

THEORIES OF LAW

Natural Law, Legal Positivism, The Morality of Law Dworkin's "Third Theory of Law" Legal Realism and Critical Legal Studies

1. Thomas Aquinas and Natural Law Theory

Natural law theory like legal positivism has appeared in a variety of forms and in many guises. One of the most elaborate statements of natural law theory can be found in Aquinas who distinguished four types of law: eternal, divine, natural, and man-made. So, according to Aquinas, eternal law reflected God's grand design for the whole shebang. Divine law was that set of principles revealed by Scripture, and natural law was eternal law as it applied to human conduct. Man-made law was constructed by human beings to fit and accommodate the requirements of natural law to the needs and contexts of different and changing societies. Also, according to Aquinas, the fundamental precepts of natural law were not only ascertainable (mere mortals like you and me could and did find them out) but self-evident, i.e., they required no proof. They were, in Aquinas' terms, *per se nota*, known through themselves. Like his predecessor, Aristotle, Aquinas distinguished two kinds of reasoning: theoretical and practical. Human beings were capable of both sorts of reasoning. Theoretical reason was the capacity to apprehend certain truths, such as the truths of mathematics. Practical reason was the capacity to apprehend those principles guiding human conduct which tell us how we ought to live, what things we should value, what goods we should seek, and how we ought to order our lives. Like Aristotle, Aquinas believed that there were principles of practical reason and that they were no less fundamental than the principles of theoretical or speculative reason. Thus, for Aquinas, the principle of non-contradiction was as self-evident as the first and most fundamental principle of natural law ("Good is to be done and evil is to be avoided"). Like the principle of non-contradiction, the precepts of natural law were, according to Aquinas, general and unchanging. They were the same for everyone. But man-made or human law has to take the particularities of each human situation into account. Man-made law must adjust natural law to specific and often changing circumstances. Man made law is accommodating and changeable. Furthermore, there are

areas of human conduct where natural law does not spell out the particular ways that human beings ought to behave themselves. Natural law does not dictate, for example, that we drive on the right hand side of the road. Human communities require a host of regulations simply in order to function (traffic and tax laws). But even these regulations are guided, albeit somewhat distantly, by natural law, i.e., by the requirement of natural law that health and safety be protected. Man-made law may, of course, conflict with natural law or fail to capture some fundamental feature. Aquinas argued that human laws that contravene natural law are "acts of violence," and "a perversion of law." Such laws he argued do not bind the conscience. They have no legal validity and cease, in this regard, to be law.

2. Martin Luther King's "Letter from a Birmingham Jail"

King: "You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, it is rather strange and paradoxical to find us consciously breaking laws. One may well ask 'How can you advocate breaking some laws and obeying others?' The answer is found in the fact that there are two types of laws: there are just and there are unjust laws. I would agree with Saint Augustine that 'An unjust law is no law at all.' . . . A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law."

3. John Austin and Legal Positivism

What is law? On Austin's nineteenth century view it is (quite simply) a command issued by a sovereign. Law is the expression of a desire (I would like you to do this, i.e., "I would like you to pay your taxes by April 15th" or "I would like you to stop at this red light") backed up by a credible use of force or threat of punishment. In making sense of his definition, Austin refused to bring in any value-laden or normative criteria to clarify its key terms.

So, for example, he did not define "sovereign," for instance, as someone who had a "right to rule." Nor did he ever argue that the use of force by a sovereign to back up his commands had to be "legitimate." The "sovereign," according to Austin, was simply that person or entity whom most people living within a given territory happen to obey but who does not himself obey anyone else. The "sovereign" is simply the fellow (or fellows) who is (who are) obeyed rather than the one (ones) doing the obeying; the sovereign is the "unobeying obeyed." The sovereign, for Austin, is not that person who exercises a legitimate use of force within a given territory. He is simply the person whose threats of punishment the people who live in that territory find credible. His threats merely need to be credible or convincing to the people who live in the territory. The matter of legitimacy, of the legitimate exercise of force, is a moral issue, a separate issue, and Austin was eager to establish a way of speaking about "the law" that was value-neutral. It is not that Austin did not believe that we could not evaluate a legal system in moral terms, or that we could not pass moral judgment on this or that legal ruling within a given territory. We could and, of course, we do make these sorts of judgments all the time but he believed that it was important to identify the law itself in non-moral terms, that legality was separable from morality. The great advantage of Austin's definition lies its simplicity, but in its simplicity it may simultaneously fail to capture certain features of the law that we intuitively suspect are intimately bound up with it. In its simplicity too Austin's definition is seemingly open to several knock-down objections.

4. Austin's command theory of law and the separability thesis.

So on Austin's command theory a law is a desire backed up by a threat. Do all laws fit this model? Austin's theory seems to work best if the prime examples are drawn from criminal law. But what about other areas of the law? Take, for instance, the law of contracts or wills. If my mother makes out a will leaving the rusting sculpture in her

garden in Arlington to the neighbors is she being threatened with punishment? What if she fails to make a will or she types it out and fails to sign it? Hasn't she then simply failed to give effect to her wishes? Isn't it better, more accurate, in this instance to describe the law of wills as empowering or enabling my mom to do certain things rather than as commands backed up by threats? In any case, who is threatening her in this case, who is commanding her?

Austin might try to deal with this sort of objection by saying that in a case such as this my mother is (after all) being threatened. She is threatened with the sanction of nullity. If she fails to conform to the law of wills, whether by failing to make out a will or failing to fill it out properly, she is threatened by the sovereign's lack of support. If she fails to make out a will or fills it out improperly, the sovereign will not give effect to her "will.". The sculpture may have to sit in her back yard after she dies and continue to rust away, perhaps becoming part of the estate and (in the absence of a will) going (Heaven forbid!) to me and my brother. So she is "punished" after all.

But what then about the constitution? Does constitutional law fit Austin's model? In one sense the Constitution is law about law. It frames the practices of legislation, saying, in effect, what laws can and cannot be made, or more accurately what laws are valid and which are not. The Constitution, you might say, lists a set of conditions that legislation must meet. But are legislators being commanded and by whom? As in the instance of the law of wills, doesn't it make more sense to describe Constitutional law as a system of relative powers and competencies designed to give effect to the fundamental assumptions and basic understandings of a people living within a given territory? And what if we, most of the citizens, say, of the United States, decided one day to reject the Constitution? Would we be punished? By whom? Who would punish us?

These questions raise another question about Austin's command theory of law. Who, after all, is the sovereign? Do all systems of law have sovereigns in the Austinian sense. Think of our own constitutional democracy. Do we have a sovereign? Where is she? In the sense that we think of ourselves as being subject to a sovereign, it is we ourselves (we, the people) who are the sovereign. We are in charge and so supposedly obey no one but ourselves. We are, in this sense, both obeyer and obeyed. Insofar as Austin can make sense of our legal system in light of his model, it loses (Austin's model begins to lose) its simplicity, begins to lose the very thing that made it attractive as a model in the first place. But worse it may in the case of our limited government not only become more complicated but incoherent. Given our system of limited government, Austin would have to say that we, the people as sovereign limit ourselves. But the sovereign, the one doing the commanding, is meant to be distinguishable from the people, i.e., from the ones doing the obeying.

One way, of course, to make the necessary distinction and so to preserve Austin's picture is to distinguish ourselves in light of different roles and capacities. So we command in our capacity (role) as guardians of the public will ourselves in our capacity (role) as private citizens. We speak out of both sides of our mouths at once, but in different voices, expressing different aspects (sides) of ourselves, a public and private side. The public voice commands and says, for example, "we shall have more public schools," and the private voice obeys, saying "I shall pay more taxes." But now to distinguish clearly between these two sides of the sovereign coin, as it were, we need to be able to distinguish the two different sides of ourselves, to be able to distinguish when we are acting in a private capacity and when we are acting in our public capacity.

And to make this distinction, we need to bring in some notion of official capacity but there is nothing in Austin's model of the law that allows us to make this distinction. Imagine that the House of Representatives and the Senate got together in a joint session of Congress and passed a law that made each member of both Houses "King (and the few instances where it would be appropriate 'Queen') for a day." Say, too, that the legislation they pass states that each member will return to his or her constituency on a specified day and the constituents will, on that day, serve their Representative and Senators, i.e, by bringing them gifts, kissing their feet, etc.. Few of us would be inclined to say that this vote in Congress had made "law," since the members of both houses would not have been acting in their "official" capacity. Austin's theory, however, has no room for official capacity. His theory only sees the people who happen on this occasion to be commanding and who might on some other occasion be obeying. If he relies exclusively upon his model and he relies on nothing else, he will not be able to explain or understand why this decision by the Congress was not law.

5. H. L. A. Hart and the separability thesis

In "Positivism and the Separation of Law and Morals" H. L. A. Hart rejects Austin's command theory but holds on to the separability of law and morals thesis. A further criticism of Austin's model was that it could not remain value-neutral and still claim to provide us with an accurate picture of the law. In other words Austin's model could not account for what is essential to each and every legal system without bringing morality in. Two sorts of objections have been raised. In his essay Hart seeks to respond to both of them. First, it has been objected that to apply even the simplest "law" the exercise of moral judgment is required. So, for example, to apply the rule "No vehicles in the park" to the specific case of a rocket-powered skateboard requires, or so it is argued, one to answer the question "Should rocket-powered skateboards be allowed in the park?" Again, there is nothing in Austin's command model that would enable us to answer this question. But these sorts of questions arise all the time. Judges are frequently in the position of having to apply rules to new cases. Is a rocket-powered skateboard a vehicle? What about a motorized wheelchair? Now of course, Austin might answer this objection by saying that the answers to these two questions are perfectly obvious, that all rules of law can be

unambiguously and straightforwardly applied to any situation with complete illogical certainty. But this would be a bit hard to swallow.

Hart offers a more convincing response. He argues that it is not necessary to rush to moral judgment to answer either of these questions. Judges can resolve these questions by looking at broader social policies as well as at the purposes of the rule. Relying on social policy and the purposes of the legislation does not necessarily require judges to make moral judgments or to insert their own opinion into the outcome. Hart further argues that the "hard" cases, the "fuzzy" ones, the "penumbral" ones, can be resolved by turning to accepted social policies and purposes and that this can be done without our having to bring morality in.

Ronald Dworkin disagrees with Hart on this point, but Hart - in this - takes Austin's view another step. Legal positivism can take a variety of forms. Austin's view is one of them. For positivists, law is that which has been "posited," i.e., "made," "enacted," or "laid down" in some prescribed fashion. In this regard, it is a deeply human product, an invention, "artificial" rather than "natural." It is neither given nor discovered, but made. On Austin's view, for instance, law is best understood as a system of orders, rules, or commands enforced by power. On this view, a rule of law need have no connection whatsoever with what is morally right or wrong in order to count (in order to qualify) as law. There is no necessary connection between what law is and what it ought to be. In contrast to the positivist position, naturalism holds that what we call "law" can only be adequately understood in light of certain moral standards and judgments. What we regard as law, what we respect as law is essentially bound up with and grounded in "a natural moral order." This "natural moral order" is not made up by any particular group of individuals or something concocted at some convention. But "out there," as it were, to be discovered. Naturalism holds that social and political practices and institutions are to be measured against these "higher" standards and where a rule of law falls short, i.e., fails to measure up to these "higher" standards, it also fails in some fundamental sense to qualify as law.

On the positivist view it does follow from the fact that something (some rule) is a rule of law that it is also morally good and right. It may be morally good and then again it may not. But if it isn't morally good, it is still a law nevertheless so long as it was enacted according to the prescribed procedures. There are also many rules that are rules of law that do not appear to have anything remotely to do with what is morally right and wrong. Take, for example, the traffic regulation which states that cars must drive (in this country) on the left-hand side of the road. Now a further objection to the positivist thesis has come from those who have had to live under an evil regime such as the regime which came into being under the National Socialists in Germany in 1933. These critics complain that the positivist position that a rule can be a rule of law even if it is immoral can have pernicious effects. If one insists that laws can remain valid even if immoral, this can be exploited by evil regimes to their advantage. Indeed this position was exploited by those convicted of war crimes at Nuremberg when defendants at the Trials claimed to have just been following orders, insisting that their actions were "within the law."

6. Hart's Concept of Law: Primary and Secondary Rules

As Dworkin points out in his essay "The Model of Rules," Hart's positivism is "more complex" than Austin's. Hart's version also avoids some of the problems of Austin's version by doing away with the idea of a commander, someone who issues orders or commands to a people who then obey. One repeated criticism of Austin's legal positivism was its side-stepping of the issue of what Lon Fuller called "the fidelity to law." People generally show respect for the law or exhibit a sense of obligation to adhere to this or that legal statute because they believe it (the statute) to be authoritative in some way. They do not adhere to the statute merely because it was promulgated by some super-powerful "other" who threatens them with punishment and has the wherewithal to carry it out. Austin's account fails to capture this "feature" of law, although in his defense he might

well argue that to insist on the authoritativeness of this or that statute is only a way of smuggling morality back into the concept of law which is best understood in value-neutral terms. Here the debate comes down to what we happen to believe is or is not essential to the law, what we suspect intuitively are its central ingredients. But critics of Austin have been eager to point out that "there is a difference between a valid law and the orders of a gunman." (Dworkin) Hart meets this criticism of the positivist approach to law by re-finishing the notion of a rule, basing that notion on two different ways in which a rule may carry weight, i.e. have authority. A rule may become authoritative by (1) because a people come to accept the rule as a standard for their conduct. It is not often that they follow the rule, no matter how regularly and consistently. For example, most Americans get up in the morning and go to sleep at night, but they do not make it a rule in that sense that they regard this rule as binding on their behavior. Nor would they appeal to this practice as a justification for their behavior or a reason for criticizing other people's behavior who fail to obey it. A rule may also (2) become authoritative by being enacted according to some set of secondary rules which specify the procedures that persons must follow to bring a rule into being. Hart calls the first set of rules primary rules and the second set secondary. According to Hart traditional societies, tribes and clans often have primary rules without secondary ones. These societies, he argues, cannot, strictly speaking, be said to have a legal system. A legal system comes into being with the addition of secondary rules. Hart also refers to these secondary rules as "rules of recognition."

7. Hart's "Rules" and Dworkin's "Principles"

Dworkin argues that Hart's analysis is incomplete since it fails to take note of the principles upon which judges rely to make their decisions, principles that are not readily captured by Hart's notion of primary or secondary rules. Lawyers and judges make use of principles that do not function as rules and when they do, they are not relying on something "outside" or "beyond" the law. Dworkin clarifies the distinction between rules and principles by analyzing the judgments in two cases: *Riggs v. Palmer* (1889) and *Henningsen v. Bloomfield Motors, Inc.* (1960). In *Riggs* Dworkin argues the court relied on the principle that "no one should profit from his or her own wrongdoing" and in *Henningsen* on the principle that "in a society such as ours the automobile manufacturer is under a special obligation in connection with the construction, promotion, and sale of his cars." Dworkin believes that the standards set out in these cases and to which the judges ultimately appeal are not the sorts of things we think of as legal rules: "They seem very different from propositions like 'The maximum legal speed on the turnpike is sixty miles an hour' or 'A will is invalid unless it is signed by three witnesses.'" Rules operate in an all-or-nothing fashion. But this is not the way principles operate. Now principles can be treated in two different ways in the context of legal obligation. "We might," as Dworkin argues, "treat legal principles the way we treat legal rules and say that some principles are binding as law and must be taken into account by judges and lawyers who

make decisions of legal obligation." The "law" then (what the law is) would include both rules and principles. Or, as Dworkin says, "we might deny that principles can be binding the way some rules are. We would then say that in cases like *Riggs v. Palmer*, the judge reaches beyond the rules that he is bound to apply (reaches, that is, beyond the 'law') for extralegal principles." Which view we adopt is not, not just, a matter of convenience. The view we adopt will have serious consequences on how we think of judicial activism, discretion, democracy, and legal obligation.

8. Dworkin's "Third" Theory of Law

One of Dworkin's main concerns has been to develop and defend a theory of interpretation, of adjudication, to offer an account of how courts (and judges) not only do decide hard cases but how they ought to decide hard cases, i.e., those cases in which the settled rules run out or in which no settled rule applies. It is also this concern that fuels Dworkin's critique of Hart. His key insight is his perception that when judges reason about hard cases, they appeal to principles and standards other than positivistic rules, i.e., those rules that are identifiable by virtue of their pedigree, by how they came about as specified by some set of secondary rules or "rules of recognition." Unlike legal rules, principles have no discernable "pedigree" in Hart's sense. Principles function as a reason in favor of a particular decision, but do not compel a result in the way a rule does. Also unlike a legal rule in Hart's sense, a principle, such as the principle to which the court referred in *Riggs*, can, according to Dworkin, remain a principle even though it may not always be followed. Principles, too, frequently give expression to background rights held by one of the parties to a dispute, and such rights frequently "trump" or take priority over other considerations. Are principles a part of the law or do they stand outside of it? Hart's theory, Dworkin argues, must treat principles as standing outside the law, as extra-legal standards to which judges may sometimes appeal, but if they do, judges are then no longer bound by any legal authority; they are acting outside the law.

Dworkin argues that Hart's view is both descriptively inaccurate and morally unattractive. It is inaccurate because courts do, Dworkin claims, invoke principles and background rights in making decisions; and unattractive because it leaves judges free to exercise their discretion in other ways, i.e., by invoking policy considerations and ignoring a defendant's background rights. Dworkin has also tried to fit his theory of law into a context of other theories of interpretation, in particular theories of interpretation directed at literary texts. What makes one

interpretation "right" or "better" than some other? Is all interpretation merely a "subjective" process in which the interpreter of a text merely imposes whatever meaning he or she chooses? Is there a sense in which the interpretation of a text can be said to be "objective?" Are there meaningful constraints on interpretive activity, distinct from political decision making? Dworkin argues that a conception of judicial interpretation must follow from a more general interpretation of what it means to interpret anything, be it a text or a work of art. In these latter cases, interpretation proceeds "from the inside out." To grasp the meaning of a play, for instance, one must understand what it means not only to the author but to the actors, director, audience, and critics, whose play it is. So, too, to understand a social practice such as the law involves the attempt to understand it as a way of life created and sustained by its members, people who see themselves as part of a larger community ("a community of principle," "an interpretive community") held together by a commitment to the rule of law. And this means, Dworkin believes, that interpretation must involve more than discovering the intent of the author of a play or the drafters of a statute. Interpretation must be constructive. Interpreters must see the play or the law in its best light, as the coherent embodiment of some theme or point.

For judges seeking to make sense of a series of earlier precedents they must seek to find the best constructive interpretation of the legal doctrine as it is expressed in those precedents. A judge is, in this respect, like a contributor to a "chain novel." He must take into account what has come before in such a way as to find some thread, some narrative line to continue, and he must think creatively in order to tell the story beyond the point that it has so far been told. When two interpretations conflict, judges must decide which reading fits best with the fundamental features of our law as well as which reading presents our law as something coherent and worthwhile, as something of value. The law is the product of that interpretation which most faithfully sums up the texts, principles,

background rights, and values of a given community into a coherent and morally attractive whole. This is a naturalism, if it is a naturalist theory at all, of a very different sort than that expressed by Aquinas or Martin Luther King. Judges, on Dworkin's view, are not free to appeal to any moral principle nor do the principles to which they do appeal derive their validity from some natural moral order. Dworkin's judges are permitted to acknowledge only those principles and values which reside, explicitly or implicitly, in the legal history and tradition of their community.

9. Oliver Wendell Holmes and Legal Realism

An alternative theory to both positivism and naturalism is legal realism. Legal realists were especially concerned with "law in action" rather than with "law in books, with what lawyers and judges in fact do in the course of their practice of the law rather than what some legal theorist may say he thinks the law is like. To understand legal realism it is helpful to grasp the picture of law to which the legal realists objected the most. In 1870 a series of reforms in legal education were introduced by the new dean of Harvard Law School, Christopher Langdell. The aim of the new reforms was the teaching of law as a science. Other law schools quickly followed suit. Underlying the new reforms and methods was a conception of law as a completely self-contained and thoroughly consistent body of rules. Once a judge or "student of the law" extracts the law from authoritative sources, he or she can logically deduce what conclusion that rule requires in any given case. On this view every legal dispute, every argument, was believed to have a unique solution, a single correct answer that could be rigorously deduced from a set of basic axioms. Oliver Wendell Holmes was one of the first to attack this picture of the law. "The life of the law has not been logic," he remarked, "it has been experience." And, as far as Holmes was concerned, the experience most relevant to our coming to "see" why law looks and works the way it does is the experience and point of view of the "bad man," that person whose primary concern is the bottom line, who asks "How much can I get away with before I bring the power of the state down on my head?"

So, Holmes argued, a contract is not a moral commitment that the law wants me to keep; it is not, as it were, simply, a promise in writing, but a transaction which offers each party to the arrangement a choice: either give what is required by the

contract and take what is offered or take what is offered, fail to give what is asked, and pay the penalty. In order to understand the nature of contracts, to understand the nature of contract law, you have to see it from the "bad man's" perspective. Contract law is designed with this "bad guy" in mind; its provisions are "triggered" by what this "bad guy" might do. Thus, contract law exhibits the prudence of distrust and presupposes that the parties are held together by combinations of self-interest and calculation rather than mutual affection and love, that each party is out to get what is best for himself without regard to the welfare of the other. The law presumes that the parties do not "care" for each other. Holmes argued that the best way to understand the law is to be able to predict when and under what circumstances one's conduct will trigger the power of the state. By washing the law in this "cynical acid," Holmes sought to boil law down to its essence. Realists also take exception to the picture of law as a self-contained deductive system of rules, accompanied by the belief in a method of arriving at determinate solutions to problems of legal choice. This is what might be called the realist's rule-skepticism: "The law consists of decisions, not of rules." The law is not a rigid body of fixed and unchanging rules but a shifting and flexible social institution, with sufficient play, sufficient give-and-take, to accommodate the balancing of competing interests within a society.

So, too, legal realists take issue with the doctrine of precedent, the idea that a court's decision in one case can serve as a guide to future cases that are similar in relevant ways. Realists emphasize the indeterminacy and looseness of the use of precedent by pointing out that a ruling in one case never binds a decision maker in any future case because the decision maker can always find some feature of the later case that can serve as a ground for differentiating it from the earlier one. Many legal realists also argue that an understanding of the law is not reached by a method of deduction but is (rather) best understood as a matter of prediction. To understand the law you must concentrate on the patterns of

decisions by judges in actual cases, whether those decisions happen to be logical or not, for these patterns of decision making are the most reliable guides to predicting what future courts will do.

10. Critical Legal Studies

The CLS movement takes a variety of forms but one of the more central varieties is that expressed by Roberto Unger of Harvard Law School. The most familiar conception of the rule of law presupposes a liberal society, that is, a pluralistic society of diverse religious, social, and political groups coupled with a shared belief among the members in the "subjectivity" of values and the conviction that public officials must remain neutral on questions of the "best" way to live. A form of social life of this type gives rise to two sorts of problems for the law: how to establish a viable social order under conditions of deep and at times fundamental moral and political disagreement (the "problem of order") and how to accomplish this task without allowing the domination by any one group or the subjugation of any other (the "problem of freedom"). The ideal of the rule of law is a system of regulations and statutes that does not, as it were, take sides, that remains neutral with respect to any particular conception of the good life, that is equally applicable to all citizens, and does not give any one group a special advantage in the pursuit of its conception of the good life over any other group.

Unger and others have argued that the very conditions that give rise to the need for the rule of law undermine the possibility for its success. The content of statutes are invariably colored by the value biases of those who have sufficient political power to get them passed into law and the interpretations of the law are invariably colored by the subjective views and biases of judges. These biases are often not merely personal but ideological, that is, systematically distorted interpretations that reflect the prevailing cultural ethos rather than simply a particular individual's personal point of view. So there is something guiding a judge's decision in this or that case, only it is not some value-free, abstract conception of the "law," but a reflection of the ideological commitments of the age (or period) in which a judge may happen to live or be born. Since there is neither

a neutral process for enacting nor for interpreting the law, legality is fraught with paradox and contradiction.

Question

I am having a little trouble recognizing the distinction between the Herculean theory and the rule of recognition. From what I have gathered, they are both an all encompassing reservoir of legal rules. Each individual fact pattern has its answer in either theory. Prof. Warner suggested that the Herculean theory is equal to the rule of recognition with the following exception: humanity does not have the capacity to articulate the Herculean theory. However, Prof. Warner also seems to suggest that Herculean rules are accessible and applicable. I can't reconcile the conflict that has formed in my understanding of the two models. If the Herculean theory cannot be "stated", how are its rules accessible?

Answer

Good question, I'm glad you asked.

Generally, Hart looks to create a legal system based on a set of primary and secondary rules. The secondary rules serve to add some necessary flexibility in the legal system. The primary rules represent "the law". One of the main secondary rules is the Rule of Recognition. It's basic purpose is to tell a judge which law (located in the primary rules) to apply for any given situation. The Rules of Recognition are just another set of rules used to apply the primary set of rules. This is what we went over basically during the review session on 2/5.

To see the difference between Hart's Rule of Recognition and Dworkin's Herculean theory, a short discussion is necessary. Dworkin basically looks to build a bridge between the general justification of the practice of precedent (basically formalism as we discussed during the second class this semester) and a decision about what general justification requires in some particular hard case (a hard case is what Hart would see as a penumbral case). Dworkin admits to the dilemma of choice in formalism (choices among various rules and interpretations), and of substantive considerations (a variety of alternative PRINCIPLES, POLICIES, AND PURPOSES). However, he claims that through reason (rather than policy) one can unearth, in any given area of law, a unifying theory with which to decide hard cases (This is the gist of the Herculean Theory). Dworkin's theory is indeed a complex (some could say 'Herculean' :)) task. He admits that mistakes will be made, and not all instances will 'fit' the theory. However, he purports that there is 'THEORY IN THE DOCTRINE' - a large, unifying construct which satisfies our taste for harmony and consistency.

Thus, a judge (Hercules), can, with endless striving, resolve hard cases within the formalism of legal rules and their underlying principles, policies, and purposes, notwithstanding their complexity and contradictions. The contradictions may remain just that and a 'best fit' theory will have to suffice. As I said earlier, mistakes may be made and this is acceptable. The judge (Hercules) need not, for example, be constrained by 'popular morality' on a particular issue if the larger theoretical construct suggests otherwise. Therefore a court may strike down anti-abortion legislation even though it is supported by a majority of the community, on the grounds that there is a contrary vein of unifying morality in the law that overrides community feeling on the particular issue of abortion.

Dworkin believes that there is an underlying political/community morality which infuses the law with coherence and legitimacy, not because it can be verified by (say) an opinion poll on a particular subject like abortion (on the contrary perhaps), but because it is a deep, background community morality which is pre-supposed by the law and therefore immanent in it. Law is in fact one of its institutional forms. There are conflicts within that community morality, and law must acknowledge them but not bend before them - the community has an 'institutional right' that dictates that courts consistently mine that vein of unifying political morality within the law and presupposed by it, even in the face of contrary public opinion on a given issue because the community may simply have it 'wrong'. It is the community morality embedded in the law which counts, and which gives law its inherent coherence. Hercules may therefore come up with a 'correct' legal decision which is nonetheless controversial. Surprising results can be explained. Of course Hercules' own opinion on a particular issue is not relevant, only his legal opinion on the proper reading of the underlying political morality immanent in the law. In that sense his reflective exercise is not one of exercising personal prejudice on a given issue (as Hart believes in discussing judicial discretion) but rather of testing alternative broad theoretical constructs, based on settled (or 'not-hard') cases, for the proper one to apply in a particular hard case. In other words, it is the best interpretation of the community's legal practice by

identifying all of the authoritative legal materials (ALM's) and constructing all possible justifications of the ALM's out of the moral and political principles in the community. Some justifications are thrown out because they do not 'fit' well enough with the ALM's. The remaining justifications are ranked against each other leaving a unique best justification. This is the Herculean theory. Professor Warner stated that the Herculean rules are accessible because of the process one must undergo to arrive at them is accessible (I think that's why he said it, you'd really have to ask him why to know for sure). But this is my interpretation of why Prof. Warner would make that statement. Since the Herculean theory defines what the law is (by the process just described), judges should attempt to approximate the results of this theory as best they can.

The question then begs to be asked, why can't these principles, policies, and purposes be figured into Hart's secondary rules, the main one being the Rule of Recognition? Dworkin has considered this and offered this response. The Rule of Recognition would be too unstable. He said that humanity could not devise any formula for testing how much and what kind of institutional support is necessary to make a principle a legal principle, still less to fix its weight at a particular order or magnitude. Under the Herculean theory, we grapple with a whole set of shifting, developing, and interacting standards. There is no way to bolt all of these together into a single rule as the Rule of Recognition would require. Besides being way too much work, Dworkin believes, it is a seemingly impossible task anyway.