. , 2026. Kindle edition. FORM AND SUBSTANCE IN PRIVATE LAW ADJUDICATION + Duncan Kennedy * This article is an inquiry into the nature and interconnection of the different rhetorical modes found in American private law opinions, articles and treatises. there are two opposed rhetorical modes for dealing with substantive issues, which I will call individualism and altruism. are also two opposed modes for dealing with questions of the form in which legal solutions to the substantive problems should be cast. One formal mode favors the use of clearly defined, highly administrable, general rules; the other supports the use of equitable standards producing ad hoc decisions with relatively little precedential value. rational vindication of two common intuitions The first

altruist views on substantive private law issues lead to willingness to resort to standards in administration,

individualism seems to harmonize with an insistence on rigid rules rigidly applied.

The second is that substantive and formal conflict in private law cannot be reduced to disagreement about how to apply some neutral calculus that will “maximize the total satisfactions of valid human wants.”1

The opposed rhetorical modes lawyers use reflect a deeper level of contradiction.

we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.

I. THE JURISPRUDENCE OF RULES

body of legal thought that deals explicitly with the question of legal form.

It is premised on the notion the the choice between standards and rules of different degrees of generality is significant, and can be analyzed in isolation from the substantive issues that the rules or standards respond to.4

A. Dimensions of Form as:

1. Formal Realizability.

The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way.

At the opposite pole from a formally realizable rule is a standard or principle or policy.

2. Generality.—The second dimension that we commonly use in describing legal directives is that of generality vs. particularity.

dimensions of generality and formal realizability are logically independent:

3. Formalities vs. Rules Designed to Deter Wrongful Behavior.

as a third dimension

Here we place at one pole legal institutions whose purpose is to prevent people from engaging in particular activities because those activities are morally wrong or otherwise flatly undesirable.

E.g., laws against murder

Formalities are premised on the lawmaker's indifference as to which of a number of alternative relationships the parties decide to enter.

By contrast, legal institutions aimed at wrongdoing attach sanctions to courses of conduct in order to discourage them.

B. Relationship of the Formal Dimensions to One Another.

The categorization of rules as formalities or as designed to

deter wrongdoing is logically independent of the issues of formal realizability and generality.

legal directives designed to deter immoral or antisocial conduct can be couched in terms of general or particular rules, general or particular standards, or some combination.

This is equally true, though less obvious in the case of formalities.

2. Formalities.

In the context of formalities the problem is that general rules will lead to many instances in which the judge is obliged to disregard the real intent of the parties choosing between alternative legal relationships.

a. The Argument for Casting Formalities as Rules.

are as important in torts as they are in the area of pure formalities. If the rules are clear, people will invest time and energy in finding out what they are.

b. The Critique of the Argument for Rules.

The first set of assumptions

If the argument for rules is to work, we must anticipate that private parties will in fact respond to the threat of the sanction of nullity by learning to operate the system.

But real as opposed to hypothetical legal actors may be unwilling or unable to do this.35

The second set of assumptions underlying the argument for rules concerns the practical possibility of maintaining a highly formal regime.

went into showing that legal directives that looked general and formally realizable were in fact indeterminate.38

The more general and the more formally realizable the rule, the greater the equitable pull of extreme cases of over- or underinclusion.

II. TYPES OF RELATIONSHIP BETWEEN FORM AND SUBSTANCE

From this starting point of "value neutral" description of the likely consequences of adopting rules or standards, there are two quite different directions in which one might press the analysis of legal form.

One alternative is to attempt to enrich the initial schema by contextualizing it.

The second, and I think more important, approach ignores both the question of how rules and standards work in realistic settings and the question of how we can best solve the problem of fitting form to particular objectives.

A. Contextualization

I. Social Engineering.

"rules of law… which are applied mechanically are more adapted to property and to business transactions; standards where application proceeds upon intuition are more adapted to human conduct and to the conduct of enterprises." 42

2. The Social Science Approach.

The "scientist" as opposed to the "engineer" can ask how the choice of form will favor the interests of some participants in a conflict and disfavor others.

b. Rules as a Means to Control Action.

c. Rules and the Legitimacy of Judicial Action.

—In many situations that arise in our legal system, it is open to argument whether substantive norms of conduct ought to be laid down by the courts or by some other, more “democratically legitimate” institution,

In short, there may be conflict about who is the superior and who the inferior legal actor in the premises.

B. Form as Substance

The main problem with contextualization as I have presented it thus far is that it leaves out of account the common sense that the choice of form is seldom purely instrumental or tactical.

What we need is a way to relate the values intrinsic to form to the values we try to achieve through form.

The method I have adopted in place of contextualization might be called, in, a loose sense, dialetical or structuralist or historicist or the method of contradictions.73

the experience of unresolvable conflict among our own values and ways of understanding the world is here to stay.

III. ALTRUISM AND INDIVIDUALISM

two opposed attitudes that manifest themselves in debates about the content of private law rules.

the arguments lawyers use are relatively few in number and highly stereotyped, although they are applied in an infinite diversity of factual situations.

A. The Content of the Ideal of Individualism

The essence of individualism is the making of a sharp distinction between one’s interests and those of others, combined with the belief that a preference in conduct for one’s own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly selfinterested.

B. The Content of the Ideal of Altruism

The essence of altruism is the belief that one ought not to indulge a sharp preference for one’s own interest over those of others.

C. Methodological Problems

There are many problems with the use of concepts like individualism and altruism.

As a result, it is impossible to “prove” or “disprove” the validity

of the two constructs.

IV. THREE PHASES OF THE CONFLICT OF INDIVIDUALISM AND ALTRUISM

A. The Antebellum Period (1800-1870): Morality vs. Policy

Individualism was at first not an ethic in conflict with the ethic of altruism, but a set of pragmatic arguments perceived as in conflict with ethics in general.

B. Classical Individualism (1850-1940): Free Will

One major difference is the total disappearance of religious arguments, and the fading of overtly moralistic discussion.

Classical individualism," which represented not just a rhetorical shift away from the earlier emphasis on altruism, but the denial that altruism had anything at all to do with basic legal doctrines.

C. Modern Legal Thought (1900 to the present): The Sense of Contradiction

In private law, modern legal thought begins with the rejection of Classical individualism. Its premise is that Classical theory failed to show either that the genius of our institutions is individualist or that it is possible to deduce concrete legal rules from concepts like liberty, property or bodily security.

I. The Critique of Classical Individualism.

First, modern legal thought and especially modern legal education are committed to the position that no issue of substance can be resolved merely by reference to one of the Classical concepts.

Second, the problem with the concepts is that they assert the possibility of making clear and convincing on-off distinctions among fact situations, along the lines of free vs. coerced; proximate vs. remote cause; private vs. affected with a public interest.

Third, given the indeterminacy of the concepts, their inherent ambiguity as criteria of decision, it is implausible to describe the total body of legal rules as implicit in general principles like "protection of property" or "freedom of contract."

Fourth, there are numerous issues on which there exists a judicial and also a societal consensus, so that the judge's use of his views on policy will be noncontroversial.

But there are also situations in which there is great conflict. The judge is then faced with a dilemma: to impose his personal views may bring on accusations that he is acting "politically" rather than "judicially."

2. The Sense of Contradiction.

a. Community vs. Autonomy.

b. Regulation vs. Facilitation.—The

determinant of the distribution of desired objects and the allocation of resources to different uses.

c. Paternalism vs. Self-Determination.—This

V. THE CORRESPONDENCE BETWEEN FORMAL AND SUBSTANTIVE MORAL ARGUMENTS

The three sections also have a second purpose: to trace the larger dispute between individualism/rules and altruism/standards through the series of stages that lead to the modern confrontation of contradictory premises that is the subject of Section VIII.

One might attempt to link the substantive and formal dimensions at the level of social reality.

This method is hopelessly difficult, given the current limited state of the art of assessing either actual effects of decisions or their actual formal properties.

There is a strong analogy between the arguments that lawyers make when they are defending a “strict” interpretation of a rule and those they put forward when they are asking a judge to make a rule that is substantively individualist.

Likewise, there is a rhetorical analogy between the arguments lawyers make for “relaxing the rigor” of a regime of rules and those they offer in support of substantively altruist lawmaking.

The simplest of these analogies is at the level of moral argument. Individualist rhetoric in general emphasizes self-reliance as a cardinal virtue.

The same argument applies to rules that are designed to enforce substantive policies rather than merely to facilitate choice between equally acceptable alternatives.

VI. THE CORRESPONDENCE BETWEEN FORMAL AND SUBSTANTIVE ECONOMIC ARGUMENTS

an abstract statement of the structural analogy of the formal and substantive positions,

and an historical synopsis of how the positions got to their present state.

A. An Abstract Statement of the Analogy

I. Non-intervention vs. Result-Orientation.

Suppose a situation in which the people who are the objects of the lawmaking process can do any one of three things: X, Y and Z. The lawmaker wants them to do X, and he wants them to refrain from Y and Z. If he does not intervene at all, they will do some X, some Y and some Z. As an individualist, the lawmaker believes that it would be wrong to try to force everyone to do X all the time. He may see freedom to do Y as a natural right, or believe that if he forbids Z, most people will find themselves choosing X over Y as often as if it were legally compelled. Or he may take the view that the bad side effects of state intervention to prohibit Y outweigh the benefits.

In spite of these contextual factors, there is a close analogy between the substantive individualist position and the argument for rules.

The rule advocate claims that we can best achieve the prohibition of Z through a rule that not only permits some Z (underinclusion) but also arbitrarily punishes some Y (overinclusion).

In short, the argument for rules over standards is inherently noninterventionist, and it is for that reason inherently individualist.

The main difficulty with seeing rules as noninterventionist is that they presuppose state intervention.

In other words, the issue of rules vs. standards only arises after the lawmaker has decided against the state of nature and in favor of the imposition of some

level of duty, however minimal.

2. Tolerance of Breach of Altruistic Duty: The Sanction of Abandonment.—In

Both strategies rely on the sanctioning effect of nonintervention to stimulate private activity that will remedy the evils that the state refuses to attack directly.

The self-conscious use of the sanction of abandonment as an incentive to production expresses itself on two different levels of the legal system.

In private law, it means that people are authorized to refuse to share their superfluous wealth with those who need it more than they do.

In public law, the individualist opposes welfare programs financed through the tax system as a form of compulsory collective altruism that endangers the wealth of society.

In the area of formalities, the sanction of nullity works in the

same fashion as the sanction of starvation in the substantive debate.

The parties are told that unless they use the proper language in expressing their intentions, they will fail of legal effect.

3. Transaction in General.

The argument is that both rules and the substantive reduction of Bookmark - Page 61 · Location 1371

altruistic duty will encourage transaction in general.116

A man need not, it is true, do this or that act,—the term act implies a choice,—but he must act somehow. Furthermore, the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor.

The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens' mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts. As between individuals it might adopt the mutual insurance principle pro tanto, and divide damages when both were in fault, as in the rusticum judicium of the admiralty, or it might throw all loss upon the actor irrespective of fault. The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the status quo. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise.

why the activity encouraged by permitting breach of altruistic duty should lead to a public good.

he would not have generalized his position to cover all such duties, although a return to the state of nature would certainly stimulate a vast amount of activity now deterred by fear of legal intervention.

the limitation of duty should have an inhibiting effect on the activity of those subjected to uncompensated injury.

Holmes simply assumes that these inhibiting effects on desirable activity (or stimulating effects on undesirable activity) do not cancel out the gains from the "liberation of energy."

The parallel argument about rules is that "security" encourages transaction in general.

The minimization of "judicial risk" (the risk that the judge will upset a transaction and defeat the intentions of the parties) leads to a higher level of activity than would occur under a regime of standards.

The formal argument rests on the same implicit Social Darwinism as the substantive.

Security of transaction is purchased at the expense of tolerating breach of altruistic duty on the part of the beneficiary of mechanical arbitrariness.

B. Rules as an Aspect of Classical Laissez-Faire

The conclusion of the abstract consideration of the relationship of form and substance is that there is a sound analytical basis for the intuition of a connection between individualism and rules.

It is not a connection that is necessary in practice, or even verifiable empirically. It consists in the exact correspondence between the structures of the two arguments.

I. Laissez-Faire.—It is not easy to reconstruct the Classical individualist economic vision, especially if we want to understand it from the inside as plausible, rather than absurd or obviously evil.

While there were several strands of argumentation, the most important seems to have been the idea that the outcome of economic activity within a common law framework of contract and tort rules mechanically applied would be a natural allocation of resources and distribution of income.

2. The Altruist Attack on Laissez-Faire.—The altruist attack on laissez-faire denied the neutrality of the outcomes of bargaining within the background rules.

VII. THE POLITICAL ARGUMENTS ABOUT JUDICIAL RESULT ORIENTATION

The advocate of rules argues that the cast-

ing of law as standards is inconsistent with the fundamental rights of a citizen of a democratic state.

There are two branches to the argument.

institutional competence

political question gambits.

The premise of the institutional competence argument is that judges do not have the equipment they would need if they were to try to determine the likely consequences of their decisions for the total pattern of social activity.

The premise of the political question gambit is that there is a radical distinction between the activity of following rules and that of applying standards.

It seems intuitively obvious that both of these gambits are prototypically individualist.

It would therefore seem reasonable to expect that we would find an exactly

parallel substantive claim that the judge should not attempt to impose a high standard of altruistic duty because he has neither the knowledge nor the democratic legitimacy required for the enterprise.

the central thesis of the modern conservative attack on judicial activism in both public and private law.127

A. The Origins of the Institutional Competence and Political Question Gambits

I. The Classical Individualist Position on Judicial Review.

2. The Altruists Accept the Individualist Theory of the Judicial Role.

First, the altruists pointed out that the individualist public law position was conceptualist.

3. The Inconsistency of the Altruist Distinction Between Public and Private Law.

First, Classical individualist private law was no less dependent on conceptualism than public law for its claim to neutrality and legitimacy.

Second, a major strand in the public law argument was precisely that common law rules of property, tort and contract represented a massive state intervention in the economy.

Thus there is really a single altruist critique of constitutional and common law judicial lawmaking.

If the gambits are valid in public but not in private law, it must be because we should draw different conclusions from the discovery of the political element according to whether we are dealing with the Constitution or with common law institutions.

B. The Individualist Character of the Gambits in Private Law

Judicial private lawmaking takes place precisely in those marginal and interstitial areas of the legal system where there is no unequivocal or even extremely suggestive indication of legislative will.

In this individualist argument, the judge has a legitimate function as a marginal and interstitial lawmaker, and as a law applier, so long as he eschews result orientation.

The altruist response is that the three tiered system leads to deference to private power, rather than to the legislature.

The will that the judge is enforcing when he refuses to interfere with freedom of contract is the will of the parties, or of the dominant party, if the relationship is an unequal one.

Once one accepts such a conception, the three-tiered structure collapses. The judge, by hypothesis, cannot appeal to a legislative command, and the common law with which she is to harmonize her result points in both directions at the same time.

C. Two Proposed Solutions to the Political Dilemma

While in 1940 one might reasonably have asserted that the net effect of individualist-altruist conflict in private law had been to deprive the judge of any basis for deciding cases beyond personal orientation to results, there have since been two major attempts to help him out of this embarrassing situation, and to restore the prestige of law by vindicating its claim to autonomy from politics.

The law and economics movement,148 insomuch as it purports to offer a theory of what judges should do, is an attempt to formalize the three-tiered system while at the same time substituting the authority of economic science for that of the historical common law.

The problem with this position, even supposing that one accepts its revolutionary rejection of the common law tradition, is that efficient resource allocation cannot provide a determinate answer for the judge's dilemma as to what law to make.

The alternative proposal, that the judge engage in "reasoned elaboration" of the immanent social purposes of the legal order, or that he decide on the basis of a "moral discourse," rejects the dichotomy of factual judgments and value judgments.151

But it also creates a three-tiered structure.

There is the outcome of private activity. There is judicial intervention via reasoned elaboration. And there is legislative intervention in pursuit of goals that the judge must ignore.

The postulate of democracy then requires the judge to restrict his lawmaking to the narrowest possible compass by adopting a regime of formally realizable general rules.

But a compromise of this kind is as hostile to the altruist program of result orientation as it is to individualism.

My own view is that the ideologists offer a convincing description of reality when they answer that there is no core. Every occasion for lawmaking will raise the fundamental conflict of individualism and altruism, on both a substantive and a formal level. It would be convenient, indeed providential, if there really were a core, but if one ever existed it has long since been devoured by the encroaching periphery.

VIII. FUNDAMENTAL PREMISES OF INDIVIDUALISM AND ALTRUISM

In this section, I will argue that the persistence of these attitudes as organizing principles of legal discourse is derived from the fact that they reflect not only practical and moral dispute, but also conflict about the nature of humanity, economy and society.

There are two sets of conflicting fundamental premises that are available when we attempt to reason abstractly about the world, and these are linked with the positions that are available to us on the more mundane level of substantive and formal issues in the legal system.

Individualism is associated with the body of thought about man and society sometimes very generally described as liberalism.

The whole enterprise of Classical individualist conceptualism was to show that a determinate legal regime could be deduced from liberal premises, as well as derived from individualist morality and practicality.

The same is true on the altruist side.

The organicist premises with which the altruist responds to the liberal political argument are on another level altogether from the moral and practical assertions we have dealt with up to now.

The importance of adding this theoretical dimension to the moral and practical is that it leads to a new kind of understanding of the conflict of individualism and altruism.

In particular, it helps to explain what I called earlier the sticking points of the two sides—the moments at which the individualist, in his movement towards the state of nature, suddenly reverses himself and becomes an altruist, and the symmetrical moment at which the altruist becomes an advocate of rules and self-reliance rather than slide all the way to total collectivism or anarchism.

A. Fundamental Premises of Individualism

The characteristic structure of individualist social order consists of two elements.154

First, there are areas within which

actors (groups or individuals) have total arbitrary discretion (often referred to as total freedom) to pursue their ends (purposes, values, desires, goals, interests) without regard to the impact of their actions on others.

Second, there are rules, of two kinds: those defining the spheres of freedom or arbitrary discretion, and those governing the cooperative activities of actors—that is, their activity outside their spheres of arbitrariness.

a. A is permitted to ignore B and carry on within the sphere of his discretion as though B did not exist.

b. A and B are negotiating, either as private contracting parties or as public legislators, the establishment of some rules to govern their future relations.

c. A and B are once again permitted to ignore one another, so long as each follows the rules that govern their cooperative behavior.

The creation of an order within which there are no occasions on which it is necessary for group members to achieve a consensus about the ends they are to pursue, or indeed for group members to make the slightest effort toward the achievement of other ends than their own, makes perfect sense if one operates on the premise that values, as opposed to facts, are inherently arbitrary and subjective.

The subjectivity of values means that it is, by postulate, impossible to verify directly another person's statement about his experience of ends.

The postulate of the arbitrariness of values means that there is little basis for discussing them.

B. Fundamental Premises of Altruism

The utopian counter-program of altruist justice is collectivism.157 It asserts that justice consists of order according to shared ends.

Altruism denies the arbitrariness of values.

It asserts that we understand our own goals and purposes and those of others to be at all times in a state of evolution, progress or retrogression,

terms of a universal ideal of human brotherhood.

Altruism also denies the subjectivity of values.

My neighbor's experience is anything but a closed book to me.

Altruism offers its own definitions of legal certainty, efficiency, and freedom.

The certainty of individualism is perfectly embodied in the calculations of Holmes' "bad man," who is concerned with law only as a means or an obstacle to the accomplishment of his antisocial ends.

To the altruist this is a kind of collective insanity by which we traduce our values while pretending to define them.

"Efficiency" in the resolution of disputes is a pernicious objective unless it includes in the calculus of benefits set against the costs of administering justice the moral development of society through deliberation on the problem of our apparently disparate ends.

The "freedom" of individualism is negative, alienated and arbitrary.

When the group creates an order consisting of spheres of autonomy separated by (property) and linked by (contract) rules, each member declares her indifference to her neighbor's salvation—washes her hands of him the better to "deal" with him.

C. The Implications of Contradictions Within Consciousness

The explanation of the sticking points of the modern individualist and altruist is that both believe quite firmly in both of these sets of premises, in spite of the fact that they are radically contradictory.

The altruist critique of liberalism rings true for the individualist who no longer believes in the possibility of generating concepts that will in turn generate rules defining a just social order.

The liberal critique of anarchy or collectivism rings true for the altruist, who acknowledges that after all we have not

overcome the fundamental dichotomy of subject and object.

So long as others are, to some degree, independent and unknowable beings, the slogan of shared values carries a real threat of a tyranny more oppressive than alienation in an at least somewhat altruistic liberal state.

The meaning of contradiction at the level of abstraction is that there is no metasystem that would, if only we could find it, key us into one mode or the other as circumstances "required."

Second, the acknowledgment of contradiction means that we cannot "balance" individualist and altruist values or rules against equitable standards, except in the tautological sense that we can, as a matter of fact, decide if we have to.

Third, the recognition that both participants in the rhetorical struggle of individualism and altruism operate from premises that they accept only in this problematic fashion weakens the individualist argument that result orientation is dynamically unstable.

Finally, the acknowledgement of contradiction makes it easier to understand judicial behavior that offends the ideal of the judge as a supremely rational being.

In place of the apparatus of rule making and rule application, with its attendant premises and attitudes, we come suddenly on a gap, a balancing test, a good faith standard, a fake or incoherent rule, or the enthusiastic adoption of a train of reasoning all know will be ignored in the next case.

In terms of individualism, the judge has suddenly begun to act in bad faith. In terms of altruism she has found herself.

The only thing that counts is this change in attitude, but it is hard to imagine anything more elusive of analysis.

Crito

In the Crito, Socrates is awaiting his execution in an Athenian prison on charges of impiety against the recognized Athenian gods, and corrupting the youth of Athens. For his punishment, Socrates will forced to commit suicide by drinking the deadly poison hemlock.

> "No, it hasn't arrived, but it looks like it will arrive today, based on the report of some people who have come from Sounion* and who left when it was there. It's clear from this that it will arrive today, and you will have to end your life tomorrow, Socrates." (Woods and Pack, 2022, p. 1) (pdf)

Crito, a prominent Athenian citizen has entered Socrates' cell while Socrates was still asleep. As Socrates begins to awaken, Crito states the purpose of his visit. This purpose goes beyond a mere visit as one who will soon need to bid farewell to a trusted and deeply loved friend, and begins to implore Socrates to escape Athens.

Some Reasons for escape include:

Eternal Separation from Friends and Family	
Friends will be accused of being unfaithful	Accused by whom?

Betraying Family, prioritizing Athenian laws over and above family: Betrayal	
Satisfying the desires of his enemies	
The trial and conviction were utterly unnecessary	

Betrayal By Friends

> “If you die, for me it won’t be just one misfortune: apart from being separated from the kind of friend the like of which I will never find again, many people, moreover, who do not know me and you well will think that I could have saved you if I were willing to spend the money, but that I didn’t care to. And wouldn’t this indeed be the most shameful reputation, that I would seem to value money above friends? For the many will not believe that it was you yourself who refused to leave here, even though we were urging you to.” (Woods and Pack, 2022, p. 2) (pdf)

1. Stanford Encyclopedia of Philosophy, bottom of section 2↩