

PHIL 168; UCSD

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Handout #2: Hart's Model of Rules and Legal Realism

LAW AS THE UNION OF PRIMARY AND SECONDARY RULES

A system of **primary** rules, such as a system of positive morality, suffers three sorts of problems.

- **uncertainty** about which primary rules are part of the system
- **disputes** about the interpretation of the primary rules
- the primary rules are comparatively **static**

Hart claims that these problems can only be solved by introducing **secondary** rules (or meta-rules) into the system, that is, rules about the rules. He recognizes three kinds of secondary rules.

- A **rule of recognition** resolves uncertainty about which rules are primary rules by specifying criteria for membership among the primary rules.
- **Rules of adjudication** address concerns about the interpretation and application of the primary rules by establishing tribunals to adjudicate disputes about the primary rules.
- **Rules of change** ensure that the system of primary rules is dynamic by specifying procedures for modifying the primary rules in light of changing circumstances, beliefs, and values.

Hart thinks that the addition of secondary rules to a system of primary rules marks the step from the prelegal world into the legal world (CL: 91).

Primary rules are valid law iff they have the right **pedigree**, that is, they satisfy the criteria in the rule of recognition; secondary rules are valid law by regulating the conduct of officials in the system in the right way (CL: 112-13). Most officials must adopt an **internal**, and not merely external, attitude to the secondary rules of the system.

LEGAL POSITIVISM

Hart defends the "minimum content of natural law": given pervasive (but contingent) facts of human nature -- including scarcity of goods, limited altruism, and approximate equality of physical strength and intelligence -- there is a certain necessity that legal systems contain and enforce some modest norms of mutual non-aggression and cooperation (CL: 189-95). However, this concession to natural law is compatible with legal positivism; systems that meet the minimum content of natural law can nonetheless violate basic moral and political rights (e.g. Nazi Germany, South African apartheid, and Jim Crow).

LEGAL REALISM AND THE MODEL OF RULES

The realists criticized the model of rules, which they associate with **mechanical jurisprudence**. The mechanical jurist apparently thinks that all cases are easy cases and that legal reasoning takes a simple syllogistic form.

1. All Fs are forbidden (legal rule).
2. A's action x is F (statement of fact).
3. Hence, x is forbidden (judicial decision).

Some legal realists are skeptical about whether there are exceptionless rules that can serve as the major premises in such syllogisms. They are **rule-skeptics**. Instead of identifying the law with legal rules, they think we should identify it in some way with the **decisions of courts**. Oliver Wendell Holmes (1841-1935) appeals to the "bad man's" point of view and identifies the law with predictions of what courts will do. John Chipman Gray (1839-1915) appeals to the final authority of judges in interpreting the law and identifies law with what courts decide.

LEGAL REALISM AS VERIFICATIONISM ABOUT THE LAW

Ironically, rule-skepticism represents a kind of philosophical **anti-realism** about the law. Realism about a domain typically claims that there are facts or truths of a certain kind that are independent of our beliefs about them and our verification procedures. As such, realism implies fallibility. By contrast, anti-realist views deny or at least restrict fallibility. For example, **verificationist** views eliminate the possible gap between truth and our evidence by reducing the facts or truths in question to our evidence or verification procedures.

The model of rules is realistic (in this sense), because it treats the decisions of courts (and predictions about the decisions of courts) as reliable but fallible evidence about what the law is. By contrast, rule skepticism is anti-realistic (verificationist), because it collapses the distinction between the law and our evidence about the law and implies judicial infallibility.

LEGAL VERIFICATIONISM'S EXPLANATORY PROBLEMS

A realist recognizes standards that we might conform to (or fail to conform to) and that might guide our responses; the verificationist does not. For this reason, legal realism seems a poor fit from the perspective of both observers and participants, because participants seem to use these standards to guide their behavior.

It's hard for observers of the legal process to square legal realism with the way legal principals act as if there are pre-existing legal rules. Judges write opinions as if they were applying constitutional, statutory, or common law rules and not as if they were legislators designing desirable policy; they write as if there are legal standards which they are bound to apply. Litigants demand a decision as a matter of **pre-existing legal right**; they do not lobby for legislative favors. Lawyers present arguments for these legal rights that rely on the language of statutes and constitutional provisions and previous cases. If legal realism were true, we should expect legal principals to behave in a much different way.

Legal realism also fails to make sense of the legal process from the point of view of the judge or other interpreters and participants. The commonsense view and the view contained in our separation of powers doctrine is that it is the function of the judiciary to interpret and apply the law. But if there are no pre-existing legal rules to interpret or apply, what is it that they are supposed to be doing? Should a judge see herself as trying to decide what she is going to decide? If so, it's unclear how she should deliberate. It's also unclear how parties to a dispute before her should frame their arguments; there seems to be no reason to frame their arguments in terms of the best construction of existing legal materials.

Why should we embrace the realist's counter-intuitive claims?

THE BAD MAN'S POINT OF VIEW

Holmes defends the predictive theory as a consequence of the **bad man's point of view**. It is true that the bad man's reasons for being interested in legal rules is derivative in a way that his interest in the decisions of courts is not; however, it doesn't follow that the law includes only the decisions of courts and not the legal rules unless we assume that the law is only what the bad man cares about non-derivatively.

THE ARGUMENT FROM LEGAL POSITIVISM

Holmes and Gray also defend legal realism as a consequence of avoiding a confusion between law and morality.

1. The alternative to legal realism is to recognize unenforced rights.
2. Unenforced rights imply natural law.
3. Hence, either legal realism or natural law is true.
4. Natural law theory is false.
5. Hence, legal realism is true.

Is this argument compelling? Is the choice between legal realism and natural law exhaustive, or can we accept legal positivism without endorsing legal realism?

THE ARGUMENT FROM JUDICIAL FINALITY AND PRECEDENT

Gray defends verificationist claims about the law by appeal to the fact that in legal systems such as our own, it is the courts that have the authoritative say on what the laws mean. There are two things worth distinguishing here. One issue concerns **finality**. Courts (ultimately the highest court) have (has) the final say in a particular case about what legal rights the parties to that case have. Another issue concerns **precedent**. Other things being equal, a court's ruling in a relevantly similar case has the status of law; subsequent interpretations of the law must take that decision into account with other legal materials.

But finality does not imply infallibility. Hart's analogy with the finality of umpires in baseball is helpful. Because umpires have the final say on the interpretation and application of the rules of baseball, we might be tempted to say that the rules of baseball are whatever the umpire says they are. But this confuses the umpire's finality with his infallibility. Indeed, it's hard to explain how the players regulate their behavior or the umpire is to make decisions if it is not normally as a good faith effort to follow the rules of the game.

Nor does precedential value imply infallibility. We can agree that a bad decision can add to the law while insisting that that decision was not supported by the law that existed at the time of the decision. The forward-looking claim on behalf of bad interpretation and the backward-looking claim against it are fully compatible. Indeed, if the significance of precedent is that subsequent interpretations of the law must take that decision into account with other legal materials, then precedents are among the pre-existing legal rules that any future decision must take into account. But then precedent counts against legal verificationism, not in favor of it.

HARD CASES AND INDETERMINACY

Legal realism is implausible as a general theory of law if only because there are legal rules that judges can apply in easy cases. But legal realism's indeterminacy thesis is more

plausible when restricted to hard cases in which, for a variety of reasons, it is controversial what the law requires or whether the law applies to the case at hand.

Indeed, Hart himself clearly accepts this more restricted realist claim. On this view, easy cases, to which the legal rules clearly apply, are legally determinate. But hard cases, in which it is controversial or unclear whether the rules apply, are, as a result, legally indeterminate. Hart thinks that such indeterminacy is an artifact of the "**open texture**" of language (CL: 119-20). When a case falls within the open texture of language, Hart believes that it is legally indeterminate (CL: 124, 252). Judges cannot decide such cases by applying the law but only by exercising a quasi-legislative capacity -- what Hart calls **judicial discretion**. Hart makes clear that this sort of judicial legislation need not and should not be arbitrary; such judicial choice should reflect characteristic judicial virtues of impartiality, neutrality, and principled decision-making (CL: 124, 200, 273). But such resolution must ex hypothesi be based on extra-legal considerations.

1. The law consists of legal rules formulated in general terms.
2. All general terms are "open-textured": though they contain a core of settled meaning, they also have a periphery where their meaning is not determinate.
3. Controversial or hard cases, about which reasonable people with legal training disagree, fall within the open texture of legal terms within existing legal rules.
4. Hence, hard cases are legally indeterminate.
5. Hence, courts cannot decide hard cases on legal grounds; they could decide them only on extra-legal (e.g. moral and political) grounds.
6. Hence, in hard cases courts must exercise judicial discretion and make, rather than apply, law.

CONCERNS ABOUT JUDICIAL DISCRETION

We might worry about the move from indeterminacy to judicial discretion in the inference from (5) to (6). Of course, if courts are to decide legally indeterminate cases, they must exercise discretion. But should they decide such cases? A **democratic** worry is that judicial discretion involves judge-made law and, as such, violates the **separation of powers** doctrine that requires law-makers to be politically accountable as, in principle, legislators are and many judges are not.

Alternatively, we might worry that judicial discretion is **unfair** insofar as it would hold people legally liable for conduct whose legal status at the time was, by hypothesis, indeterminate.

Are these worries decisive? In response to the democratic worry, we might distinguish between a generalized discretion that encourages judges to make law wherever there is none and a more restricted discretion that encourages them to legislate but only interstitially, at the margins of existing legal rules. Whereas a generalized discretion would clearly offend the separation of governmental powers or functions, a restricted judicial discretion, of the sort Hart contemplates, would do so much less. In response to the fairness worry, it can be argued that retrospective legislation is unfair only where people's expectations about what they are permitted to do were reasonable. But in hard cases, where, ex hypothesi, the law is unclear, it is not clear that parties could have reasonable expectations that retrospective legislation might upset.