Phil 324: Law and Morality

Module 4 Reading Guide

# Ronald Dworkin, “The Model of Rules”

## Embarrassing Questions

1. A quick note: This paper is probably the most difficult reading in this course. Take your time (there is no other reading assigned for this module), and don’t think *you* are somehow failing when you can’t make sense of a passage even after reading it multiple times. I find many passages deeply puzzling too.
2. Dworkin begins the paper by introducing the practical implications of conceptual puzzles about the law and legal obligations. What are these implications and why does Dworkin find them “embarrassing”?
3. Please skim Dworkin’s response to the “nominalists” (that is, the legal realists), but do note that Dworkin introduces legal positivism by way of nominalism about the law—he thinks they “differ[] mainly in emphasis.” This seems surprising, and in a puzzling way.

## Positivism

1. **What, according to Dworkin, are the three “key tenets” of legal positivism?**
2. What does Dworkin claim can “chiefly” differentiate different variants of legal positivism?
3. What is the “simple factual test” for the legal validity of a rule on Austin’s account, as Dworkin understands it?
4. Which two “fundamental” problems does Dworkin think Austin’s account has? How might Austin respond? What is Dworkin’s assessment of each of Austin’s possible responses?
5. How is Hart’s account different from—and similar to—Austin’s account?

## Rules, Principles, and Policies

1. How does Dworkin distinguish policies from principles (narrowly construed)?
2. **How does Dworkin distinguish principles (broadly construed) from rules?**

## Principles and the Concept of Law

1. **What, according to Dworkin, are the two ways to account for the role played by principles in an analysis of legal obligation?**
2. In which respects does the difference between the two matter?
3. Which of the two are legal positivists committed to? (The answer turns out to be somewhat non-obvious?)

## Discretion

1. What is the donut hole metaphor supposed to show?
2. **What are the three senses in which someone might have discretion?**
3. Dworkin then quickly dismisses the second sense as irrelevant—it’s not entirely clear what his argument is here. But since legal positivists do not subscribe to the second sense anyway, we probably don’t need to worry too much about it.
4. In the three paragraphs that follow, we are given this highly convoluted discussion of how legal positivists understand judicial discretion. The moral here seems to be this: even though we might think legal positivists subscribe to judicial discretion in the first sense, they (“at least sometimes”?) talk about judicial discretion in the third sense.
5. **What are the three arguments legal positivists might offer for thinking that judges have discretion in the strong (i.e., third) sense? How does Dworkin object to each of them?**
6. **What is this “one strong counter-argument” against judicial discretion in the strong sense?**
7. Dworkin gives us a summary of his argument in the first paragraph on p. 39.
8. Next, Dworkin tries to offer a diagnosis as to why someone might even want to be caught talking about judicial discretion in the strong sense.
9. The last paragraph of this section: this seems to be what Dworkin thinks is the ultimate mistake of legal positivism—they think all laws must be rules, and so a principle that’s not a rule of course has to be extra-legal.

## The Rule of Recognition

1. Here, Dworkin considers the question of whether legal positivism could weaken their view on judicial discretion and just live with the first sense. What, according to Dworkin, are the consequences of this strategy (that is, what other tenets legal positivists will have to give up)? (Don’t worry too much about the details here. The discussion is very difficult to sort through.)