

Gains and Losses in Jurisprudence since H. L. A. Hart

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Abstract:

The 2014 Natural Law Lecture at the University of Notre Dame Law School presents a balance of gain and loss in Jurisprudence since H. L. A. Hart. After noting first a loss, which is the feeling of confusion evinced by many authors in the tradition of analytical jurisprudence, each one of them pretending to bring new lights to the scene, the paper contends that the main gain has been Hart's recovery of a reason-based explanation of law (and normativity in general), which is considered as a return to some central tenets of natural law theory. I tried to account for this development through an original narrative of Hart's transformation of the tradition of legal positivism after World War II. Some other gains, to some extent derived from the former, are explained: the recovery of moral reasons for action in legal reasoning (not by natural lawyers, but rather by "extreme" legal positivists such as Joseph Raz); the acceptance—with different terminology—of the idea that (extremely) unjust laws are not laws in a fully normative sense, since they ought not to be obeyed or applied by public officials; the extension of reason-based explanations of the law to several fields of legal science. Next, I show similar gains in jurisprudence beyond the English speaking world, considering insights by Joseph Esser, Chäim Perelman, Theodor Viehweg, Arthur Kaufmann, and others. Finally, the paper considers the developments of old and new natural law theories, and the different trends in this tradition. They are appreciated as valuable developments in contrast with some losses due to the influence of different forms of relativism, nihilism, etc.

Keywords:

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