

Legal Theory Exam Notes

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Conceptual realists: the role of the law is to predict what the courts will say

1. Stuff

1.1 Overview

Theorist	Criteria for law	Morality	Adjudication
Austin (P)	<ul style="list-style-type: none"> • Command by sovereign backed by threat of sanction 		
Hart (P)	<ul style="list-style-type: none"> • Union of primary and secondary rules • Social sources 	<ul style="list-style-type: none"> • Morality and principles only come into play where law runs out • Natural law would result in blind, uncritical obedience of laws -> moral considerations should sit outside 	<ul style="list-style-type: none"> • Judges make law in hard cases/penumbras • Law is open textured bc language and lawmakers' lack of foresight •
Dworkin (N)	<ul style="list-style-type: none"> • Principles = law • Integrity: 'justice, fairness and procedural due process' • Interpretation (fit and justification) 	<ul style="list-style-type: none"> • Morality comes into play in interpretive and post-interpretive stage, especially the consideration of justification 	<ul style="list-style-type: none"> • Judges ascertain law, always a right answer • Positivism cannot account for theoretical disagreement
Fuller (N)		<ul style="list-style-type: none"> • The moral duty to obey law is linked to other moral obligations 	<ul style="list-style-type: none"> • Judges identify law • Hart focusses too much on words, purpose more important
Finnis (N)	<ul style="list-style-type: none"> • Law in focal sense: defined by purpose • Law in secondary sense: not defined by purpose 	<ul style="list-style-type: none"> • Morality justifies the authority and obligatory force of positive law • Positive law provides solutions to coordination problems 	
Llewellyn (R)			<ul style="list-style-type: none"> • Law is whatever judges say it is, judges have a lot of discretion
Leiter (?)			<ul style="list-style-type: none"> • Positivism is compatible with empirical rule-scepticism

1.2 Quotes to Memorise

Meyerson

- "'Positivism" and "natural law" are broad churches'

Gardner

- Lawyers 'argue characteristically from authority'

Austin

- Big picture
 - 'positive morality': 'rules set and enforced by mere opinion'
 - Dworkin's summary of Austin's view: 'law is a matter of historical decisions by people in positions of power'
- Command
 - 'Every law or rule ... is a command'
 - 'A law is a command which obliges a person or persons to a course of conduct'
 - 'imperative character'
- Sanction
 - 'sanction, or an enforcement of obedience'
 - 'smallest chance of incurring the smallest evil'
- Sovereign
 - 'The bulk of the given society are in a habit of obedience or submission'

Hart critiquing Austin

- **Gunman scenario: obliged to do something cf duty to do something**
- Power-conferring laws
 - 'provide individuals with facilities for realizing their wishes'
 - 'cannot, without absurdity, be construed as orders backed by threats'
- Continuity
 - 'uninterrupted continuity of law-making power by rules'
 - 'cannot confer on a new legislator any right to succeed the old and give orders in his place'
- Persistence
 - 'How can law made by an earlier legislator, long dead, still be law for a society that cannot be said habitually to obey him?'
 - 'When the individual ruler dies his legislative work lives on' because of the existence of a rule

Hart law as the union of primary and secondary rules

- Without 'the idea of a rule', 'we cannot hope to elucidate even the most elementary forms of law'
- 'inefficiency of the diffuse social pressure by which the rules are maintained'
- Rule of recognition: 'conclusive affirmative indication'
- Internal point of view: 'basis of criticism' and 'the justification of demands for conformity, social pressure, and punishment'

Dworkin critiquing Hart

- Principle: 'standard that is to be observed [as] a requirement of justice or fairness or some other dimension of morality'
- Rules: 'applicable in an all-or-nothing fashion'
- Principles: 'does not necessitate a particular decision'
- Principles have a 'dimension of weight or importance'
- Positivists claim theoretical disagreements about law 'must be a pretense'

Dworkin on law as integrity

- 'Law's constraints benefit society'
 - Instrumentally (procedural fairness)
 - substantively ('makes their community more genuine')
- this then 'improves [law's] moral justification for exercising the political power it does'
- Law should be treated as created by 'the community personified ... expressing a coherent conception of justice and fairness'
- 'propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process'

Dworkin on law as interpretation

- Pre-interpretive stage: 'tentative content of the practice are identified'
- Interpretive stage: 'general justification for the main elements of the practice'
- Post-interpretive stage: 'adjust our sense of what the practice really requires' so as to better serve the justification
- Fit and justification-> chain novel analogy
 - 'general explanatory power' -> fit
 - 'aesthetic' dimension-> justification

Hart critiquing Dworkin

- 'There are no necessary conceptual connections between the content of law and morality'
- Why reject natural law
 - 'morally iniquitous provisions may be valid as legal rules or principles'
 - 'stiffening of resistance to evil'
 - Morality should be 'something outside the official system'
 - 'delicate and complex'
 - 'cloak the true nature of the problems with which we are faced'
 - 'romantic optimism'

Finnis

- 'basic forms of human flourishing'
- 'methodological requirements of practical reasonableness'
- 'set of general moral standards'
- 'justify the exercise of authority in community'
- 'the act of "positing" law ... can and should be guided by "moral" principles'

Fuller

- Nazi dictatorship has departed so far 'from the morality of order, from the inner morality of law itself, that it ceases to be a legal system'
- 'a system so oblivious to the morality of law that it is not entitled to be called a law'

Gover

- 'a single society can contain more than one legal system'
- Emphasis on 'their compatibility with the existing law of the state, nor compliance with legal theories used by the state'
- 'law of relationship'
- 'Understanding of law as relatively undifferentiated from moral, ethical, and cosmological orders'
 - Graham: 'Aboriginal Law is as natural (and as scientific) a system of law as physics'
- 'intergenerational transmission of law as stories'
- 'land as the source and repository of law'
- Graham: 'incapable of being added to, amended or repealed by any human agency'

Black

- 'ordained and deposited into the land by the primordial energies'
- 'walking of the land' -> 'law is actualized and realized'

Hart on adjudication

- 'there is a limit, inherent in the nature of language, to the guidance which general language can provide'
 - **Vehicles in park**
 - **Hat off in church**
- 'canons of "interpretation" cannot eliminate, though they can diminish, these uncertainties' -> bc canons themselves use language

Fuller critiquing Hart

- 'is it really ever possible to interpret a word in a statute without knowing the aim of the statute?'
 - **Memorial truck in park**
 - **Sleeping at train station**

Llewellyn

- There is no 'one single correct answer to a disputed issue of law'
- Precedent does not have 'some one and single meaning'
- Same stat interp rules 'can lead in happily variant directions'
- 'there are two opposing canons on almost every point'

Hart critiquing rule-scepticism

- 'the existence of a court entails the existence of secondary rules conferring jurisdiction'

2. Law, Coercion and Sovereignty

2.1 Austin's Command Theory

Contention: law is

1. A command ('expression or intimation of [a] wish');
2. By a sovereign (bulk of society is in habitual obedience of sovereign and sovereign is not in habit of obedience to anyone);
3. Backed by a threat of sanction.

2.2 Hart's Critique of Austin

A. Not all laws are coercive

Power-conferring rules (eg marriage/will/contract) do not impose sanctions for non-compliance, only consequence is invalidity (27)

- This 'feature of law [is] obscured by representing all law as a matter of orders backed by threats' (28)

Criminal law, guiding behaviour is primary function, punishment/coercion is secondary purpose

Sidetrack w Finnis: in a society of angels, we would only need positive laws to solve coordination problems

- Coordination problems:
 - a. Problems that have multiple solutions;
 - b. Where morality cannot tell us whether one solution is superior; and
 - c. Any one of the solutions requires multiple people to work together to achieve it
 - Eg climate change requires every country to reduce emissions, not enough just that Sweden takes climate change seriously
- Positive law has a role in filling the gaps of natural law by picking up one solution and saying everyone must do this
 - Eg road rules that require everyone to drive on left side of road
- Thus, Finnis views the role of positive law to be action-guiding:
 - a. To the extent that positive law conforms with the natural law; and
 - b. To elect a solution for coordination problems.
- Cf Hart, who views the role of all law to be action-guiding, whether solving coordination problems or not

B. Austin fails to account for the continuity of law

Sovereigns change over time (eg each new election, Parliament changes) (54–5)

- Austin's theory cannot account for new sovereign: people are not (yet) in habit of obeying new sovereign (55)
- This means, on Austin's theory, new law by new sovereign is not law because there is not yet habit

Hart's imagined response from Austin (lol):

- It is not the individual lawmaker (ie MP or King) who is the sovereign, but rather the *office* they occupy (ie institution of Parliament), and people are in habit of obeying the *office/institution*

Hart's response to Austin's imaginary response (lmao):

- Establishing a legal institution requires power-conferring rules, and Austin's account cannot explain power-conferring rules at all (bc not backed by threat/coercion as required by Austin's theory!)

C. Austin fails to account for the persistence of law

Certain laws cannot be said to be 'law' under Austin's account, because the people who passed those laws have left office/died (62)

Hart's solution: law does not need to be passed by a legally unrestricted sovereign (who obeys no one habitually), the only requirement is that the law is passed by a **legislator who acted within their powers** (70)

- Rule of recognition confers law-making power on current and past parliaments
 - Laws made by a previous parliament continue to remain valid law, until repealed by a subsequent parliament
- Restrictions on law-making power conceived of as **limits on power** (absence of power beyond scope of legislative competence), as opposed to **duties** (70)

3. Law as a System of Rules

3.1 Hart's Account of Law as a System of Rules

Contention: law is a system of primary and secondary rules

Chief critique of Austin is 'the elements out of which the theory was constructed ... do not include, and cannot by their combination yield, the idea of a **rule**, without which we cannot hope to elucidate even the most elementary forms of law' (80)

Hart cf Austin on **obligation**

- Austin: sense of duty/obligation to comply with law derives from **command by superior**
- Hart: sense of duty/obligation to comply with law derives from **social pressure of conformity**

Pedigree thesis: law is the product of social institutions

Rules of habits (83–6)

Concept	Requirements	Consequences of non-compliance
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