

What are We Debating When We Debate Legal Interpretation?

Bill Watson – January 23, 2025 – ITAM/USC Conference

Introduction

Hartian Positivism can't resolve first-order interpretive debates but can still meaningfully advance those debates by clarifying their subject matter.

I. The Meta-Interpretive Debate

First-order interpretive debates: disagreements over how to interpret constitutions, statutes, and the like.

Meta-interpretive debate: disagreement over the subject matter of first-order interpretive debates, i.e., over what interpretive theories aim to explain.

Some possible answers to the meta-interpretive debate. Interpretive theories (textualism, purposivism, etc.) aim to explain:

1. How legal texts communicate (LINGUISTIC).
2. How legal texts contribute to the law (LEGAL).
3. How legal actors epistemically should grasp legal texts' contributions to the law (EPISTEMIC).
4. How legal actors morally should proceed when legal texts' contributions to the law are underdetermined (REMEDIAL).
5. When and how judges morally should revise a legal text's contribution to the law (AMENDING).

II. Hartian Positivism's Answer

1. Debates over legal interpretation are primarily about what judges should do in sociologically hard cases.
2. If Hartian Positivism is right, then sociologically hard cases are overwhelmingly metaphysically hard cases.
- C. If Hartian Positivism is right, then debates over legal interpretation are primarily about what judges should do in metaphysically hard cases (i.e., are primarily about remedial interpretation).

III. Rules of Recognition

One rule of recognition in the U.S. today: an enacted legal text's clear communicative content (or "plain meaning") fully determines its contribution to the law.

IV. Legally Best v. Legally Right Answers

Some formalists, like Will Baude and Steve Sachs, seem to believe that there's a legally best answer in nearly every case and that the legally best answer is necessarily the legally right answer.

Legally best answer: disposition of the case at hand required by the norms that meet, or come closest to meeting, the relevant criteria of legal validity.

Legally right answer: disposition of the case at hand required by the norms that do meet the relevant criteria of legal validity.

The formalist intuition is mistaken. The relationship between legally best and legally right answers is a matter of contingent practice. In the U.S., judges do not converge in treating legally best answers as legally right ones.

V. Upshots for Justifying Interpretive Theories

Interpretive theories require a moral defense. Legal actors are justified in adopting such a theory only if following it makes them more likely to do what is morally best than following any other theory or no theory at all.

Two main types of arguments that proponents of interpretive theories can make: arguments based on a legal actor's (1) role or (2) epistemic position.

We should be skeptical of monolithic interpretive theories that purport to apply across the board. How legal actors morally should proceed once the law runs out is likely too complicated for a one-size-fits-all approach.