



Eliminativism: Doing without the Concept of Law?

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Structure

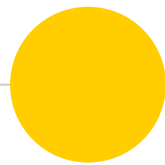
- What gives rise to eliminativism

- What is eliminativism:

two leading paradigms: “the moral impact theory” and “law as a moral practice”

- Critiques of eliminativism

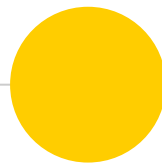
What gives rise to eliminativism?



The dissolvement of the separation thesis

- On legal positivism's side.....
- On anti-positivism's side.....
- Dworkin's one-system view
- What next then?

What is eliminativism:
two leading paradigms: “the moral
impact theory” and “law as a
moral practice”



The Moral Impact Theory

- the standoff between legal positivism and anti-positivism

btw, why saying “anti-positivism” instead of “natural law”?

- Where does the moral impact theory stands?
How does it distinguish itself from Dworkin’s view?
- What are the implications of these three views have on legal interpretation?

The Moral Impact Theory

- How can legal institutions like legislatures and courts change our moral obligations?

How does legal positivism answer this question? What the moral impact theory can offer?

- How do you understand “the content of the law is not determined simply by the meaning of the text”?
- How legal institutions alter/reinforce rather than just pronounce our moral obligations?

The Moral Impact Theory

- Which moral obligations can be altered or reinforced by legal institutions?
- Why not *any* obligation created by legal institution can be altered or reinforced?
- What makes something a legal institution?

The Moral Impact Theory

- How does the moral impact theory apply to legal interpretation?
- What difference the moral impact theory could make to the *Smith* case?
- More generally, how could the moral impact theory contribute to factoring moral considerations into deciding cases?
- Apart from what legal institutions can do, what are the other factors the moral impact theory can explain?

The Moral Impact Theory

- The master question: what is morally required in light of the enactment of the statute, not what the statute's linguistic content is.
- What the moral impact theory can achieve and cannot do?

Time for reflection:

By claiming “Moral obligations that are produced in the paradoxical way are not legal obligations”, legal obligations have to be moral in the first place, is that argument circular?

What counts as “improving the moral situation”?

Mark Greenberg claims that by altering the morally relevant circumstances, legal institutions moved moral obligation to legal obligation, what do you think of this view? Any objections?

The End of Jurisprudence

- Hershovitz proposes that we get out of the fly-bottle, “the thought that traffic signs and the legal practices they are embedded in have distinctively legal upshots—that is, normative or quasinormative upshots that are legal but not moral or prudential—is the glass that makes the fly-bottle. And it is that thought that I am going to propose we reject.” Can you translate what he really means?
- What is the “fly-bottle”?

The End of Jurisprudence

- Compared to what the moral impact theory has proposed, what Herschovitz is proposing here?
- What's the point of the long, multiple layers of the house-rules narrative?
What's the point of the differing scenarios involving promise?

The End of Jurisprudence

- How does the chess/game example complicate the discussion of X-domain of normativity or quasi-normativity?
- According to Herschovitz, can we separate these two questions?
 - a. Do we have reasons to follow certain rules?
 - b. Suppose we do, how should we act under those rules?
- What's the point of the analogy between house-rules, promise, chess rules and law?

The End of Jurisprudence

- What does Herschovitz mean by the title, “the end of jurisprudence”?
- Why would we talk about legal obligations if there is no distinctively legal domain of normativity or quasi-normativity?
- Would we have any reason to distinguish our moral obligations that are legal from our moral obligations that are merely moral?
- How to explain the impasse between legal obligation and moral obligation when they are in conflict?

The End of Jurisprudence

- According to Herschovitz, what are the strengths of his so-called eliminativism?
- How does eliminativism differ from both positivism and anti-positivism?

Compare the moral impact theory and Herschovitz's view, given that both theories highlight the inseparability between law and morality, what are their major differences?

Which view you reckon more convincing?

What do you think of legal institutions and practice in terms of their normative bearing?

Can facts, in any way, make norms?

Critiques:

- eliminativism would require too much revision to our ordinary discourse: it is important that we be able to talk about what the law requires and what it does not, which would be impossible if the doctrinal concept of law is dispensed.
- What roles of law might be missing had we taken the eliminativist approach?