WHEN RULES RUN OUT: HART'S DISCRETION AND DWORKIN'S PRINCIPLES

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ABSTRACT

This essay explores the development of modern legal theory by tracing the move from John Austin's "command theory" to H.L.A. Hart's "rule of recognition," and finally to Ronald Dworkin's theory of "law as integrity." The central question is whether law can be fully understood as a system of social rules, separate from morality, or whether principles of justice and fairness are part of law itself. The first part of the essay explains the main ideas of Austin's command theory and why it was considered inadequate. Austin described law as the command of a sovereign, backed by sanctions. While simple, this account failed to explain constitutional law, the persistence of legal rules after a sovereign's fall, and the existence of power-conferring laws such as contracts and wills. The second part turns to Hart, who addressed these problems by distinguishing between primary rules of conduct and secondary rules about how laws are made, changed, and applied. His "rule of recognition" provided a way to identify valid law within a legal system, and his theory seemed to solve Austin's shortcomings. However, Hart also separated law from morality and admitted that in "hard cases," judges have no legal guidance and must use their discretion. The final part considers Dworkin's critique. Dworkin argued that Hart's account was incomplete because it ignored principles that are part of the legal system. He showed that in hard cases, judges do not simply make new law but interpret and apply moral principles already embedded in the legal framework. His examples show how courts rely on deeper principles of justice and fairness to reach decisions. The conclusion of the essay is that Dworkin's model provides a stronger account of law because it explains both rules and principles. By treating law as an interpretive practice that combines legal materials with moral reasoning, Dworkin offers a more complete picture than Hart. This also ensures that judicial decisions are not seen as acts of pure discretion but as reasoned interpretations that protect rights and legitimacy.

Introduction

Jurisprudence is the study of law at its most fundamental level.[1] It asks big questions about what a legal system really is, where laws get their authority from, and how law connects with morality. It's not just about defining what law is, but also about understanding why people follow it and how legal institutions gain their power. For much of the 19th and early 20th centuries, the 'Command theory' of law stood as a dominant paradigm in jurisprudence.[2] It defines law as a command issued by a sovereign, backed by a threat of sanction or punishment, and habitually obeyed by the bulk of society. This project of legal positivism, to describe law as it *is*, not as it *ought to be,* found one of its most influential voices in John Austin from his book "The Province of Jurisprudence Determined". [3]It can be observed that Austin sought to entirely separate law and morality, inclining his understanding of law towards a concept well-cultivated as "legal positivism". However, the command theory, despite its initial appeal, collapsed under the weight of its own limitations. It could not adequately explain the existence of constitutional law, the perseverance of law beyond the life of a sovereign, or the function of power-conferring rules. [4]

To begin with, the problem of Constitutional law, Austin fails to explain how a sovereign can *command itself.* [5]Under Austin's model, constitutional rules are true "law"; they are just rules of positive morality because the sovereign cannot sanction itself. This is a terrible description of how we actually view constitutional law, which we see as the highest law of the land. Further, as we examine the Problem of the Persistence of Law, this theory claims that law is a command from a *current* sovereign, obeyed out of habit. This cannot explain why laws remain valid after the fall of such a sovereign. [6]A new sovereign required a new habit of obedience, so old laws should become void-a conclusion that contradicts every modern legal system, where laws persist until officially changed.

Lastly, Austin's model fundamentally *mischaracterises* the nature of a power-conferring rule. [7] Not all laws are commands that impose a duty (commission or omission of an act) backed by sanctions, but some laws are also of the nature of creating legal relationships.

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[1] Brian Bix, Jurisprudence: Theory and Context 1 (9th ed. 2022).
[2] See generally John Austin, The Province of Jurisprudence Determined (2000) (1832).
[3] Id. at 11.
[4] H.L.A. Hart, The Concept of Law 18-25, 26-33, 27-29 (2nd ed. 1994).
[5] Id. at 63-66.
[6] Id. at 58-59.
[7] Id. at 27-29.

These critical shortcomings revealed the model as intellectually bankrupt. H.L.A. Hart famously dismantled Austin's model, arguing that it was too simplistic.[8] Instead, in its place, Hart constructed a more sophisticated system, defining law as a system of social rules, which includes both rules for behaviour (like 'do not steal'), and rules about how to make and change those rules (like a constitution). This can be illustrated through his most important theory - "the rule of recognition", a social practice used by officials to identify what counts as a valid law. [9]Hart's solution is often presented as the final word, the elegant fix to Austin's crude theory. However, this celebration of Hart's victory was shortsighted. While he effectively patched the holes in Austin's theory, he accidentally carved out a new one, deeper and more significant. By building a wall between law and morality, he left a significant gap in his theory. He proposed that in legally uncertain situations where rules offer no clear answer, judges must rely on their own discretion, effectively creating new law. [10]

It was Ronald Dworkin who stepped into this breach with a more expansive vision. He proposed that Hart's model, while analytically elegant, remained fundamentally incomplete because it failed to account for the vital role of moral principles within law itself. This essay will examine how Dworkin's critique highlighted important limitations in Hart's positivist framework by demonstrating that judges in difficult cases do not merely apply predetermined rules or exercise pure discretion. Rather, they arrive at decisions by interpreting and applying moral principles that are already embedded within the legal framework. For Dworkin, law represents not just a system of rules but a continuous interpretive enterprise through which legal decisions are justified and state power is legitimised by recourse to moral reasoning. It was Ronald Dworkin who stepped into this breach with a more expansive vision. He proposed that Hart's model, while analytically elegant, remained fundamentally incomplete because it failed to account for the vital role of moral principles within law itself.[11] This essay will examine how Dworkin's critique highlighted important limitations in Hart's positivist framework by demonstrating that judges in difficult cases do not merely apply predetermined rules or exercise pure discretion. Rather, they arrive at decisions by interpreting and applying moral principles that are already embedded within the legal framework[12]. For Dworkin, law represents not just a system of rules but a continuous

[8] Id. at 79.
[9] Id. at 94-95.
[10] Id. at 124-136.
[11] Ronald Dworkin, Taking Rights Seriously 22-28 (1977).
[12] Id. at 81

interpretive enterprise through which legal decisions are justified and state power is legitimised by recourse to moral reasoning.

The Austinian Edifice and Its Spectacular Collapse

John Austin, a 19th-century jurist, aimed to establish a scientific, value-free study of law. [13]His model, articulated in The Province of Jurisprudence Determined, is built on a few core components that are deceptively simple. For Austin, law is fundamentally a command. But not every command is law. It must be a command from a sovereign. The sovereign is defined as a person or group that receives habitual obedience from the bulk of a society but does not, in turn, habitually obey any other earthly superior[14]. Lastly, all true commands are supported by a sanction—a threat of evil or punishment if disobeyed. [15]The reason why people obey is not important; it may be out of fear, inertia, or mere habit. The key is that the command issues from a source whose authority is a matter of social fact, not moral merit.

This model has a certain intuitive, hard-nosed appeal, particularly when considering criminal law.[16] A law banning theft fits neatly: it is an order of the sovereign state ("do not steal"), enforced by a penalty (imprisonment), and the people, as a rule, are to obey it. But the moment one goes beyond this most primitive example, the Austinian structure starts to develop cracks and fissures under the strain of its own exclusions. Its failures are not minor oversights but fundamental flaws that render it incapable of describing a functioning legal system, as highlighted in the introduction: its inability to explain constitutional limits, the persistence of law, and power-conferring rules[17].

Hart's Solution: The Rule of Recognition

H.L.A. Hart's response in The Concept of Law was to revolutionise the positivist project.[18] He argued that Austin's fatal error was his "external" perspective; he viewed law from the standpoint of an observer who sees only regularities of behaviour (habits of obedience). Hart argued we

[13] John Austin, The Province of Jurisprudence Determined 1 (2000) (1832).
[14] Id. at 133
[15] Id. at 24
[16] H.L.A. Hart, The Concept of Law 18-25 (2nd ed. 1994).
[17] Id. at 18-33.
[18] Id. at 79

must also adopt an "internal" perspective—the viewpoint of those inside the system (officials, lawyers, citizens) who see the rules as reasons for action.[19]

From this insight, Hart built his model of law as a system of two types of rules:[20]

Primary Rules are the rules of conduct that place obligations, telling individuals what they are to or not to do (e.g., do not steal, do not kill). These equate to Austin's commands.

Secondary Rules are rules about the primary rules. They stipulate how primary rules are created, identified, changed, and adjudicated. Hart identifies three key types:

Rules of Change confer power to create new primary rules or amend old ones (e.g., the procedures in the Indian Constitution for Parliament to enact legislation).[21]

Rules of Adjudication confer power on certain individuals to make authoritative determinations about whether a primary rule has been broken (e.g., the rules establishing courts and their jurisdiction).[22]

The Rule of Recognition is the master rule, the ultimate source of legal validity. It is a social practice among officials (particularly judges) that specifies the criteria for identifying valid law in that system (e.g., "Whatever the Queen in Parliament enacts is law" in the UK, or "Any law consistent with the provisions of the Indian Constitution is valid" in India).[23] Hart's rule of recognition elegantly solves all of Austin's problems.[24]

In Constitutional Law, the rule of recognition itself is the ultimate constitutional rule. It is the social fact that validates the written constitution. Officials accept that the Constitution sets the criteria for validity.[25]

Where Persistence of Law is discussed, the rule of recognition is a persistent social practice. The rule "What Parliament enacts is law" persists through countless elections. A law passed by a previous government remains valid because the current officials' rule of recognition continues to recognise enactments of past Parliaments as valid.[26]

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[19] Id. at 89-91.
[20] Id. at 94-95.
[21] Id. at 96-97.
[22] Id. at 100-110.
[23] Id. at 107-108.
[24] Id. at 94-110.
[25] Id. at 107-108.
[26] Id. at 58-59, 145-147.

Lastly, analysing the intricacies of power-conferring Rules, the rule of recognition can validate any type of rule. It validates not only duty-imposing criminal laws but also the power-conferring rules of contract, wills, and marriage.[27]

While the well-trodden path of undergraduate jurisprudence leads inevitably to the altar of H.L.A. Hart, where one is expected to kneel before his 'revolutionary' union of primary and secondary rules, this superficial narrative is as intellectually satisfying as it is simplistic. To portray Hart's work as the "elegant, final solution" to the Austinian problem is to mistake a compelling first-act plot twist for the resolution of the entire story. It is a comforting fable for students content with a world of clear heroes and defeated villains.

In reality, Hart's monumental contribution was not to conclude the jurisprudential project, but to simply relocate its central anxiety. By replacing Austin's crude sovereign with the conventional rule of recognition, Hart did not solve the problem of law's foundation; he merely refined it, thereby exposing legal positivism to a new set of far more sophisticated and devastating critiques. The true intellectual drama begins not when Hart enters the stage, but when the curtain rises on the philosophical void he left behind, a void that demanded figures of Dworkin's and Raz's calibre to fill it. To ignore this subsequent drama is to fundamentally misunderstand the ongoing conversation that is legal philosophy.

This void is Hart's doctrine of judicial discretion. Hart, committed to the separation of law and morals, conceded that language has an "open texture."[28] Rules have a core of settled meaning and a penumbra of uncertainty.[29] In these "hard cases," where a fact pattern falls into the penumbra (e.g., Is an electric scooter a "vehicle" banned from the park?), Hart argued the rules—and thus the law—run out. There is no predetermined right answer. Therefore, judges must exercise their strong discretion. They must step outside the law and make a new law based on social policy or their own personal morality.[30]

[27] Id. at 149-150.
[28] Id. at 128.
[29] Id. at 128.
[30] Id. at 135.

This concession is Hart's intellectual bankruptcy. It creates a crisis of legitimacy, suggesting that in the most important cases, judges are not interpreters of law but creators of it. This was the void into which Ronald Dworkin stepped.

Dworkin's Challenge: Law as Integrity and the Role of Principles

Ronald Dworkin did not seek to mend Hart's model; he sought to replace it.[31] His critique was that of a rival architect with a wholly different blueprint for law. Dworkin argued that Hart's model was disastrously inaccurate because it ignored a crucial component of any legal system: principles.[32]

Dworkin introduced a vital distinction:[33]

Rules: These are all-or-nothing. If the rule applies, it determines the result (e.g., "a will must be signed by two witnesses").[34]
Principles: These are not all-or-nothing. They are fundamental ideals of justice and fairness that have "weight" and must be balanced against competing principles in any given case (e.g., "no one should profit from their own wrong," "the law should protect the reasonable expectations of parties").[35]
Dworkin's masterstroke was to show that principles are not extralegal materials judges turn to after the law runs out. They are integral, binding parts of the law itself. He demonstrated this through famous cases like Riggs v. Palmer (1889).[36] In Riggs, a murderer sought to inherit from his victim under the literal text of the statute of wills. The court denied him the inheritance. The judges did not look at the clear rule and then exercise discretion to make new law because they found the outcome distasteful. Instead, they applied the fundamental principle that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong."[37] This principle was, the court argued, a deep-seated part of the legal background against which all statutes are enacted and interpreted.

[31] Ronald Dworkin, Law's Empire 52 (1986).
[32] Dworkin, Taking Rights Seriously at 14-45.
[33] Id. at 22-28.
[34] Id. at 24
[35] Id. at 26.
[36] Riggs v. Palmer, 115 N.Y. 506 (1889).
[37] Id. at 511.

For Dworkin, Riggs was proof that law contains more than pedigree-based rules. Judges are not making law in hard cases; they are constructing the best moral interpretation of the existing legal materials—statutes, precedents, constitutional clauses—all of which are saturated with principles. The judge's task is to find the right answer, the one that best "fits" and "justifies" the legal landscape as a whole, making it the best it can be. This is his theory of "law as integrity."[38] The Indian Supreme Court's constitutional case of Kesavananda Bharati v. State of Kerala (1973) is a paradigm case of Dworkinian adjudication.[39] The legal issue was whether Parliament's power to "amend" the Constitution under Article 368 entailed the power to change or destroy its basic structure. The text was silent. A Hartian judge would have been forced to conclude that the law had run out and exercise discretion.

But the Court did not do this. Instead, the majority engaged in a deep interpretive process. They looked at the entirety of the Constitution—its Preamble, its fundamental rights, its structure—and discerned underlying principles that formed its "basic structure."[40] They argued that these principles were the soul of the document, and the power of amendment could not be used to destroy the very identity of the Constitution itself. They did not claim to be making new law; they claimed to be discovering a limitation that was already inherent in the legal material.[41] This was not discretion; it was a herculean effort of moral interpretation, exactly as Dworkin describes.

Conclusion

The journey from Austin to Hart to Dworkin represents the central drama of modern jurisprudence.[42] Austin's command theory provided a simple but fatally flawed answer to the question "what is law?"[43] Hart's genius was to dismantle this model and replace it with a sophisticated system of social and secondary rules, centred on the rule of recognition.[44] This

[38] Dworkin, Law's Empire at 225-275.
[39] Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India).
[40] Id. at ¶ 302 (Sikri, C.J.).
[41] Id. at ¶ 1432 (Khanna, J.).
[42] Brian Bix, Jurisprudence: Theory and Context 38-120 (9th ed. 2022).
[43] John Austin, The Province of Jurisprudence Determined 11 (2000) (1832).
[44] H.L.A. Hart, The Concept of Law 94-110 (2nd ed. 1994).

solved Austin's technical problems but created a normative nightmare: the admission that in hard cases, law is incomplete and judges must legislate from the bench.[45]

Ronald Dworkin's profound contribution was to reveal this conclusion as both descriptively false and normatively dangerous.[46] He successfully showed that Hart's model remained fundamentally incomplete because it failed to account for the vital role of moral principles within law itself.[47] By demonstrating that judges in difficult cases do not merely apply predetermined rules or exercise pure discretion, but instead arrive at decisions by interpreting and applying principles embedded within the legal framework, Dworkin recast law as a continuous interpretive enterprise.[48] For Dworkin, law is not a system of rules that occasionally runs out; it is a seamless web of rules and principles that always provides a right answer for a judge who seeks, in good faith, to interpret the system in its best light. This vision ensures that state power is legitimised not by the mere fact of a social rule, but by its recourse to coherent moral reasoning, protecting the rights of citizens and the integrity of the legal system itself.

[45] Id. at 124-136.
[46] Ronald Dworkin, Taking Rights Seriously 81-130 (1977).
[47] Id. at 14-45.
[48] Ronald Dworkin, Law's Empire 239 (1986).