Rule Skepticism

Kevin J.S. Zollman
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Nature of Law
We looked at two different types of rules, primary and secondary.

- We observed three pitfalls for legal systems which only have primary rules, the problems of uncertainty, static character, and inefficiency.
- We examined three types of secondary rules relevant to legal systems, the rule of recognition, the rule of change, and the rule of adjudication.
- We saw how Hart applies these rules to determine if a legal system exists and what it involves.
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Judicial Activism
Rule Skepticism

A flow chart

The general populous
Patterns of deference
The officials
Internal attitudes
Secondary rules
By the rule of recognition
Primary Rules

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Rule Skepticism
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- Judicial Activism vs. Judicial Restraint
Judicial Activism

- Judicial Activism
  - Judges “make” law, by applying laws in ways not intended by the original legislature.
  - Criticized because it is a non-democratic way of making law.

- Judicial Restraint
  - Judges merely apply the law, they don’t “create” law.
  - They usually try to follow the intent of the original author, whenever possible.
  - Criticized for making the law static and non-adaptive to new situations.
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Examples of activism

- Brown v Topeka BOE
- Griswold v Connecticut
- Roe v Wade
- Sexual Harrassment and Title VII of the Civil Rights Act of 1964
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- Judges merely apply the rules, as intended, to cases that come before them.
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Rule Skepticism
Hart says this view is untenable. Judges cannot always mechanically apply laws. Being too rigid frustrates our aims.

- We cannot always predict what sorts of situations will arise.
- We want to prevent a general type of behavior.
- If we pass laws that are too specific we cannot prevent those cases that we could not predict.

Even if we could, language is too vague to be able to specify everything.
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Sexual Harassment

William Renquest

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on “sex.”

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  - Hart calls this the “open texture” of law.
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Making Rules

H.L.A. Hart

Here at the margin of rules and in the fields left open by the theory of precedents, the courts perform a *rule-producing* function which administrative bodies perform centrally in the elaboration of variable standards. (135)

- Courts actually make new rules when confronted with a situation of “open texture”
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Courts create law when they encounter a case in the penumbra of a law.

But what about in everyday cases?

Suppose that the Supreme Court refuses to apply a law in the way the legislature intended.

Since the Supreme Court interprets every law, and they cannot be overruled, maybe law is just “being applied by the Supreme Court”

When I say “That is illegal” what I really mean is that “If brought before the Supreme Court they will rule punish you for it.”

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Legislation is just one source of law, for the Rule Skeptic.
- There are other sources as well, like precedent, custom, etc.
- None of these sources are law, however.
- They are merely things that guide the Supreme Court who is the ultimate authority.
- They are *not* rules that bind the Supreme Court in any way.
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Hart responds with an analogy.

- Consider the homeplate umpire in baseball.
- He is the final arbiter of whether a run has been scored or not.
- No one can overrule him.

©Rick Dikeman
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This is in contrast to the game “scorer’s discretion”.

In this game, the umpire just decides when a run is scored.

Again, no one can overrule him.

But in this case, he’s infallible. He cannot, by definition, be wrong.
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Baseball vs. Scorer’s Discretion

Two differences:

- In baseball, people argue calls.
- In baseball, one can play without a scorer and still be playing baseball.
- In scorer’s discretion, these would be crazy.
- Because in baseball, the umpire is “final” but not “infallible”.

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This is analogous to law.

- Although the Supreme Court is final they are not infallible.
- They can fail to apply the rule.
- If they deviate from the rules too much, we are no longer in the same legal system. We are now in a dictatorship.
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Two extremes

- Formalism - There are laws that come from the legislature which are uncreatively applied by the courts.
- Legal skepticism - All laws are made up by the courts and they chose whether to use statute as a source or not.
- Hart says these two represent extremes and that the truth lies somewhere in the middle.
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The statement that the court always had an inherent power to rule in this way would surely only be a way of making the situation look more tidy than it really is. Here, at the fringe that of these very fundamental things, we should welcome the rule-sceptic, as long as he does not forget that it is at the fringe that he is welcome; and does not blind us to the fact that what makes possible these striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of law. (154)
Theories of law so far

- Natural law theory
- Formalism
- Legal skepticism
- Legal positivism
  - Austin’s command theory
  - Hart’s rule based theory
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