CENTRAL CASE METHODOLOGY

Literature:

A. Langlinais, B. Leiter, *The Methodology of Legal Philosophy*

METHODOLOGICAL ANTI-POSITIVISM

- normative jurisprudence (Finnis, Perry)
- every theory first has to select the important features of its object of inquiry
- but: this cannot be done without engaging in moral reflection on the value of law
- one cannot explain law without any consideration of its moral value or reason-giving potential
- methodological anti-positivism: one cannot understand what law is prior to some account of what law ought to be

METHODOLOGICAL ANTI-POSITIVISM

- theory construction should start with some assumptions about which aspects of the object of inquiry are significant or important for the purposes of explanation
  - otherwise: we get ”a vast rubbish heap of miscellaneous facts” (Finnis)
- Hart’s methodological positivistic answer: salient features of law are those picked out as sailent by the folk concept
  - descriptive adequacy to what the ”ordinary man” knows about law is the starting point

METHODOLOGICAL ANTI-POSITIVISM

”Any educated man might be expected to be able to identify these sailent features in some such skeleton way as follows. They comprise (i) rules forbidding or enjoining certain types of behaviour under penalty; (ii) rules requiring people to compensate those whom they injure in certain ways; (iii) rules specifying what must be done to make wills, contracts or other arrangements which confer rights and create obligations; (iv) courts to determine what the rules are and when they have been broken, and to fix the punishment or compensation to be paid; (v) a legislature to make new rules and abolish old ones.” (Hart, CL, 3)

METHODOLOGICAL ANTI-POSITIVISM

- Finnis's critique:
  - agrees with Hart that a legal theorist should explain various social fact by which law is constituted
  - but: to fully understand these social facts one has to understand their point, "their objective, their value, their significance or importance, *as conceived by the people who performed them, engaged in them, etc.*" (Finnis, NLNR, 3)
  - one cannot fully understand a society's legal practices without accounting for the participants' understanding of the point or purpose of those practices

METHODOLOGICAL ANTI-POSITIVISM

- but: there is no universal agreement about the point or purpose of law
- societies vary greatly in their conceptions of the point or purpose of law
- there is no folk concept whose judgments can be authoritative with respect to all legal systems
  - there is no one concept of law shared by every society that has law
  - there are only particular, and perhaps incommensurable, conceptions of law
- is, then, a general descriptive theory of these varying particulars possible?

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- Finnis's way out: adopting a central case methodology (CCM)
  - central case analysis identifies some subset of possible or actual instances of the analyzed phenomenon as explanatorily privileged
  - members of the subset are paradigm or *central cases*
    - privileged because 1) a theory of the phenomenon is primarily concerned with explaining the important features of these case, and 2) they are explanatorily prior to those instances of the phenomenon that are not members of the set of central cases (peripheral cases)
  - peripheral cases: understood as defective, failed versions of central cases

CENTRAL CASE METHODOLOGY

- central case of a legal system is one whose valid norms are at least presumptive moral requirements
- if importance is to be assessed from the ”internal point of view”, then the central case of a LS is one whose norms are generally *treated as reasons for doing or refraining* from certain acts and reasons for criticizing or punishing non-conforming conduct

- to describe the central cases of law a theorist should engage in some moral theorizing to determine *what would have to be true* of a legal system that actually generated moral obligations

CENTRAL CASE METHODOLOGY

- Hart: there are many motivations for treating law as generating reasons for action; differentiating between them does not help us explain any interesting *general* feature of law
- Finnis: we should differentiate between central and peripheral cases of the internal point of view (IPV)!
- central case of the IPV is the perspective of one who *correctly* treats the law as morally obligatory (moral point of view)

CENTRAL CASE METHODOLOGY

- MPV is the one ”that brings law into being as a significantly differentiated type of social order and maintains it as such” (Finnis, NLNR, 14)
- other points of view ”will, up to a point, tend to maintain in existence a legal system (as distinct from, say, a system of despotic discretion) if one already exists. But they will not bring about the transition from the pre-legal ... social order of custom or discretion to a legal order, *for they do not share the concern ... to remedy the defects of pre-legal social orders*” (Finnis, NLNR, 14)

Thank you for your attention!