

The Return of Habits

Author : Sean Coyle

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Sylvie Delacroix, *Law and Habits*, 37 **Oxford J. of Legal Stud.** 660 (2017), available at [SSRN](#).

The article begins by considering two theses from H.L.A Hart: thesis 1) a legal system can be based on official acceptance alone; thesis 2) such a system is particularly conducive to a society that is deplorably sheeplike. The author argues that (2) is correct but (1) is unhelpful or wrong. Hart spells out the sheeplike tendency when he speaks of 'an unreflecting inherited or traditional attitude, or the mere wish to do as others do.' The author wants to interrogate the idea of "acceptance", and to switch the focus from social practices to the habits (patterns of repeated behaviour) that underpin the practices. Hart, it is said, sought to bridge the gap between habits as a social fact and law as social rules, by the concept of acceptance.

The author states that an "emphasis on the necessity to grow out of the habitual through critical reasoning translates a key assumption that structures all non-naturalist accounts of ethical agency: there is a fundamental discontinuity between the natural and the ethical." She defends a type of moral naturalism that gives a central place to habit. For, quoting Hans Fink, "nature is never mere nature." There follows an interesting account of the position of habits (or social facts) in the philosophy of thinkers such as Railton, McDowell and Leiter. In short, the account "highlight[s] the extent to which one's understanding of habit reflects one's meta-ethical understanding of agency." For example, if one's notion of autonomy requires "transcending one's causal environment," then habits "belong firmly to the province of sociology." On the other hand, a naturalist interpretation of human agency will regard habits not only as conditioning but as enabling "normative choices." Hart himself maintained an "agnostic meta-ethical position" in which he utilized habits only as a means of more clearly opposing them to rule-governed practices.

Two strategies were open to Hart: the first, a Wittgensteinian approach, which seeks to demonstrate that rule-following's bedrock is "simply what we do." The second is a Weberian approach which conjectures a continuum from usage, custom, convention and finally legal order (which may then in turn lead to new habits and custom formation). This two-way relationship of law and habit is then subjected to an enlightening analysis in the article's middle section.

The general question of habits is important also in relation to Raz's service conception of authority. Where the law successfully claims authority, it gives us reasons for action that displace a range of dependent reasons and therefore simplifies our practical reasoning. But this tendency of the law leads to a situation in which it is the law that forms the basis of habit, allowing us precisely to avoid reasoning, and act out of habit: we become like sheep. Thus ever fewer people will maintain that critical standpoint toward the law that is necessary for it to retain its authority: the sense that the law does indeed better enable us to comply with demands of right reason.

Returning to Hart, the article's final conclusion is that "a theory of law that dismisses the importance of habits ends up with a poorer concept of ethical agency and a concomitantly truncated account of legal normativity."

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