

Habitus: Why Positive Law Is Better than Originalism or Post-Modernism in Law

Written by Patricia Sohn

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PATRICIA SOHN, DEC 15 2018

ORIGINALISM. Why is originalism a bad idea? The first “democracies” in the late-modern era – the United States and France – were not democracies when they were established through revolutions. Initially, the innovative rights and freedoms enumerated in the Constitution and other documents in the U.S. applied only to White men – and not to all White men. The rights of democracy applied only to White men who owned property. Everyone who was not White, male, and a real property owner was not living in a democracy. Everyone else was living, to various degrees, in an authoritarian regime by today’s standards. That is, any country may present parallel political systems in which some exist in a democracy while others live, in practice and/or by written law, under various degrees of authoritarianism, institutionally speaking.

France, likewise, established itself on the principles of liberty, equality, and fraternity. While a feminist movement was very active as part of the process of the French Revolution, the allowance of that (largely unsuccessful) discourse and activism happened, in part, in the wider context of the extraordinarily violent and repressive Reign of Terror that followed.

Today, both the U.S. and France are exemplary democracies. Originalism, then, in a range of legal contexts, may bring with it wider bath waters that we prefer not to rejoin.

POST-MODERNISM. Post-modernist scholars such as Jacques Derrida, Michel Foucault, Edward Said, and scholars such as Pierre Bourdieu who navigate a line between structuralism and post-structuralism, offered a corrective in the second half of the 20th century that was absolutely critical to making Western scholars more modest about the truth and fact claims that they were willing to make. The importance of this corrective cannot be overstated. These scholars illustrated concretely in their various forms of analysis the extent to which truth and fact claims could be *normative, ideological, culturally biased, imbued with unequal power relations*, and were endemic to *scholarly* as well as wider *public and political discourses, social, and cultural norms*.

However, post-modernism in particular can be taken to an extreme in which truth no longer exists, and *all* fact claims are considered illegitimate. This position is impossible for law and courts. For, facts must be established, and they must be *established empirically if we are not to devolve into arbitrary rule*.

That is, *law* – as a concept and/or as a system – *is predicated on the notion that facts exist and can be established empirically*. A person was murdered, and someone did nor did not murder that person, etc. If we cannot accept that facts exist, then we either stop applying the law, or we let go of law and legal systems altogether. Indeed, these options may simply make up a continuum. The mis-application of the law in either patterned or non-patterned ways is another problem that does not, inherently, undermine the notion of fact. Society can apply law properly or improperly without changing the philosophical and empirical reality of the fact on the ground. It is roughly equivalent to the tree in the forest metaphor; if legends and stories are woven by a given society around a tree falling alone in the forest, it does not change the empirical fact of how or why the tree fell. The fact does not require human interpretation. Humans getting the answer right does.

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POSITIVE LAW. Positive law (in the sense of human enacted law in contrast to natural law, although the former may be informed by the later) stands as a tradition that predates post-modernism and post-structuralism; and, yet, it persists as an important corrective to them in their extremes. While understanding that all reading of any kind involves an interpretive action of the brain (e.g., all text is symbolic in that alphabets and words are both symbolic in different ways), positive law requires attention to the simple reading of the legal text only. Anything else is distortion or arbitrariness. Likewise, if precedent does not correspond with statute or foundational principle, then it is not in keeping with the legal tradition. (None of this discussion addresses the continuing problem of transparency in the law, which remains, unfortunately, one of the only areas of the state, institutionally speaking, in which written text is used to obfuscate rather than to make plain both principles and practices.)

Right now, as a divided society, we in the U.S. have little agreement on foundational principles. Some parts of society are seeking to change the political order fundamentally and quickly without the agreement of significant portions of society. They seek to do so in ways that take certain rights claims to extremes that are likely to have significant and negative unintended consequences. In such a context, the changing of existing foundational principles is precisely *not* appropriate. The legal tradition allows for *slow* change over time, ideally enacted during periods of stability; not under duress during and from periods of social upheaval as we now experience.

HABITUS. As someone who would rather be freely riding across the Mongolian Steppes on her Appaloosa horse, very far from the expanding hand and reach of the state, I have always found the claims of some Western scholars (usually historically) of what counts as “primitive” and what counts as “modern” to be either insulting to the human condition broadly speaking, or subject of much humor, depending upon context. That is, *freedom* is the most progressive notion of the human condition as well as of our various democratic constitutions, cross-nationally. Freedom requires a habit (as in, inhabiting a [physical and/or intellectual] space and practice, or *habitus*) of less state intervention rather than more. Such a move brings us back, again, to the tradition of self-restrained courts and positive law as the proper *habitus* for courts in democracies.

About the author:

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