Legal Positivism

Austin’s Command Theory
- The foundation of any legal system is a legally unfettered sovereign.
- Law is essentially the sovereign’s command—an order backed by a credible threat—issued to a population who habitually obeys its commander.
- The existence of a legal system depended on a combination of the unfettered power of the sovereign and a habit of obedience in the subject population.
- To have a legal obligation is to be subject to a sovereign command to do or forbear, where a command requires an expression of will together with an attached risk: “When I am talking directly of the chance of incurring the evil…I employ the term duty, or the term obligation…”
- Two key elements of positivist approaches to the law: separation thesis (“The existence of law is one thing; its merit or demerit is another”) and pedigree thesis (the legal is distinguished from the nonlegal in terms of pedigree, which for Austin is the command of the sovereign).

Hart’s Rule-Based Theory
- Austin’s sovereign command theory cannot account for two basic features of legal systems: “the continuity of the authority to make law possessed by a succession of different legislators, and the persistence of laws long after their maker and those who rendered him habitual obedience have perished.”
- Hart’s critique of Austin:
  - Austin makes no place for the legally central concept of rule
  - Austin adopts what might be called a criminal law rather than a civil law model of law
- The foundation of any legal system is not the sheer power of a legally unfettered sovereign but rather its rule of recognition. (Such a rule “will specify some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts.”)
- Law is essentially a union of primary and secondary rules.
- Primary rules: a rule directed to all individuals in the social group telling them how they ought to act in certain circumstances. These rules function to impose duties or obligations on people.
- Primary rules impose obligations or duties in the sense that they serve as standards of criticism or justification. A rule providing for a sanction serves as a reason that justifies the sanction, not a ground for predicting the actual occurrence of the sanction.
- Secondary rules (stepping from the pre-legal into the legal world): rules about primary rules specifying “the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.” These are rules of recognition, rules of change, and rules of adjudication.
- Some rule R exists as a rule in legal system S if its pedigree can be traced to the rule or rules of recognition defining legality for S. Thus, for example, there exists a valid law prohibiting driving over 25 miles per hour in a residential area, even if nobody ever obeys that law, so long as the law was enacted in the proper law-creating and law-defining way.
- The rule of recognition is unlike other rules of the system. Hart: “The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense ‘exist’ even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.”
- Jennifer Nadler: “As the ultimate rule of the legal system, the rule of recognition cannot derive its authority from its conformity with a prior rule or from the power of the law-giver. The authority of the rule of recognition must derive from its own normative force, that is, from its being accepted as the authoritative rule of identifying the primary rules of obligation.”
- Philip Soper suggests that the authority of the rule of recognition may rest on the force of the statement: “that’s just the way we do things around here.”