SLIDE 1

Theories of Adjudication: Legal Formalism

A theory of adjudication is a theory primarily about what judges do when they decide cases in courts of law.

American legal realism was a legal movement, influential in American jurisprudence in the 1920s & 30s. It purportedly challenged a dominant theory of adjudication: legal formalism.

The formalist view was that, when judges in superior courts of appeal decide case, they follow a deductive process.

First, the judge categorises the factual situation: characterising the facts as a certain situation type.

Second, the judge identifies the rule that applies to that category.

Then the judge applies the rule to the facts to yield an outcome.

Once a factual situation is categorised, the outcome of the adjudication follows deductively.

Yet, according to the legal realists, the legal rules and principles that judges in superior courts invoke are almost always too indeterminate to provide a single right answer to a legal problem.

Instead, the heavy lifting of adjudication occurs in the way that a given factual situation is categorised. This suggests a non-deductive process of adjudication.

SLIDE 2

Theories of Adjudication: Legal Realism

First, the judge determines the best outcome given the factual situation.

Second, the judge identifies the rule that yields the outcome.

Last the judge categorises the factual situation so that the rule applies.

If this is right then judges decide cases purely on the basis what strikes them as the right outcome when they are confronted by the particular facts of a case.

Only after an outcome is preferred does the process of legal rationalisation begin.

For reasons I won’t go into, the 1940s saw the decline of American Legal Realism.

Then, in 1961, Hart published *The Concept of Law*, which set the program of analytic legal philosophy for the second half of the 20th century.

Hart offers a general theory of law and not just a theory of adjudication. Hart’s general theory is a form of legal positivism, which sets out to clarify our *actual* concept of the law. This is opposed to a natural law approach that argues for a view of what the law *ought* to be.

Hart’s theory of law starts with his theory of rules. A rule exists in virtue of a critical mass of people in a community endorsing the rule and being disposed to adopt a critical attitude towards themselves and others on the occasion of breaching the rule.

For Hart, the modern concept of law involves a systematic union of primary and secondary rules.

Primary rules are simply rules about our conduct. Secondary rules are rules that govern the way that new rules are made. These secondary rules exist when they are internalised by a critical mass of government officials.

Hart thinks that certain features of adjudication would not be observed if the making of new laws were not really governed by secondary rules. There could be no mistakes of law or genuine legal deliberation. So, Hart criticised Legal Realists for failing to have an account of how a judge could wrongly apply the law, or wonder what the correct law is, if adjudication is just a matter of brute decision.
Brian Leiter sees his own approach as a modern day refinement of American Legal Realism.

Leiter sees Hart’s critique of Legal Realism as an attack on a straw man. Hart assumed that the Realists have no concept of law, at all. Instead, Leiter argues that American Legal Realists took for granted a kind of Legal Positivism at the level of identifying the sources of law. That is, on the questions of who gets to make new laws in what circumstances and what documents constitute existing laws.

Leiter then criticises Hart for saying that the practice of the adjudication is mostly about applying secondary rules for making new rules. Isn’t this a question for empirical research? Isn’t Hart just doing sociology of law from his armchair?

Once you’ve got to the point of determining who the judges are in a given society, then no further conceptual resources are required to say what the law is. If you want to know what the law is then go and see what the judges are doing. If you want a theoretical basis for jurisprudence then study judges as a distinct sociological class within a society and try to discern patterns of that class, from which you can make fruitful generalisations.

Leiter is not saying that the Legal Realists had it right all along. But what he faults them for is their empirical method and not their theory of adjudication.

In ways that I don’t have time to go into, Leiter argues for a method of naturalised jurisprudence, which bears similarity to the naturalised epistemology proposed by Willard Van Orman Quine. I mention this in passing to explain the title of this shortened presentation.
Not Naturalising, but Fictionalising Jurisprudence

Because Leiter accepts something like Hart’s positivism to a point, I think showing another way that Hart went wrong also shows where Leiter went wrong.

The discourse of the law not only concerns principles and rules, but entities and the properties of entities, such as courts, offices, non-natural persons, trusts, offences, rights, duties, powers and instruments.

Contrary to Hart’s view, the legal discourse does not just include talk of rules one must follow when reasoning about legal entities. The legal discourse also includes direct talk of the legal entities themselves, such as talk about what a corporation has done, and there is no principled reason to privilege talk of rules over talk of entities.

Hart also confuses facts about beliefs with belief in facts. This becomes more obvious if we already accept the first point that rules have no better standing than other entities in the legal discourse. Because of this equivalence, we should not accept the existence of rules if we do not accept the existence of dragons.

After all, if everyone in a community believed in dragons, would we say that dragons exist for that community? Intuitively, the community is in error about the existence of dragons. Why then should their beliefs concerning rules be regarded any differently, to the extent of constituting those very rules?

If Hart’s legal positivism does confuse facts about beliefs with belief in facts then one way we can avoid the confusion is to decide that the discourse of the law was never properly aimed at truth, at all.

Instead we might consider a theory of legal fictionalism, wherein we find some other good reason to maintain the discourse of the law, apart from truth. This would mean that the law is like a novel, written in turn by many authors, all with the conviction that they are writing the same story.

There are at least four (4) points in favour of legal fictionalism.

(a) the first is that we no longer need to find anything in the world to make legal propositions true;

(b) second, we no longer need to explain how we can know that a given legal proposition is true;

(c) third, we no longer need to justify conceptual boundaries with reference to empirical considerations; and

(d) fourth, a fictional analysis seems right, because of the stipulative nature of legal entities. For example, a Minister declaring the existence of a statutory corporation is sufficient for there to be a corporation.
What's at stake?

If Legal Fictionalism is right then Leiter's view, that we should do jurisprudence by generalising from the background and decision-making patterns of judges, is not just wrong but corrosive to the integrity of a fictional discourse of the law.

To give an example of what I mean by integrity, consider this analogy. You might think that it would do, when fleshing out details not explicitly stated in a work of fiction, to ask the author for the answer. But what if Sir Arthur Conan Doyle had been overheard sincerely confiding to a friend that he always imagined that Sherlock Holmes had internal organs made of mashed potato? You might share my intuition that the Sherlock Holmes stories have an integrity that the author fails to respect if he speaks in that way.

Now, maybe Doyle would not have said such a thing and, correspondingly, maybe judges would never say something that is outrageously non-legal-sounding in deciding a case. The point is that different considerations are relevant when answering the question of what a judge might decide, on the one hand, as opposed to the question of what decision makes sense within a fictional discourse of law. Furthermore, these different considerations can yield different answers.

This is precisely what happens when a judge internalises legal realism. Such a judge self-consciously decides cases on the basis of personal morality and then attempts to reintegrate their decision into the legal discourse. Yet, this merely secondary focus on the maintenance of the law as a fictional discourse can and probably will result in decisions that diverge from what would be decided if the integrity of the discourse were put first. So, the integrity of the discourse is corroded.

Of course, it is burden of any fictionalist theory is to give a reason to maintain a fictional discourse when truth is obviously not what is at stake. Why should we care if legal realism corrodes the fictional discourse of the law?

I think that there is a broad strategy implicit in engagement with a fictional discourse of the law that benefits both the more and less powerful, but in distinct ways. On the side of the more powerful, they obtain the benefit of stability of power. They do not need to fear revolution in times of weakness, because they can invoke legal rules and principles that favour their power. On the side of the less powerful, by holding the more powerful to the same rules and principles that entrench power, potentially extreme power differences between the more and less powerful in society are moderated.

So, there is something for everyone in maintaining the fictional discourse of the law, and we should consider this before corroding the discourse by internalising legal realism.