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Assess Frederick Schauer's Attempt in 'Was Austin Right After All?' to Revive John Austin's Command Theory and Defend it Against H.L.A. Hart's Many Criticisms. How Successful is Schauer's Attempt?

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Abstract

Since it is expounded, John Austin's command theory of law has been subject to debate and criticism of thinkers affiliated to both Naturalist and Positivist traditions. Among positivists, HLA Hart, being his most ardent critic, has scrutinized various aspects of his theory. Hart pointed out that Austin while placing an exaggerated emphasis on the role of sanctions in securing compliance with law, has obscured the difference between 'being obliged' and 'being under an obligation'. Fredrick Schauer in "Was Austin Right Afterall?" has attempted to revive Austin's theory against Hart's criticism. He, inter alia, argues that Austin's account of law is descriptive and therefore closer to reality as compared to Hart's who puts forward rather a conceptual account of law. From an analytical standpoint, this essay seeks to refute Schauer's claim. It maintains that Schauer's analysis of Hart's theory and criticism is tainted with misconceptions and therefore, he has failed in his attempt to revive Austin's theory.

Keywords: Hart, Austin, common theory, sanctions, jurisprudence

Introduction

This essay will assess Schauer's attempt in 'Was Austin Right After All?' to revive Austin's command theory and defend it against Hart's criticisms. It will explain Austin's original theory, explore Hart's critique, then examine Schauer's defence and determine its success. Schauer's criticisms can be reduced primarily to an attack on the methodological basis of Hart's jurisprudence, rather than a denial of his conceptual analysis. His argument is more concerned with the value and proper objects of the jurisprudential exercise. This attack

on Hart's methodology and the lack of significance Hart allegedly placed on coercion can be seen as drastically overstated: coercion played a significant role in Hart's theory, and the evidence is equivocal at best to show that it plays the crucial role in explaining why people obey the law in practice that Schauer ascribes to it. As such, Schauer fails to revive Austin's command theory.

Command Theory

Austin was keen to show that what is legal is separate from what is morally right or practically prudent but he was also concerned with distinguishing law and legal obligations from other similar rules and systems (Austin, 1995). To do this, Austin characterized the law as commands from a sovereign backed by the threat of sanction in the case of non-compliance. The threat of sanction produces a habit of obeying the law in the law's subjects, and a habit of treating law as a reason for action. The element of sanction and the nature of the commander as a sovereign, in Austin's mind, distinguishes law from mere requests and other threats. The law is binding on its subjects because it has the power to punish those who disobey (Austin, 1995). This explanation of the obligatory force of law is reductionist (Marmor, 2012; Bunnin & Tsui-James, 2003): for Austin, the existence of a legal obligation is a factual question of whether citizens and officials feel obliged to obey the law as a result of the threatened sanction.

On its face, Austin's theory makes two separate claims. The first is about the concept of law: what a person means when they say something is a 'law' is that it is a threat backed by the sanction of a sovereign. The second is about the nature of legal obligations: that the law's normative force stems from the subject's anticipation of and desire to avoid a sanction (George, 1999).

Hart's Criticisms

Hart had several criticisms of Austin's theory. Firstly, the characterization of law as a command backed by a threat of sanction fails to account for the full spectrum of laws. Most notably, it fails to account for power-conferring laws, such as laws prescribing the consequences and form of entering into a contract (Hart, 1994). To characterize the law as based purely on the imposition of duties, is

unduly criminal law-centric: entire areas of law such as contract, wills and trusts are based on power- conferring laws rather than duty-imposing ones.

While it may be possible to recast power-conferring rules as duty-imposing ones, such as by characterizing nullity as a form of sanction or characterizing power-conferring rules as incomplete rules which form part of a duty-imposing rule (Bayles, 2013), this misses the point of power-conferring rules (Schauer, 2010; Hart, 1994). Non-duty-imposing rules of law are generally intended to enhance and expand the choices available to the citizen, facilitating behaviour which would not otherwise be possible, not restrict behaviour in the way that duty-imposing rules do. In addition, sanctions can be detached from a rule and leave that rule intelligible, while a 'nullity cannot likewise be detached and leave an intelligible rule that the threat of nullity supports' (Benditt, 1978, p.142).

Secondly, Hart criticized Austin's characterization of the sovereign and its necessary role in Austin's theory. Austin's sovereign habitually obeys and is bound by nothing and no one, which sits uneasily with the nature of sovereignty in the real world. Modern legal sovereigns tend to be created and bound by the law like any other citizen or official, and often sovereignty is separated between different bodies which act to check and bind each other (Belliotti, 1994). The theory has sat particularly poorly with international lawyers, as the logical conclusion of international law's lack of a sovereign under Austin's thesis is that it is not law at all (Cali, 2015; Fitzmaurice, 1956).

Thirdly, Hart thought that Austin's treatment of the nature of legal obligations failed to distinguish between being obliged to do something and having an obligation to do it. Obligations arise in the context of social practices and do not necessarily invoke the concept of sanction. Hart argued that Austin effectively characterized the primary subject of the law as the 'bad' individual: those inclined not to obey the law without the threat of sanction. This, he thought, ignores the fact that many of the law's subjects are inclined to obey the law regardless of sanction. These are people who have committed to the 'internal point of view' and see the law as imposing obligations even in the absence of sanction (Hart, 1994). This, Hart argued, is especially true of the judge, who "takes legal rules as his guide and the breach of a rule as his reason and justification for punishing the offender" (Hart, 1994, p. 11).

Hart therefore labels the primary subject of the law 'the puzzled man', who wishes to obey the law and merely seeks guidance as to what it is (Hart, 1994, p.40). To the puzzled man, law is a reason for action, and obedience is not merely habitual. As later positivists put it, the law is entitled to impose a sanction *because* it imposes a normative obligation: it does not impose a normative obligation because it provides a sanction, as Austin believed (Goodhart, 1953). Hart's deconstruction of Austin's theory is widely considered conclusive (Green, 2002; MacCormick, 1973). Hart explained that the legal obligations are grounded in social rules (rather than habits) which have both an internal and an external aspect (Hart, 1994).

Schauer's Critique and Defence

Creating a first-order theory of law involves making several methodological commitments. One must set out the goal which one's theory aims to achieve, and the criteria by which it can be said that it has successfully achieved this goal. Marmor and Sarch argue that there are four broad methodological approaches which tend to be adopted when expounding a theory of law (2015).

The first is conceptual analysis, by which the theorist tries to synthesizes common intuitions on the concept of law or legal obligations to discover the necessary and/or sufficient conditions of the concept. A conceptual account will be successful if it produces intuitive results in a non-ad-hoc manner (Shapiro, 2011). The second approach seeks to describe the law as it manifests in the real world. The third is a prescriptive approach which aims to explain which notion of law is most desirable. The fourth combines the second and third approach to offer a constructive interpretation of real-world legal practice.

Underpinning Schaeuer's critique of Hart are two points about Hart's methodology. Hart tries to achieve two methodological goals: a descriptive and a conceptual account of law. It might be argued that Hart was merely giving a conceptual account, but Schauer points out, this is inconsistent with his criticism of Austin and Kelsen for failing to describe the reality of law (Hart,1994), such as when he argued that many subjects of the law are not recalcitrant bad men, but merely puzzled men.

Schauer's first point is that the conceptual analysis of law is a project with less value than many positivists, including Hart, have

supposed. His second point is that Hart fails in his attempt to give a descriptive account of law, and that Austin's account was much closer to reality. As will be seen, the two points are interlinked, and are part of a broader argument that if the concept of law has little bearing on the real world, it is not obviously a worthwhile project to pursue.

Schauer does not deny that sanctions are not a necessary conceptual condition of law, or that there are individuals who obey the law purely because it is law (Schauer, 2015). Schauer's primary argument is that the internal point of view and the normative aspects of law are not as important to understanding law's nature as Hart makes out, and that Hart was wrong to deem sanctions and coercion as unimportant. Schauer admits that Austin greatly undervalued the role of non-coercive elements of the law, he argues that this was no greater a distortion of the nature of law than Hart's marginalization of its coercive elements (Schauer, 2010).

Modern law, Schauer argues, is highly coercive due to increased regulation of the way in which people order their private affairs, even in areas which consist of power- conferring rules. Schauer gives the example of tax laws, consumer regulations, and employment rights law (Schauer, 2010, p.7). Where regulation has occurred, the citizen who does not order his private affairs according to the law risks sanction (Schauer, 2010, p.8).

Schauer notes that sanctions are a universal part of every system of law and 'the phenomena of law as it is overwhelmingly experienced is coercive' (2015, p.30). By placing coercion and sanction as the center of his account of law, Austin gave a more empirically accurate account of the law than Hart. Though Austin's account fails due to its inability to account for power-conferring rules, Schauer argues that Austin should be read as giving a descriptive account of a central element of the nature of law as it exists in practice. (2010).

Schauer criticises Hart's focus on the puzzled man to the exclusion of the bad man. Hart makes an empirical claim that many of the law's subjects are puzzled men, which he does not back up with evidence. Schauer points out, it makes far less sense to focus on the puzzled man if the bad man is in the majority. Hart's rule of recognition, and the other mere conventions relied on by positivists as the source of the obligation 'sit uneasily with any notion of obligation' (Green, 1996). This means that there is no obvious reason for law to provide citizens with reasons to act, and no obvious

reason to suppose that the puzzled man is in the majority. Schauer argues that Hart's empirical claim that there is a linguistic difference between being obliged and having an obligation is also suspect. Schauer argues that dictionary evidence and the dicta of the American courts provides strong evidence that being obliged and having an obligation are interchangeable notions (2010, p.13).

Raz (2005) argues that even if there is only a single puzzled man, a proper theory of law needs to be able to explain his attitude, as it indicates that coercion is not an essential feature of legal obligations. Schauer argues that if it does so, it no longer has any claim to be a satisfactory descriptive account of actual legal systems, nor to be an account of what is essential or 'genuinely important about the phenomena of law' (p.11). This is because determining which features of the law are important or essential involves judgements that are informed by empirical assessments based on the real world. Such a theory can only claim to be an account of the concept of law: a set of criteria by which to distinguish hypothetical legal systems from hypothetical non-legal systems. It concerns itself with the question of whether a hypothetical completely non- coercive system would be legal in nature. Schauer doubts that such a theory has any real value, since its salient features are largely divorced from the salient features of the typical legal system. Far more valuable is a theory that aims to describe what is non-logically present in the paradigm case of law in practice.

Schauer reconceptualizes, and thus attempts to revive, Austin's theory of law: Austin should be understood as arguing that the presence of sanctions offers the most empirically satisfying method of distinguishing legal obligations from other sorts of obligations, even if it is conceptually possible to conceive of a sanction-free duty. The role of coercion in Schauer's mind, as Freeman and Mindus put it, "might be considered analogous to the role of electric energy in surgery" (2012, p.103).

Analysis

The first thing to note from the above is that Schauer admits that Austin's account fails as a purely conceptual account of law: he merely questions the value of a project which focuses on universal properties to the exclusion of common, but non-essential properties. As such, command theory still cannot be defended from a

conceptual standpoint. Their value to purely conceptual analyses of law. However, Schauer has a strong point to make that if a concept does not align with practiced reality, it should not dominate jurisprudential methodology in the way that Schauer claims that it has since Hart.

However, it has been disputed that the conceptual analysis of Hart has marginalized coercion in the way which Schauer describes. Green demonstrates that Hart's analysis is replete with 'positive theses about the role of coercion in law', some which even '*over*-emphasize the role of coercion in law' (2016, p.171). For example, Hart states that coercive sanctions are vital in legal systems to assure that those who would comply even in the absence of sanctions are not taken advantage of by those who would not (1994, p.198), and is part of the 'serious social pressure' to conform which Hart characterizes as partially constitutive of duty-imposing norms.

Green speculates that Schauer's belief that post-Hart jurisprudence marginalizes coercion might be based on Hart's belief that primary function of law is 'guiding and evaluating conduct', thus making the 'normal function of sanctions in a legal system…ancillary' (2016). As she points out, however, the fact that Hart characterizes this 'ancillary' function as 'vital' makes this a poor basis on which to believe that modern jurisprudence ignores the role of coercion.

Nevertheless, even if Schauer has a strong argument for the need to re-evaluate the best methodology for the jurisprudential exercise, this is not enough to revive Austin on its own. To evaluate whether Schauer's defence of Austin succeeds, therefore, one must examine his empirical claims and criticisms of Hart with care, to assess whether Austin's command theory is a good descriptive account of law.

The first problem arises with Schauer's claim that it is unwise to focus on the puzzled man when he may well be in the minority compared to the bad man. There is empirical evidence that people's motivations for obeying the law is, by and large, because it is the law, and not because they fear sanctions. An empirical study done by Tyler indicated that people are inclined to obey the law even where they are not backed by sanctions (Tyler, 2006), which provides strong evidence that Hart's concept of the 'internal point of view' is a better descriptive account of legal obligations than Austin's command thesis.

Schauer later argued that this study did not prove that it was the legal status of the rule that motivated people to obey it (as opposed to some coincidence of morality or self-interest) (2015, p.60). While this is true, the fact that Tyler's study showed that the threat of sanction was very much secondary means that more proof is needed that Austin's command theory is empirically superior to Hart's. There is very little evidence that specifically does so.

Schauer puts forward a study which showed that subjects expressed preferences for following rules when asked in the abstract, but typically chose to break the rule in favour of a morally good outcome if given specific concrete example (2015; Saks & Spellman, 2016). However, this study concerned a non-legal rule, and can be contrasted with a similar study which showed that even when given concrete examples, choosing to break a rule to achieve a morally good outcome was judged more harshly the more law-like characteristics the rule had (Schweitzer et al, 2007). It would appear then, that Schauer's claim that coercion is the most empirically essential or common feature of the law (and that it is therefore more deserving of jurisprudential and descriptive attention) is suspect: there is evidence that legal rules are commonly considered to have obligatory force purely by virtue of being legal in character.

It appears especially unwise to ignore the role of non-coercive obligation in determining the actions of officials of the system. Accounts of what motivate judges when applying and developing the law tend to characterize judges as wanting to be a 'good judge', not because there is any sanction attached to not being so, but because of role differentiated morality, a belief that law maximizes group interest and other sanction-independent reasons (Dagan, 2013). Schauer himself admits in his most recent work that most legal officials internalize legal rules for sanction-independent reasons (2015).

Conclusion

In conclusion, Schauer's defence of Austin's command theory fails for three reasons. Firstly, it is primarily concerned with arguing that a purely conceptual methodology is not a valuable enterprise for jurisprudence to engage in, as it leads to a concept of law which is divorced from reality. It does not refute the conceptual attacks which Hart made of Austin's theory, leaving Austin still incapable of

conceptually explaining or accounting for the existence of power-conferring rules. Secondly, his claim that Hart's jurisprudence does not give proper recognition to the role of coercion is false: as Green demonstrates, coercion is a vital part of Hart's theory, and is given the proper acknowledgement it deserves. Thirdly, the evidence is at best equivocal as to whether sanctions are a more influential reason as to why people obey the law in practice over a mere perception that law should be obeyed purely because it is law. Schauer therefore fails to support the claim that a valuable theory of law would place, as Austin did, coercion at the very centre.

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