

PHILOSOPHY OF LAW OUTLINE

Tommaso Pavone (tpavone@princeton.edu)

Spring 2015

LEGAL POSITIVISM I: THE COMMAND THEORY OF LAW

John Austin, *The Province of Jurisprudence Determined* (1832)

1. What is law?

- a. A command: “A law is a command which obliges a person or persons, and obliges generally to acts or forbearances of a class” or a “course of conduct”
 - i. The law constitutes a subtype of the concept of “command:” only when the command “obliges generally” – possessing *ergo omnes* effects (synchronic generality) and by obliging its audience to a particular conduct into the future (diachronic generality) – rather than in an *ad hoc* fashion vis-à-vis a “specific act or forbearance,” does it constitute a law
- b. The law of nature: “laws set by God to his human creatures [the law of nature],” are also embraced within the command definition of law. These may either be “revealed” via “the word of God...the medium of human language...uttered by God directly, or by servants whom he sends to announce them,” or they may be “unrevealed.”
 - i. When unrevealed, God’s commands can be discerned via the principle of general utility: “If acts of the class were generally done, or generally forborne or omitted, what would be the probable effect on the general happiness or good?” When the effects would be “pernicious, we must conclude that [God] enjoins or forbids them, and by a rule which probably is inflexible”

2. Who can make law?

- a. Generally, a superior: The law is a command in a relational situation, where the superior expresses his wishes to his inferiors. “Superior” does not mean excellence, but dominant: “Superiority signifies might: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one’s wishes”

- b. Specifically, the state/sovereign Parliament: The state (in England, the sovereign Parliament) possesses a corporate personality (*universitas*) whose legal basis is not contingent *a priori* upon the consent of its subordinates or encompassed in complying with a social contract (in the Hobbesian tradition)
- c. More specifically, courts delegated authority by the sovereign: “All judge-made law is the creation of the sovereign or state,” and since judges are public officials endowed with delegated sovereign authority, when they draw from social practices – customs – and codify them “into legal rules...the legal rules which emerge from the customs are tacit commands of the sovereign legislature”
- d. God (in the case of the law of nature)

H.L.A. Hart, Critique of Austin in *The Concept of Law* (1961)

- 1. Austin ignores power-conferring rules: some “statutes are unlike orders in that they do not require persons to do things, but may confer powers on them; they do not impose duties but offer facilities for the free creation of legal rights and duties within the coercive framework of the law.”
- 2. Austin ignores how laws bind superiors and inferiors: Even the penal laws that most approximate commands “may impose duties on those who make it as well as on others.” In short, we “must distinguish between a legally unlimited legislative authority and one which, though limited, is supreme in the system.”
- 3. Austin ignores customary rules: “though the enactment of a statute is in some ways analogous to the giving of an order, some rules of law originate in custom and do not owe their legal statutes to any such conscious law-creating act.”

LEGAL POSITIVISM II: LEGAL REALISM

Oliver Wendell Holmes, “The Path of the Law” (1897)

1. What is law?

- a. A prediction of what courts will do: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law
 - i. Hence, 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 or that way by judgment of the court”
 - ii. Hence, the object of jurisprudence is “the prediction of the incidence of the public force through the instrumentality of the courts”

2. How do we know what the law is?

- a. We look at it as a bad man: “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reason for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”
- b. Look at external actions, not internal intent: For example, to understand the law of contracts, we must realize that “the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs- not on the parties’ having meant the same thing but on their having said the same thing.”

3. What the law isn’t

- a. It isn’t logical: “The danger of which I speak is... the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct.”
 - i. In fact, “Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, and yet the very root and nerve of the whole proceeding.”
- b. It isn’t a set of moral rights: “Nothing but confusion can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law.”
- c. It isn’t always rational: Tradition- or the historical evolution of the law- often overrides rational policy.
- d. It isn’t only a historical relic: “We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present,” and indeed Holmes looks “forward to a time when the part played by history in the explanation of dogma shall be very small, and instead...we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them.”

Karl Llewellyn, “A Realistic Jurisprudence – The Next Step” (1930)

1. How we should study the law

- a. By focusing on “behavior-contacts”: “we should focus instead on the area of contact between judicial behavior and the behavior of laymen, and rights should be studied with reference to behavior-contacts.”
 - i. This also allows us to consider the actions of actors other than judges: “The focus, the center of law, is not merely what the judge does, in the impact of that doing on the interested layman, but what any state official does, officially.”

- b. By focusing on “real rules,” not “paper laws:” The proposed approach is to leverage a “comparison of facts with facts, not of words with words.”
 - i. Real rules: are conceived in terms of behavior, they are names for the remedies, the actions of courts. They are descriptive, not prescriptive. They are more so practices than they are rules. They are what the law is, rather than what it ought to be
 - ii. Paper rules: are rules of law- the accepted doctrine of the time and place, what the books say the law is. And they are often prescriptive

2. **How we should not study the law**

- a. By avoiding rights-talk: “the term ‘rights and rules’ has persistent tendency to misfocus attention, and we would gain clarity by avoiding it.” This is because rights-talk has a tendency to conflate a non-legal ‘right’ (“a reason for claiming or striving toward awarding a legal right”) with a legal right (“recognizing that some kind of remedy could be had”)
- b. By avoiding legalism: This is because legalism assumes that all paper rules are real rules: “The traditional focus is on words, the letter of the law; from this we mindlessly jump to assume that the prescriptions of the law are accepted in the legal system under discussion; from this without discussion or inquiry we assume that the practice of the relevant actors conforms to these accepted prescriptions.”

H.L.A. Hart, Critique of Legal Realism in *The Concept of Law* (1961)

1. Rules need not be enacted by a court to be laws: “There is a difference, crucial for understanding of law, between the truth that if a statute is to be law, the courts must accept the rule that certain legislative operations make law, and the misleading theory that nothing is law till it is applied in a particular case by the court.”
2. Legal realists ignore the “internal aspect” of laws: “The [legal realist] will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop; they look upon it as a signal for them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behavior and an obligation.”
3. Legal realists cannot explain judicial behavior: “For the judge, in punishing, takes the rule as his guide and the breach of the rule as his reason and justification for punishing the offender. The predictive aspect of the rule (though real enough) is irrelevant to his purposes, whereas its status as a guide and justification is essential.”

LEGAL POSITIVISM III: HART'S "SOFT" POSITIVISM

H. L. A. Hart, *The Concept of Law* (1961)

1. What is law?

- a. A union of primary and secondary rules:
 - i. Primary rules require human beings to do or abstain from certain actions, regardless of whether they wish to or not (hence they are content-independent reasons for action). They impose duties.
 - ii. Secondary rules allow human beings to introduce new primary rules or extinguish or modify old ones (rules of change), and specify some features of a primary rule that indicates that it is supported by the social pressure it exerts (rule of recognition), or to otherwise determine their incidence or control (rules of adjudication)
 1. Rules of recognition remedy the problem of uncertainty, rules of change remedy the problem of the static quality of primary rules, and rules of adjudication remedy the problem of the inefficiency of rules
 2. The absence of secondary rules from primitive societies is exactly why they lacked full fledged legal systems: Their body of only primary rules was uncertain, static, and inefficient
 - iii. In short, "[Where] a secondary rule of recognition is accepted and used for the identification of primary rules of obligation... this situation ...deserves, if anything does, to be called the foundations of a legal system."

2. The characteristics of legal rules

- a. They purport to serve as evaluative standards: "there should be a critical reflective attitude to certain patterns of behavior as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticisms and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must', and 'should', 'right' and 'wrong'."
- b. They are open-textured: "rules will have what has been termed an open texture. So far we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open-textured." Hence "all rules have a penumbra of uncertainty where the judge must choose between alternatives."
- c. They impose obligations via social pressure: "Rules are conceived and spoken of as imposing obligations when the general demand for conformity

is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.”

3. **The sufficient conditions for the presence of a legal system**

- a. That citizens obey the law: “They may obey each ‘for his part only’ and from any motive whatever; though in a healthy society they will in fact often accept these rules as common standards of behavior and acknowledge an obligation to obey them.”
- b. That public officials accept laws as evaluative standards: “They must regard these as common standards of official behavior and appraise critically their own and each other’s deviations as lapses.”

4. **Legal positivism vs. natural law**

- a. In legal positivism laws need not satisfy the demands of morality: “we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.”
- b. In natural law, laws must conform to certain principles of human conduct: It argues that “here are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid.”

5. **The distinctions between morality and law**

- a. Laws are often less important than morals: “In contrast with morals [...] some, though not all, rules of law, occupy a relatively low place in the scale of serious importance. They may be tiresome to follow, but they do not demand great sacrifice”
- b. Laws can be changed by deliberate enactment: “By contrast moral rules or principles cannot be brought into being or changed or eliminated in this way”
- c. Legal responsibility cannot be evaded by an inability to act: “by contrast, in morals ‘I could not help it’ is always an excuse, and moral obligation would be altogether different from what it is if the moral ‘ought’ did not in this sense imply ‘can’.”
- d. Laws are exerted by threats or appeals to interest: Whereas moral pressure is exerted “by reminders of the moral character of the action contemplated of the demands of morality.”

6. **The minimum content of natural law**

- a. Despite the distinctions between law and morality, there is likely to be some degree of overlap between natural law and man-made legal systems. The minimum content of natural law specifies the components of most legal systems necessary for human beings to survive:
 - i. Prohibitions against violence or inflicting bodily harm (due to the vulnerability of men)
 - ii. A minimal amount of property rights (due to the scarcity of resources)

- iii. Sanctions against non-compliance (due to limited human understanding/willpower to follow law)
- iv. Provisions for compromise and exchange (due to the approximate equality of men)
- v. Provisions for mutual forbearances (due to the limited altruism of man)

Ronald Dworkin, Critique of Hart in *Taking Rights Seriously* (1978)

1. Hart embraces a deterministic model of rules that ignores principles: Legal positivism conceives the law as “rules... applicable in an all-or-nothing fashion,” in the sense that when two rules conflict, “one of them cannot be a valid rule.” Yet lawyers, particularly in hard cases, “make use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards.”
 - a. Rules determine, whereas principles tip the scales: when rules conflict, they prevail and invalidate one another, such that casualties are inescapable; conversely, when principles conflict, they balance against one another, and both sets of principles may “survive intact when they do not prevail.”
 - b. Rules are recognized via social compliance with a rule of recognition, but principles cannot “have a simple or direct connection” with “official acts of legal institutions” or some “ultimate master rule of recognition.” Their proximity in content and form to a legislative act will never be sufficient for them to be recognizable by a rule of recognition.
2. Hart treats judges as unbound by law in hard cases:
 - a. For Hart, “when a judge runs out of rules he has discretion, in the sense that he is not bound by any standards from the authority of law.” In such situations, judges inhabit the equivalent of “the hole in a doughnut,” free to move within it as they please.
 - b. Yet for Dworkin, judges are bound by principles in hard cases: “When “people who live outside philosophy texts” appeal to “moral standards” in controversial cases, they do not argue that they “ought to have the duties and responsibilities that the standard prescribed, but that they do have them.” Absent a rule of recognition, for Hart principles could not bind judges; but common law judges frequently make use of principles and treat them as binding, pre-existing entities.
3. Hart focuses on conventional morality and ignores concurrent morality:
 - a. Hart focus on a conventional morality is noted when he states that “agreement as an essential part of [individuals’] grounds for asserting [a] rule.” Indeed, for Hart a rule of recognition “is constituted by the conforming behavior of the bulk of a population.” Yet when judges disagree

- with each other in hard cases, their judicial duties cannot be founded upon a conventional morality of agreement.
- b. Dworkin posits that a second morality explicates individuals' obedience to the law. This is a concurrent morality emerging within a community "when its members are agreed in asserting the same, or much the same, normative rule, but they do not count the fact of that agreement as an essential part of their grounds for asserting that rule."

H. L. A. Hart, Response to Dworkin in the Postscript to *The Concept of Law* (1961)

1. Legal positivism does not embrace a deterministic view of rules: Hart writes that "the exclusion of all uncertainty at whatever costs in other values is not a goal which I have ever envisaged for the rule of recognition. This is made plain, or so I had hoped, both by my explicit statement in this book that the rule of recognition itself as well as particular rules of law identified by reference to it may have a debatable 'penumbra' of uncertainty."
2. It is unnecessary to determine whether judges make law in hard cases: "whatever the answer is to this philosophical question, the judge's duty will be the same... It will not matter for any practical purpose whether in so deciding cases the judge is making law in accordance with morality...or alternatively is guided by his moral judgment as to what already existing law is revealed by a moral test for law."
3. The rule of recognition can accommodate moral principles: Dworkin's critique "ignores my explicit acknowledgement that the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values; so my doctrine is what has been called 'soft positivism' and not as in Dworkin's version of it 'plain-fact' positivism'."
4. It is true that soft positivism cannot explain the normative character of rules: Hart concedes, that his account "cannot... explain the normative character possessed by even the simplest conventional rule," and that he has ignored what Dworkin calls a "concurrent morality."

Joseph Raz, Critique of Hart in *Practical Reason and Norms* (1990)

1. Hart does not explain rules which are not practices (for example, moral rules)
2. Hart fails to distinguish between social rules and widely accepted reasons ("we do not regard practices determined by general reasons to always be cases of complying with a rule")
3. Hart's model of rules deprives them of their normative character (rules are reasons for action; a practice, as such, need not be)

LEGAL POSITIVISM IV: RAZ'S POSITIVISM

Joseph Raz, *The Morality of Freedom* (1988)

1. What is a legitimate, political authority?

- a. A political authority imposes duties and confers rights, without relying exclusively or even predominantly on coercive threats.
 - i. A political entity has legitimate authority “only if and to the extent that their claim is justified and they are owed a duty of obedience.”
 - ii. “There is no reason why people cannot criticize a legitimate authority for having ignored certain reasons. It is merely action for some of these reasons which is excluded”
- b. Political authorities solve coordination and collective action problems:
 - i. They “designate one of the options as the one to be chosen, and, if their action is regarded as a reason to adopt that course of action, then a successful resolution of the problem is found “
 - ii. In Prisoner’s Dilemma situations, authorities make a difference in that they are able to pull individuals out of pareto-suboptimal equilibria
- c. Political authorities are justified to the extent that they make the compliant subject better off: “the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them”
- d. Common reasons establishing the legitimacy of a political authority:
 - i. It possesses expertise that renders it better able to establish how individuals to act
 - ii. It possesses a steadier, more unbiased will
 - iii. Deciding for oneself causes anxiety and is costly. Following authoritative rules reduces both
 - iv. It often is in a better position to achieve what the individual has reason to want but is in no position to achieve
- e. Legal authorities can only benefit from contingent consent:
 - i. The authority of the state, for example, “may be greater over some individuals than over others, depending on their personal circumstances.” Yet the greater the amount of people consenting, the more legitimate the authority.
 1. Indeed, “It is not good enough to say that an authoritative measure is justified because it serves the public interest. If it is

- binding on individuals it has to be justified by considerations which bind them.”
2. Furthermore, the state “cannot coerce consent. Duress is designed to exert pressure in order to secure the consent. This explains why duress invalidates consent.”
 - ii. Contingent consent does not undermine the law, for this is a “melodramatic exaggeration. Many people break the law without implicating the stability of the government and the law.”

Joseph Raz, *Practical Reason and Norms* (1990)

1. What are legal rules?

- a. Legal rules can be exclusionary practical reasons (secondary reasons not to act for some first order reasons, where “a second order reason is any reason to act for some reason or to refrain from acting for some reason.”)
- b. Legal rules can be content-independent first-order reasons for action
- c. Legal rules can be permissive, non-mandatory rules, where in contrast to reasons for action that impose practical constraints, permissions “indicate the absence of constraints.”
- d. Legal rules can be power-conferring rules (these can include the power to create or repeal norms (norm-creating powers) as well as powers to change the application of norms (regulative powers))
- e. Legal rules are institutionalized rules, “a subclass of social rules except that they exist only when there are institutions designed to ensure conformity to the rules or to deal with deviations from them.”
- f. Legal rules are normative: “We cannot be satisfied with an answer which shows that laws coincide with systems of valid norms - we want to see individuals following laws because they are laws.”
 - i. “It is not necessary that the entire population at large will follow the law for it to be valid. But judges, acting as judges do need to follow the law, because they act on the belief that laws are valid reasons for action.”

2. What are the essential features legal systems?

- a. Legal systems are comprehensive: “By this I mean that they claim authority to regulate any type of behavior - they do not acknowledge any limitation of the spheres of behavior which they claim to regulate.”
- b. Legal systems claim to be supreme: “Every legal system claims authority to regulate the setting up and application of other institutionalized systems by its subject-community.”

- c. Legal systems are open systems: “All legal systems are open systems. It is part of their function to sustain and encourage various other norms and organizations.”

3. **Reasons for the necessity of law and courts in the absence of coercion**

- a. To ensure coordination
- b. To resolve factual disagreements: Even a society of angels would need courts to resolve factual disagreements about the interpretation of legal transactions
- c. To settle partly unregulated disputes whose solution is not uniquely determined by existing law but requires discretion by the courts
- d. To provide remedial rights and duties in light of accidental damage

4. **The fallacies of natural law theory**

- a. Natural law approaches latch onto the normativity of law to perpetuate two fallacies: (1) That laws are of necessity moral reasons, and (2) that a legal system can exist only if the bulk of its subject community believes in its moral validity. Yet law should not be defined as having moral worth, because:
 - i. This approach would have to explain away many counter-examples of morally abhorrent laws (such as racially discriminatory laws)
 - ii. The moral virtues of the law need not compromise its identity: The fact that the law can be both good or bad need not depend on its identity as a social institution – rather, it may depend on other circumstances
 - iii. Natural law requires some degree of moral objectivism, and all those who object to the notion that there are objective truths such as “right” and “wrong” will reject this definitional approach
- b. Natural law approaches sometimes concede that individual laws may not have moral worth, but they argue that a legal system necessarily has moral worth. Yet we should not treat all legal systems as having moral worth because:
 - i. It is unclear that all human societies have moral value, no matter how wicked
 - ii. The moral worth of a legal system should not be proclaimed a priori, for it depends on whether its merits outweigh its shortcomings, and “it seems unlikely that the moral worth of having a law will override all the reasons against the law’s validity”
 - iii. Individuals may accept law out of conformism rather than conviction: “The fact that other people follow the law may itself become a reason for people who do not believe in the validity of the norms of systems concerned, which leads them to make normative statements from a point of view which they do not necessarily accept as valid.”

Joseph Raz, “The Obligation to Obey” (1984)

1. There is no general moral obligation to obey the law

- a. The extent of the obligation to obey varies from person to person, and “in no case is the moral obligation as extensive as the legal obligation.”
- b. There is no obligation to obey because the law is a seamless web: The rule of law is not undermined if some individuals fail to comply.
- c. There is no obligation to obey because of “consent”: “The well known difficulty with consent as the foundation of political authority is that too few have given their consent.”
- d. There is a contingent, instrumental obligation to obey
 - i. Out of deference to technocratic expertise (or the law’s superior knowledge) – For example, “imagine that I use in the course of my employment tools which may create a safety hazard...The government has issued safety regulations. The government experts who laid down these safety regulations are experts in their field. Their judgment is much more reliable than mine. I am therefore duty bound to obey the regulations which they have adopted.”
 - ii. To resolve coordination problems (or to achieve goals individuals have reason to pursue but cannot do so on their own)- For example, “We all have reason to preserve the countryside. This goal would be enhanced if no one had barbecues. In fact everyone has barbecues in those areas. The damage is done and my refraining from a barbecue will not help. At long last the government steps in and forbids having barbecues except in a few designated locations. Because the regulation might reverse the trend, I have an obligation to obey this law.”
- e. There is one potential, non-instrumental obligation to obey “which arises out of a sense of identifying with or belonging to the community. Such an attitude, if directed to a community which deserves it, is intrinsically valuable.” Yet this is a “semi-voluntary obligation,” because nobody has a moral duty to identify with this community.

LEGAL POSITIVISM V: INCLUSIVE LEGAL POSITIVISM

Jules Coleman, “Negative and Positive Positivism” (1982)

1. Three types of legal positivism

- a. Negative positivism: The view that the legal system need not recognize as law “controversial” moral standards, or that there exists at least one “there exists at least one conceivable rule of recognition (and therefore one possible legal system) that does not specify truth as a moral principle among the truth conditions for any proposition of law.”
 - i. This approach, Coleman concludes, is inadequate insofar as it does not espouse a theory of law.
- b. Positive, hard-facts positivism: The view that controversial standards cannot be regarded as law (rejecting Dworkin’s thesis that controversial principles are legal objects). In short, being a moral principle is not a truth condition for any proposition of law in any community.
 - i. This approach, Coleman concludes, was successfully undermined by Dworkin.
- c. Positive, social rule positivism: This approach insists only on the conventional status of the rule of recognition, but accepts Dworkin’s point that law is comprised of moral principles.
 - i. Coleman proclaims this to be the preferable form of legal positivism. This approach accommodates Dworkin’s thesis as follows: “What, in Dworkin's view, is evidence for the normative theory of the rule of recognition-that is, general and widespread appeal to moral principle to resolve controversies in it-is, in my view, evidence of the existence of a social practice among judges of resolving such disputes in a particular way.”

Neil McCormick, “Law, Morality, and Positivism” (1981)

1. The minimal necessary components of legal positivism

- a. Law need not satisfy universal moral values: “The existence of laws is not dependent on their satisfying any particular moral values of universal application to all legal systems.”
- b. Laws are man-made: “The existence of laws depends upon their being established through the decisions of human beings in society.”

2. The “internal point of view” as the interpretation of social values

- a. The internal point of view is a hermeneutic perspective: “The more we scrutinize the ‘internal point of view’ as characterized by Hart in its role as the keystone of his theory of rules, however, and the more we probe the

implications of what he says, the more it appears that rules are rooted in values.”

- b. The jurist need not embrace the values embodied in the law: “the theorist or jurist who seeks to understand law need not be himself committed to the values inherent in the legal or moral order he seeks to portray or describe.”
- c. Citizens’ values may clash with values captured by law: “from the point of view of the citizen the claims of his morality may come to diverge from or even conflict with those of the law as seen from the official standpoint.”

3. Reconciling natural law and legal positivism

- a. “To be a so-called positivist in this mold is not to assert the superiority of law to moral considerations nor to treat it as a morally indifferent phenomenon. Rather, it is to present law as a form of social practice or social institution which has to be subjected to a permanent moral critique.”
- b. “We delude ourselves in supposing that there remains nowadays any sharp division between these approaches so named. The best forms of positivism lead to conclusions similar in important ways to those derivable from the more credible modes of natural law thought, when we pursue rigorously the matters in hand.”

NATURAL LAW I: LON FULLER’S NATURAL LAW THEORY

Lon Fuller, *The Morality of Law* (1964)

1. There are two conceptions of morality

- a. The morality of aspiration, or the the morality of Greek Philosophy, “of the Good Life, of excellence, of the fullest realization of human powers.” It shares “kinship with aesthetics” and the principle of marginal utility in economics; it is an amorphous, subjective morality, confident in man’s ability for self-perfection and willing to enable his quest for self-fulfillment even as it “condemn[s] men for failing to embrace opportunities for the fullest realization of their powers.”
- b. The morality of duty, which “lays down the basic rules without which an ordered society is impossible [...] speaks in terms of “though shalt not,” and condemns men for “failing to respect the basic requirements of social living.” It is not unlike the “rules of grammar,” the law itself, and theories of reciprocity and market exchange in economics – namely a rationally discoverable and objective morality.
- c. The two moralities occupy a moral scale: At the bottom of the scale lies the morality of duty: cynical, formal, prohibitive – the bare essentials for social existence. At the top of the scale lies the morality of aspiration: hopeful,

informal, liberating – the domain of human triumph. Somewhere near the middle of the scale exists a foggy transition from the morality of duty to the morality of aspiration, and locating this pointer is “a basic problem of social philosophy.”

2. What is law?

- a. Law is “the [purposive] enterprise of subjecting human conduct to the governance of rules.”

3. The dual moral foundations of the law

- a. The inner morality of law, or “the “basic morality of social life, duties that run toward other persons generally.” It is an affirmative, general, procedural morality that generally tends to warn individuals “away from harmful acts” but also “demands [that] human energies must be directed towards specific kinds of achievement.” Because the inner morality of law is partially aspirational, it is difficult to fully crystallize into legal duties.

- i. The accordance of the inner morality of law with the morality of duty manifests itself via eight principles:

1. Laws should be general
 2. Laws should be publicly promulgated
 3. Laws should not be retroactive
 4. Laws should be clear
 5. Laws should be internally consistent
 6. Laws should not be impossible to be complied with
 7. Laws should be temporally enduring
 8. Laws should be congruent with official action

- ii. The accordance of the inner morality of law with the morality of aspiration manifests itself with the difficulties in applying the foregoing principles:

1. Even retroactive laws, for example, can enhance legality, as when individual’s benevolent yet mistaken observance of an opaque law at time $t-1$ is recognized and legalized at time t , such that the principle of non-retroactivity is violated in the interest of fulfilling the principle of publicity. Indeed, the fact that the law’s inner morality can contain contradictions pushes Fuller to conclude that “of course, both rules of law and legal systems can and do half exist.”

- b. The external morality of law, which is concerned not with procedure, or means, but with substance, or ends: it is a “substantive natural law.” One central principle of substantive natural law/the external morality of law is the following: “Open up, maintain, and preserve the integrity of channels of communication by which men convey to one another what they perceive, feel, and desire.” Because the external morality of law is fully aspirational, it is almost impervious to legalization.

H.L.A. Hart, Critique of Fuller in *The Concept of Law* (1961)

1. Fuller conflates purposive activity with morality. The act of poisoning, Hart notes, “is no doubt a purposive activity, and reflections on its purpose may show that it has internal principles...But to call these principles of the poisoner’s art “the morality of poisoning” would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality” is concerned.
2. Fuller’s definition of law is imprecise. The outer boundaries of Fuller’s conception of law as the “purposive enterprise of subjecting human conduct to the governance of rules” cannot be “determined from this book with any precision, since the author does not give us any account of what “rules” are.”
3. Fuller’s principles of the inner morality of law were articulated by legal positivists: For example, “Bentham devoted many pages to the discussion of the evils of obscurity and retroactivity in the law.” Yet Fuller straw-mans Bentham and Austin to distinguish himself from them.
4. Fuller’s principles of the inner morality of law are not incompatible with evil laws: “I cannot find any cogent argument in support of his claim that these principles are not neutral as between good and evil substantive aims. Indeed, his chief argument to this effect appears to me to be patently fallacious... There is therefore no special incompatibility between clear laws and evil.”

NATURAL LAW II: JOHN FINNIS’ NATURAL LAW THEORY

John Finnis, *Natural Law and Natural Rights* (1980)

1. **The objective of natural law theory**
 - a. To discover the human goods securable only by man-made law: “to understand the relationship(s) between particular laws of particular societies and the permanently relevant principles of practical reasonableness.”
 - b. To uncover the rational foundations of moral judgment by identifying “conditions and principles of practical right-mindedness, of good and proper order among persons, and in individual conduct.”
2. **What natural law theorists do not believe**
 - a. That positive law is derivative of natural law. “Aquinas, for one, thinks that positive law is needed in part because when natural law is already in existence it does not itself provide all or even most of the solutions to the coordination problems of communal life.”

- b. That all human beings pursue aims and not survival
- c. That God must exist in order to proclaim a theory of natural law

3. **Nine requirements for practical reasonableness**

- a. These are nine requirements for morality, though they need not be clearly recognizable by all or even most people
 - i. A rational plan for life (“a harmonious set of purposes and orientations”)
 - ii. Non-arbitrary preferences amongst values
 - iii. Impartiality among human subjects who may be partakers of basic human goods (one’s moral judgments must be universalizable),
 - iv. Detachment (“In order to be sufficiently open to all the basic forms of good in all the changing circumstances of a lifetime”)
 - v. Commitment,
 - vi. Efficiency within reason,
 - vii. Respect for every basic value in every act (“One should not choose to do any act which of itself does nothing but damage or impede a realization or participation of any one or more of the basic forms of human good”)
 - viii. Favoring the common good of one’s communities
 - ix. Following one’s conscience

4. **Seven fundamental human goods intelligible to all**

- a. Life, knowledge, play, aesthetic experience, friendship, religion, and freedom

5. **Community, the common good, justice, and authority**

- a. Community is a unifying relationship between human beings, and it exists “wherever there is, over an appreciable span of time, a coordination of activity by a number of persons, in the form of interactions, and with a view to a shared objective.”
- b. The common good is “A set of conditions which enables members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the values, for the sake of which they have reason to collaborate with each other in a community”
 - i. The common good need not require unity of objectives
 - ii. Aquinas “regards human action not as the result of a push (whether from within or an external agent, such as a superior), but rather as a person’s response to the attraction of something considered to be good.”
- c. Justice: “s an ensemble of requirements of practical reasonableness that hold because one must seek to realize and respect human goods not merely in oneself and for one’s own sake but also in common, in community.”
 - i. Justice is other-directed (has to do with one’s relations with others)
 - ii. Justice entails duty, or with what one owes others

- iii. Justice entails equality (all have equal right to a respectful consideration)
- d. Authority: “Someone’s stipulation has authority when practically reasonable subjects, with the common good in view, would think that they ought to consent to it.”

6. Natural rights

- a. Natural, or human, rights can only be enjoyed in particular contexts, namely a “framework of mutual respect and trust and common understanding, an environment which is physically healthy and in which the weak can go about without fear of the whims of the strong.”
- b. The concept of right: when a requirement of practical reasonableness gives to A (or others like A) the benefit of a positive/negative requirement (obligation) on the part of B (including non-interference)
- c. Absolute human rights:
 - i. The right not to have one’s life taken directly as a means to any further end
 - ii. The right not to be lied to in any situation in which factual communication is reasonably expected
 - iii. The right not to be condemned on knowingly false charges
 - iv. The right not to be deprived of one’s procreative capacity
 - v. The right to be taken into respectful consideration in any assessment of what the common good requires

7. The law and the legal system

- a. Central case of a “legal system”: “a complete community, purporting to have authority to provide comprehensive and supreme direction for human behavior in that community, and to grant legal validity to all other normative arrangements affecting the members of that community.”
- b. Central case of a law: “Rules made, in accordance with regulative legal rules, by a legitimate authority for a complete community, buttressed by sanctions, to reasonably resolve the community’s coordination problems for the common good of the community, in a specific, non-arbitrary, and reciprocity-maintaining way.”
 - i. Law brings precision and thus predictability into human interactions
 - ii. A validly created law remains valid until it ceases to be valid/is repealed by its own terms
 - iii. Laws regulate the ways in which individuals may modify existing laws
 - iv. A legal postulate is that every present practical question or coordination problem has been provided for by a past juridical act
- c. The objective of law: to anticipate and capitalize “upon the good citizen’s schema of practical reasoning, and to give it unquestioned or dogmatic status.”

- i. Hence legal sanctions seek to “restore the distributively just balance of advantages between the criminal and the law-abiding so that the law-abiding are not disadvantaged by remaining within the confines of the law.”
- d. The Rule of law is achieved when Lon Fuller’s eight principles of the rule of law are met

8. **The relationship between natural and positive law**

- a. Positive law is derived, but not entailed, by natural law: “Reasonable choice over legal rules is to some extent guided by circumstances of a particular society, and to some extent arbitrary. The rules adopted will thus be derived from natural law (requirements for practical reasonableness) but not entailed by it.”
- b. Positive laws have a datable origin, whereas moral rules do not
- c. Man-made law is justified insofar as it is guided by natural law: “The act of positing law is an act which can and should be guided by moral principles and rules, which are matters of objective reasonableness, and these moral norms justify the institution of positive law and its institutions.”

9. **Legal obligations**

- a. Legal obligation arises when practical reasonableness requires compliance to respect the common good. The practical reasoning proceeds as follows:
 - i. “For all coordination problems legally specified as appropriate for legal solution, I must act in the legally specified way if I am to respect the common good”
 - ii. “Where a pattern-of-action has been legally specified as obligatory, the only way of satisfying the common good is to act according to the pattern so specified.”
 - iii. Therefore, “must (ought to) act in the way specified as obligatory.”

10. **Unjust laws and the duty to obey**

- a. Natural law theorists accept that unjust laws may have legal validity: “in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground that, in the judgment of the speaker, they satisfy the criteria of validity laid down by constitutional or other legal rules, or on both counts. The tradition goes so far as to say that there may be an obligation to conform to some such unjust laws in order to uphold respect for the legal system as a whole.”
- b. Types of unjust laws
 - i. Laws promulgated by leaders intended not to advance the common good but their own factional advantage, or otherwise motivated by malice
 - ii. Laws promulgated without following proper procedure
 - iii. Laws that constitute *ultra vires* acts (except in states of emergency)

- iv. Laws that, even if not emerging due to unjust motives, are substantively unjust (either distributively unjust, whereby they misappropriate some aspect of the common stock of resources, or commutatively unjust, by denying others their human rights)
- c. Individuals may contingently discount unjust laws
 - i. They may discount unjust laws so long as they are not “homogenous with other laws in its formal source, in its reception by courts and officials, and in its common acceptance.”
 - ii. If the unjust laws accord with a corpus of law that on the whole advances the common good, then the good citizen may still be morally required to obey in order to prevent “weakening the legal system as a whole.”

John Finnis, “Authority of Law in the Predicament of Contemporary Social Theory” (1985)

1. Why there is a prima facie moral reason to obey the law

- a. Because “the law presents itself as a seamless web.” Its subjects are not permitted to pick and choose among the law’s prescriptions and stipulations
- b. Because the law is necessary to fulfill the common good: This follows Socrates, who argues that legal authority and obligation is justified in terms of what is needed for securing human good
 - i. When a law is passed, one’s practical reasoning becomes: “I should comply with this law, even though this law is neither in the national interest nor in my own. I should comply because I get many benefits from ‘the law,’ from the legal system within which I live... Getting these benefits from the law, I should accept its burdens”
 - 1. This can be achieved “by acknowledging a certain sort of good or “benefit”, the good of fairness and the related good of social or political friendship or good neighborliness...[which enables] the individual to acknowledge the moral authority of decision-procedures which cannot pretend to maximize the satisfaction of his own or others’ preferences.”
 - ii. Hence “we contradict Raz’s claim that it “matters not at all to one’s moral reasoning” whether a scheme of social cooperation is sanctioned by law.” This is because “An individual who opposes a law can judge that the regular, impartial maintenance of the legal order itself is a good which gives him sufficient shared interest in, and reason for, cooperation by compliance.”

Leslie Green, Critique of Finnis in *The Authority of the State* (1990)

1. The concept of the “common good” does not accord with conflict-ridden reality: “The first difficulty in the notion is to give some account of it in our conflict-ridden societies. Without even considering the possible modes of self-deception and false consciousness, there is just too much observable conflict for us to be satisfied with any pieties about the general interest.”
2. Finnis’ theory collapses into conventionalism: “Although he would reject the description, his theory is a version of conventionalism which argues that the authority of law is justified by its unique capacity to coordinate a broad range of human activity for the common good.”

NATURAL LAW III: MURPHY’S NATURAL LAW JURISPRUDENCE

Mark Murphy, “Natural Law Jurisprudence” (2003)

1. **The strong reading of the natural law thesis**
 - a. An unjust law is not a law, or *lex iniusta no est lex*. Since it is the purpose of natural law “to provide a set of standards that rational agents should take as a guide to their conduct entails that any standard that rational agents could not take as a guide to their conduct is not law but is simply invalid.”
 - i. The strong reading has been rejected by Finnis, George, and Soper: It expresses an “absurd view” - literally, “unjust law is not law”-that carries its self-contradiction out in the open and hence should not be considered an accurate statement of the natural law position.
 - ii. For Murphy, we ought to reject this reading not because it is self-contradictory, but because “the key argumentative strategies employed by natural law theorists fail to establish that thesis.”
2. **The moral reading of the natural law thesis**
 - a. The only law that merits obedience is that which meets a minimum standard of reasonableness. This is the view advocated by Robert George, “and Bix and Soper have agreed with George in holding that this is the point that classical natural law views meant to emphasize.”
 - i. Murphy does not believe we should embrace this view: “The main problem with this reading is, as Bix notes, that it makes the natural law thesis excruciatingly uninteresting- it affords no basis to disagree with legal positivists”
3. **The weak reading of the natural law thesis**
 - a. Laws that fail to meet a minimum standard of reasonableness are defective. This is Murphy and Finnis’ favored position: it “does not say simply that

some laws might fail to be adequate rational standards and that this is in some way objectionable; it takes the further step of saying that this way of being objectionable counts as a defect in law.”

- i. This approach is not contrary to the letter of positivism: “the weak reading does not call into question the claim that whether law is valid is a matter of social fact.”
- ii. This approach is contrary to the spirit of positivism: “For if the weak natural law thesis is true, it follows that one cannot have a complete descriptive theory of law without having a complete understanding of the requirements of practical reasonableness.”

RONALD DWORKIN’S LEGAL PHILOSOPHY

Ronald Dworkin, *Taking Rights Seriously* (1978)

1. Policy vs. Principle

- a. policy focuses on furthering a collective goal: arguments of policy “justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole.”
- b. Principle focuses on furthering a right: arguments of principle “justify a political decision by showing that the decision respects or secures some individual or group right.”
- c. Law privileges principle over policy: “If the plaintiff has a right against the defendant, then the defendant has a corresponding duty, and it is that duty, not some new duty created in court, that justifies the award against him.”

2. Legal Rights

- a. Rights mediate history and morality: “When a judge chooses between the rule established in precedent and some new rule thought to be fairer, he does not choose between history and justice. He rather makes a judgment that requires some compromise between considerations that ordinarily combine in any calculation of political right, but here compete.”

3. Judge Hercules

- a. Hercules represents the ideal-typical judge: “I have invented... a lawyer of superhuman skill, learning, patience, and acumen, whom I shall call Hercules. I suppose that Hercules is a judge in some representative American jurisdiction.”
- b. Hercules determines the fit between a moral theory and the law “to see which [theory of morality] provide[s] a smoother fit with the constitutional scheme as a whole.”

- c. Hercules derives a political justification for the law: “It calls for the construction, not of some hypothesis about the mental state of particular legislators, but of a special political theory that justifies this statute, in the light of the legislature’s more general responsibilities, better than any alternative theory.”
- d. Hercules only takes account of principled arguments: “Hercules, when he defines the gravitational force of a particular precedent, must take into account only the arguments of principle that justify that precedent.”
- e. Hercules assumes that prior legal promulgations were principled: “Since judicial practice in his community assumes that earlier cases have a general gravitational force, then he can justify that judicial practice only by supposing that the rights thesis holds in his community.”
- f. Hercules treats the law as if it were a seamless web: “The law may not be a seamless web; but the plaintiff is entitled to ask Hercules to treat it as if it were.”
- g. Hercules may deem past institutional choices mistaken: “Hercules must expand his theory to include the idea that a justification of institutional history may display some part of that history as mistaken.”
- h. Hercules may oppose conventional morality: “Hercules’ techniques may sometimes require a decision that opposes popular morality on some issues... He does not, in this case, enforce his own convictions against the community’s. He rather judges that the community’s morality is inconsistent on this issue: its constitutional morality... condemns its discrete judgment on the particular issues.”

4. **Against judicial skepticism**

- a. Judicial fallibility is no reason to not to aspire to be Herculean: For this argument “is perverse; it argues that because judges will often, by misadventure, produce unjust decisions they should make no effort to produce just ones.”
- b. Constitutionalism precludes judges from being deferential: “There is no reason to credit any other particular group with better facilities of moral argument,” and indeed “constitutionalism- the theory that the majority must be restrained to protect individual rights- may be a good or bad political theory, but the United States has adopted that theory, and to make the majority judge in its own cause seems inconsistent and unjust. So principles of fairness seem to speak against, not for, the argument from democracy.”

5. **Concepts vs. conceptions**

- a. Concepts vs. conceptions: “The man who appeals to the concept in this way may have his own conception, as I did when I told my children to act fairly; but he holds this conception only as his own theory of how the standard he set must be met, so that when he changes his theory he has not changed that standard.”

- b. When legislators articulate concepts, they invite judicial activism: “If those who enacted the broad clauses [in the US Constitution] had meant to lay down particular conceptions, they would have found the sort of language conventionally used to do this, that is, they would have offered particular theories of the conceptions in question... If we take them as appeals to moral conceptions they could not be made more precise by being more detailed.”
 - i. “The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions, therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.”

Ronald Dworkin, *A Matter of Principle* (1985)

1. Courts as fora of principle

- a. Judicial review is so entrenched that it should be accepted and justified. Indeed, “abdication would be more destructive of consensus, more a defeat for cultivated expectation, than simply going on as before.”
- b. Judicial review is justified by privileging principle over policy: “In hard cases, normatively it would be wrong for judges to decide civil suits on grounds of policy. Descriptively... judges adjudicate civil claims through arguments of principle rather than policy, even in very hard cases.”
 - i. “We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law.”

2. Originalism is an inadequate interpretive theory

- a. Judges cannot interpret the framers’ intent without substantive judgments: “Judges cannot decide what the pertinent intention of the Framers was, or which political process is really fair or democratic, unless they make substantive political decisions of just the sort the proponents of intention or process think judges should not make.”
- b. Originalism is at best the mid-part of an interpretive theory: “At best it can be the middle of such a theory, and the part that has gone before ... is substantive-and controversial-political morality.”

3. Interpreting Legislative Intent

- a. We should distinguish between concepts and conceptions: “When phrases like “due process” or “equal protection” are in play, we may describe a

- legislator's or delegate's intention either abstractly, as intending the enactment of the "concept" of justice or equality, or concretely, as intending the enactment of his particular "conception" of those concepts."
- i. "If the abstract statement is chosen as the appropriate mode or level of investigation into the original intention, then judges must make substantive decisions of political morality not in place of judgments made by the "Framers" but rather in service of those judgments."
 - b. We should not be faithful to legislative intent via reference to said intent: "Some part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular in the way just described."

Ronald Dworkin, *Law's Empire* (1986)

1. Law is an interpretive enterprise

- a. The "internal point of view" constitutes interpretation. H. L. A. Hart may have laid the foundation for such a conclusion via his exposition of law's "internal point of view," but he was frustratingly vague with regards to its constitutive nature and character. Interpretation endows the internal point of view with its form and substance, and the positivist neglect of this activity suffices to reject it as a theory of law. "[L]aw is an interpretive concept," and therefore "any jurisprudence worth having must be built on some view of what interpretation is."

2. Law as integrity: Implications for interpretation

- a. The interpretation of law is a constructive interpretation: as with the interpretation of a work of art, legal interpretation is a constructive interpretation: it "is indeed essentially concerned with purpose not cause...Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."
- b. The interpretation of law requires abstracting from individual intent: Interpretation is not reducible to aggregating individual intentions; rather, it is about abstracting from individual intent and treating the social whole as endowed with a collective will meritorious of interpretation. It requires "interpreting the [social] practice itself ... because the claims and arguments participants make, licensed and encouraged by the practice, are about what it means, not what they mean."
- c. The interpretation of law requires one's participation: unlike the interpretation of art or the scientific interpretation of empirical data, "judges think about law...within society, not apart from it."

3. The concept of integrity

- a. Integrity demands interpreting community standards as morally coherent: Integrity requires that the “the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation,” namely a coherent set of principles “fundamental to the scheme as a whole.” Integrity requires judges to assume that legal rights and duties “were all created by a single author - the community personified - expressing a coherent conception of justice and fairness.”
- b. Integrity is the foundation of morality in a “genuine” community alongside “justice” and “fairness.” Dworkin understands a genuine community as being one where
 - i. Individuals interpret their social responsibilities as “special,” or as holding distinctly within the group rather than in general
 - ii. Individuals deem responsibilities to be “personal,” or running directly from each member to each other member
 - iii. Individuals perceive these responsibilities to be ground in the “concern for the well-being of others in the group”
 - iv. Individuals demonstrate an “equal concern for all members”
- c. **The Herculean judge applies law as integrity**
 - d. Hercules acts as the author of a chain novel, “a multi-authored, incomplete, yet fundamentally coherent epic to which he must now contribute and remain faithful.”
 - e. Hercules is constrained by a community’s political history: “Anyone who accepts law as integrity must accept that the actual political history of his community will sometimes check his other political convictions in his overall interpretive judgment. If he does not...then he cannot claim in good faith to be interpreting his legal practice at all.”
 - f. Hercules abstracts from the immediate case to uncover a single political morality: As Hercules’ “judgments of fit expand out from the immediate case before him in a series of concentric circles” to latch onto precedent, it seeks to uncover within historical empirics a single political morality. Hence Hercules’ interpretation of the legal system as the “community personified” that “created” legal rights.