

Dworkin's Law as Integrity

PHIL 420
Philosophy of Law
Distance Delivery

What Is Law?

- Why it matters
- Disagreements about law
 - Realism
 - Positivism
 - Natural law
- Plain-fact view
- "Threshold Objection"
- The real world

The Cases

- Elmer's case
- The Snail Darter Case
- McLoughlin
- *Brown*

Embarrassing questions

- What is law?
- Nominalism
- Self-refutation

(Legal) Positivism

- **Special set of rules**
 - Their special *pedigree*
 - Can distinguish valid from invalid rules
 - Can settle hard cases
- **Set is exhaustive of the law**
 - Hard cases and discretion
- **Gives us a definition of "legal obligation"**
- **Only a skeleton of positivism**

Examples of Positivism

- **Austin**
- **Hart**
 - Different logical kinds of rules - primary and secondary
 - Rejects orders and substitutes more subtle analysis
 - Rules can be "accepted"
 - Rules that come into existence by secondary rules
 - Rule of recognition

Rules, Principles, & Policies

- Policy - addresses social goal
- Principle - requirement of justice or fairness (rights)
- *Riggs v. Palmer*
- *Henningsen v. Bloomfield Motors*
- Principles seem to control in these cases
- Very different from rules

Rules v. Principles

- Rules are all or nothing
 - Baseball e.g.
- Principles urge in a direction
- Principles admit to exceptions
- Principles have weight or importance
- Principles may conflict

Principles and Positivism

- **Just a new kind of “rule”?**
- **What is the secondary rule that brings them into existence?**
- **Constitutes a major problem for positivism**

Discretion

- **Use of the term in colloquial speech**
- **Actually very limited**
 - **Military**
 - **Baseball**
 - **The law**
- **Hart and “open-texture”**
- **Discretion in hard cases**

Discretion and Political Theory

- The force of the state's power
- The rule of law
- Hard cases
 - Positivism - there is no law
 - Justification for power of the state?
 - *Ex post facto* law?
- Judicial phenomenology
 - Not a two-step process
 - Not an exercise in making new law

“Hard Cases”

- The lecture
- *Harvard Law Review* (1975)
- *Taking Rights Seriously*
- “Model of Rules”
 - Critique of positivism
- “Hard Cases”
 - Dworkin's theory

The Rights Thesis

- Making law vs interpreting law
- Hard cases
- Should be decided by legal principles as opposed to policy arguments
- Democracy
- “judicial decisions enforce **existing** political rights”
- Precedent and institutional consistency

Three Problems

- General statement of rights (principles), but detail of legal decisions
- Precedent and institutional history in hard cases
- Judges must make judgments of political morality, but problems of judicial originality and democracy

Rights and Goals

- Arguments of principle
 - Individual rights
- Arguments of policy
 - Collective goals
- Political aims
- Goals and trade-offs

Principles, Utility, Economics

- Utilitarianism
- Rawls
- Conflicts
- Law and economics
- Economic efficiency
 - Descriptive theory
 - Prescriptive theory

Institutional Rights

- Background rights
- Institutional rights
- Chess example
- Legal rights
- Dworkin's claim that he's not a natural lawyer

Legal Rights

- Legislation
- Intention
- Principle embedded in the law
- Hercules
 - Constitution
 - Statutes

The Common Law

- Precedent
- Seamless web
- The rights thesis
- Mistakes

Second Analytical Paper

Who is Hercules? Using Dworkin's mythical judge as your starting point, explain and critically evaluate Dworkin's theory of "law as integrity" and his "rights thesis." You will want to clearly address how Hercules works outside of the legal positivist, and legal realist, traditions. You might also want to address whether Dworkin (and Hercules) are natural lawyers.

Naturalism

- Hard cases
- Political structure of their community
- Political morality
- *Best* justification for the structure as a whole
- Is this the rights thesis?
- Is this natural law?

The Chain Novel

- How it works
- Need to interpret past chapters
- Hercules
 - Constitution
 - Statutes
 - Common law
 - His political morality
- Rights thesis clear backward focus
- Is this true of the chain novel?

Internal and External Scepticism

- No objective right answer
- *Hamlet* example
- Internal sceptic about *Hamlet*
- External sceptic about *Hamlet*
- External scepticism about the law
- The demonstrability hypothesis
- Internal scepticism about the law

Is It Undemocratic?

- Argument from democracy
- Naturalist and conventionalist judges will decide easy cases alike
- Hard cases
 - Conventionalism - policy considerations
 - Naturalism - arguments of principle

Instrumentalism

- Legal realism
 - Utilitarianism
 - Law and economics
- McLoughlin example
 - Emotional injury awards are a mistake
 - Overrule wholesale
 - Overrule in current case
 - Mistakes
 - Naturalist response

The Political Order

- Naturalism assume the rights thesis
- Instrumentalism denies all of this
- Right to consistent application of the law?
- Ideal of a just and effective system
- The ideal of the system made pure
- Courts as the forum for this second ideal