

IS LAW DETERMINED BY MORALITY?

Dworkin and Inclusive Legal
Positivism

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□ legal positivism

- *conventionality thesis*: legal validity can ultimately be explained in terms of criteria that are authoritative in virtue of some kind of social convention
- *social fact thesis*: legal validity is a function of certain social facts
- *separability thesis*: there is no 'necessary' or 'conceptual' connection between law and morality

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- ❑ H.L.A Hart and judicial discretion
 - law is bound to run out
 - law cannot determine an outcome about every possible case
 - in principle, a ban on the denial of justice
 - thus, in some cases a judge is required to *create*, or at least modify, the law that would settle the case (judicial legislation)
- the doctrine of *judicial discretion*

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□ Dworkin's critique

- legal norms: legal rules + *legal principles*
- legal principles do not derive their legal validity from any particular enactment
- legal principles gain their legal validity by a process of (moral) reasoning
- law never runs out and thus judges do not have discretion
- legal principles cannot derive their legal validity from the rule of recognition

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- categorical distinction between rules and principles (Dworkin)
 - a) rules operate in a kind of ‘all or nothing’ fashion; if a rule applies, it *determines an outcome*
 - b) principles only *provide a reason* to decide the case one way or the other; they do not necessarily determine an outcome
 - c) principles have a dimension of weight
- a distinction in degree?
 - less general (more specific) and more general and/or particularly vague norms

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- principles are deduced by reasoning from certain facts and moral considerations (Dworkin)
 1. a case unsettled by the existing legal rules
 2. a judge looks at the legal history of the settled law in the relevant legal area
 3. a judge figures out what are the best moral principles that would justify the bulk of the settled cases
 4. the general principle that forms *the best moral justification* of the relevant body of law is the legal principle that bears on the case at hand

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- observing the relevant legal facts that are established by previous law
- reason to the principle that forms the best moral justification of the relevant body of law
- the conclusion of this, partly but essentially, moral reasoning is a legal principle
- legal principles form part of the law
- law never runs out because the kind of reasoning that leads to legal principles is one that is always available

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- Dworkin's description of judicial reasoning does not necessarily mean that judges *identify what the law is*
 - arg. from judicial rethoric
- an alternative interpretation: the identified principle becomes part of the law because of the judicial decision that applies it
- thus, Dworkin's description is compatible with the view that judges *create* new law
 - in line with the general idea that the law consists of authoritative directives

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- thought experiment:
 - 13 judges of the Constitutional Court of the RC
 - 7 in favour of a moral principle *M*, 6 in favour of *N*
 - decision rendered according to *M*
 - the majority has made a *moral* mistake (principle *N* should have been applied)
 - What is the law: principle *M* or *N*?
- a legal error (Dworkin)?
- What if the Constitutional court systematically errs?
 - a great deal of the law would be legally mistaken!⁹

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- inclusive legal positivism
- it is at least *conceptually possible* for a given legal system to include moral criteria of validity
 - a) law can incorporate moral conditions on legal validity explicitly (by decreeing so)
 - constitutions
 - b) moral conditions of legal validity can be determined by the rule of recognition
 - conventionality of the rule of recognition?
 - law as an authoritative institution?
 - a possibility that a substantial part of the law in a given legal system amounts to a legal error

Thank you for
your
attention!