Notes from Scott Shapiro's jurisprudence course podcast.

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Contents

What is law?

What do we mean by the question "what is law?"

- Is legal philosophy an attempt to understand the meaning of the term "law"?
  - This is the semantic theory of law
  - Not an interesting question. Why?
    - Law is an English word – why should we care about a particular English word?
    - Capacious word: applies to things we don't consider to be "law" in the sense of legal rules
      - Think scientific laws, mathematics, grammar
- Instead, we want to know the nature of the thing that the word "law" refers to: nature of legal institutions, rules, rights
  - Not a *semantic* question, but a *metaphysical* one
  - Consider the question "what is the nature of something?" Two approaches:
    1. Could be interested in the identity – the essential properties of an object
    2. Could be interested in the necessary properties
  - Take the number three
    - Identity: number that comes after two
    - Necessary properties: odd, divisor of nine
      - But these don't characterize its identity
  - Legal philosophers want to know both identity and necessary properties of law

The nature of legal facts

- What is a legal fact? Examples:
  - Bulgaria has a legal system
  - In California, it is the law that you are not permitted to drive more than 65 miles per hour
- Legal facts are never metaphysically basic. Whenever a law or legal obligation exists, it always does so by virtue of some other fact(s)
  - C.f. laws of physics, which are metaphysically basic
  - Legal facts depend upon their relationship to other, more basic facts
- What do legal facts depend on? Two possibilities:
  1. Social facts alone. People got together and decided something
  2. Also moral facts
     - Why is it against the law to drive more than 65 m.p.h.? Not simply that legislature and governor decided – it's that people in CA *ought* to listen to what they say
       - Perhaps because they are democratically elected
  - Whichever is true, this is a necessary property of law
    - Matters because if the first is true, then legal reasoning does not involve moral reasoning
      - Just need to figure out which social facts ground law
    - But if the second is true, need to use moral reasoning to figure out what the law is

The debate between legal positivism and natural law theory

- Positivists: the law ultimately depends on social facts, never moral facts
- Natural lawyers: law also depends on moral facts
- John Austin: ultimately, law depends on power
  - Legal facts are legal facts because they have a certain relationship to brute political power, which is a social fact
- Ronald Dworkin: legal facts ultimately depend on moral facts
  - What makes the law a particular way is not just about what political actors have done, but about deep truths about moral philosophy

Chicken or egg?

The possibility puzzle

- Chicken-egg puzzle: rules have come from some entity, but for that entity to have legal authority, there needs to be a rule giving them legal authority, but where did that come from?
  - Ex: Congress enacts stimulus plan
  - Why is that legally valid? Article I of the Constitution
  - Why is Article I legally valid? The Constitution has been ratified, and Article 7 says if ¾ of original states ratify the Constitution then it's valid
  - But Article 7 is part of the Constitution. Seems circular. How can a provision that's part of a document confer legal authority on the document it's part of?
- Conflict between 2 principles:

1. "Egg principle": some body has power to create legal norms only if existing norm confers that authority
2. "Chicken principle": a legal rule exists only if someone with power to do so created it

– End up in a vicious cycle or an infinite regress

- 2 ways of solving:
  1. Deny the egg principle: certain bodies have authority even if there was no rule which conferred that authority
     – Austin does this: law is possible because there is an ultimate authority (the sovereign) who gets authority from pure political power
     – Positivistic solution – grounding legal facts in social facts
     – But anyone who tries to solve the puzzle via social facts like this runs into Hume's puzzle
  2. Deny chicken principle: legal rules can exist which confer authority even if nobody created those rules

Hume's puzzle

- Hume's law: can't derive an ought from an is
  – Normative conclusion has to be derived from a normative premise
- Positivism: legal facts don't depend on moral facts
  – Any kind of argument that establishes existence of legal facts will run into argument that's missing normative premise
- Austin: sovereign is someone who has brute political power
  – This is a positive statement, but the law seem to have normative claims
- Natural lawyers don't have this problem because they think are legal facts also grounded in moral facts, which are normative
- If you don't believe in moral facts, do you have to be a legal positivist? Yes
  – If you don't believe in morality as objective, then the only way you can be a natural law theorist is if you deny that legal facts exist
  – If you accept legal facts, then you can't be a natural law theorist
  – Historically, positivists drawn to the theory because they are skeptical about existence of moral facts
- What if you think moral facts are constituted by social facts, i.e. morality is a social construction? Does that mean you're a positivist? No
  – Social facts themselves are not metaphysically basic
  – In jurisprudence, don't want to worry about methodological issues of what social/moral facts themselves depend on

John Austin's theory of law

- Law has two parts: theory of rules and theory of sovereignty. Law = rules + sovereignty
- All rules are commands: expression of a wish, backed by a threat to inflict an evil if the wish is not fulfilled, issued by someone who is willing and able to act on the threat
  – Austin thought obligations were analytically related to commands in that people are under obligation when another expresses a wish, backed by threat, that they act or don't act a certain way
  – Anytime someone commands someone to do something, they're obligated to do it

  - All rules are "general" commands
- Who is the sovereign?
  - Obeyed by most people most of the time
  - Must not habitually obey anybody else
- Law is general commands backed by threats issued by someone who is habitually obeyed and who habitually obeys nobody else
  - Can derive necessary properties: given what obligations are, all laws impose obligations
- Gives simple solution to the chicken-egg problem – legal facts "bottom out" in sovereign
  - Whether you habitually obey someone is not a normative statement, it's a statement of social fact
- Also solves Hume's puzzle: obligations are not normative, they are descriptive
  - Any legal argument that has obligations as (descriptive) conclusions need not have normative premises
- Ultimate idea: law rests on power, habits of obedience, expresses of wishes backed by threats of sanctions
  - This theory dominant for a century (until Hart's "Concept of Law")
  - But Austin is wrong!

Hart's critique of Austin I

Power-conferring rules

- John Austin: law = rules + sovereignty
  - A rule is a general command
    - A command is the expression of wish issued by someone willing and able to impose an "evil," called a sanction, if the wish is not obeyed
  - The sovereign is someone habitually obeyed by the bulk of population who habitually obeys nobody else
- Necessary properties:
  - A legal system exists when there is a sovereign who issues general commands
  - We know the system's contents: what was commanded and what costs might be imposed if you don't listen
    - Look at *behavioral regularities* between expressions of wishes, obedience, possibility of sanctions
  - Chicken came first: no need to find ultimate rules to convey authority on sovereign
    - Legal facts grounded in social facts (habitual obedience): a positivistic theory
  - Addresses Hume's puzzle: obligations, sovereignty, etc. are descriptive, not normative
- Hart critiques Austin's theory of rules
  - For Austin, all laws are "duty-imposing"
    - Lots of legal rules are: duty not to kill other people, reasonable care, etc.
  - But there are other rules that "confer power"
    - Constitutional law: set of laws that confer power
    - Civil procedure: confer power on private citizens to bring suit, property rights
    - We talk about these rules very differently
  - If you don't conform to a rule that imposes duty, you have "violated" it. You're "guilty"
    - But we don't say that about power-conferring rules
    - If you don't get two witnesses for a will, you're not "guilty" – you just didn't do what the law

tells you to do if you want to have certain kinds of legal effects
  - No punishments or sanctions, but your actions are null and void: they have no legal effect
- Sometimes law is not trying to prevent you from doing something, it's trying to enable you to do something

Nullities as sanctions

- Attempt to rehabilitate Austin
  - No sanctions associated with power-conferring rules?
  - Austin's response: actually, power-conferring rules *are* general commands backed by threat of sanction: nullity
  - If you don't follow the rules, you are "sanctioned" in the sense that what you wanted to do won't be done
- Hart: but there is a difference between duty-imposing and power-conferring rules in their relationship to sanctions
  - Duty-imposing: sanction is logically detachable from rule itself
    - Can imagine a rule without a sanction
  - Power-conferring: can't do this
    - Can't have success without the possibility of failure
  - Sanction associated with duty-imposing rule is designed to make you *worse off* than you would have been without sanction
    - Compare to nullity, which is not the imposition of cost, but refusal to confer a benefit

Kelsen's theory

- Hans Kelsen: agreed with Austin that law is composed of rules always backed by sanctions
  - Power-conferring rules are not real rules; they are fragments of duty-imposing rules which themselves impose sanctions
- Austin expanded category of sanctions to include nullities
  - Kelsen says no, sanctions are what Hart thinks they are, but power-conferring rules are not rules in their own right
- All rules have sanctions built-in
  - All rules are directed at legal officials, not ordinary citizens
  - Direct them to impose sanctions under certain circumstances
  - Ex: a testator has authority to distribute estate according to wishes if and only if they sign the will and two witnesses attest
    - Kelsen: that's only part of the rule. The rule is a long conditional where the antecedent is what the testator has to do, and the consequent is what duties the court is under regarding the executor carrying out the will
    - Rule which seems to confer power on testator is really the conditions under which court is under duty to impose sanction on executor if they don't execute the will
- Hart's response to Kelsen: this distorts the function of the law
  - Function of the law is to guide our conduct: guides testator conduct, guides executor's conduct, guides probate court's conduct...
  - Then it's silly to think all rules are directed at officials to impose sanctions on executors

  - It's backwards to say that the wills law is directed at officials. It's directed at the people who want to write wills, the people who have to execute them, etc.

Hart's critique of Austin II

Duty, command, custom

- Austin: law is general commands backed by threats of sanctions issued by someone habitually obeyed and habitually obeys nobody else
- Hart's critique: Austin says all laws are commands which impose duties, but this ignores power-conferring rules
- Continue Hart's critique: even with respect to duty-imposing rules, is Austin's theory correct? Is it true that they really are general commands, backed by threats of sanctions?
- People obey the law not just because they want to avoid sanctions, but because they think they're morally obligated to do so
  - Austin could say: sure, but what makes it *the law* is that it is backed by sanctions
  - But when we say the good citizen responds to the law because "it's the law," what we mean is not just that they think law has content that is morally good
    - Consider the law against murder: the good citizen doesn't want to take life without justification and the fact that the law tells them not to murder doesn't add to their motivation
  - But there are laws that the good citizen responds to but not because their content is morally good, but simply because the law requires them
    - Whether I should pay my taxes at a certain rate is morally suspect, but the fact that the law requires me to do it means I should do it
- Reason to obey the law is *content-independent*
  - Can Austin's theory make sense of this?
  - No. For Austin, duty-imposing nature of the law is the fact that it's threatening an evil. But the good citizen is not following the law because of the evil threatened against them, but because the law demands it of them, and they think they are morally obligated to do what the law demands of them
  - Austin gets duty-imposing nature of the law wrong by emphasizing sanctions
- Are laws commands? Sometimes. Police officer can tell you to stop, judge tells you to approach the bench, etc.
  - But most laws not imposed by command (created imperatively)
  - Kelsen: in order to command something, you have to know what you're commanding. But legislation is created by legislators who don't know what's happening – no legislator knows what content of an entire bill is
  - Plus, laws apply to legislators themselves. Doesn't make sense to command oneself
  - So Austin is wrong that laws are commands since laws are created in an impersonal, reflexive way
  - Imperative theory of law can't explain the existence of customary law. Stare decisis (look to precedent) is customary but binding. Business customs can be legally binding in contract law
    - But custom is not command
  - Austin would say custom is not law until courts apply it. When they do so (and sovereign doesn't contradict them) then the sovereign has tacitly commanded people to act according to the custom
    - But courts aren't applying custom with the hope that sovereign will let them do it. They are doing so because it's custom, and custom is law

Sovereignty as habit

- Austin rejects the "egg principle": sovereignty depends on habits, not normative entities
- Hart: legal sovereignty possesses a property that habits can't explain – when one sovereign leaves and another takes their place, there's no break in legal continuity
  - Austin can't explain this, since a habit of obedience takes time to form
- Persistence of law: once a law is made, it sticks around until it's unmade, even when lawmaker is no longer there
  - But Austin says all laws are threats, and when person making the threats goes, the threat goes too
- For Austin, sovereign can't be limited by law, since they habitually obey nobody else
  - Idea of constitutionalism is hard to explain
  - Who is the sovereign, according to Austin? Not a person – it's a combination of institutions and individuals
    - In U.K., Austin thought king/queen in Parliament was sovereign
    - In U.S., it's "the people." How do the people obey themselves?
    - Austin: they've commanded themselves wearing their "sovereign" hat. When they obey the law they wear their "subject" hat
- Introduces idea that sovereignty depends on rules (need to distinguish between sovereign/subject capacity with rules), not just habits

Internal point of view

- Hart wants to say Austin got it wrong by trying to rest all law on habits. Rather, the law rests on social *rules*
- Austin was right to think there is a component to social rules that involve behavioral regularities
  - But habits don't have a normative component
  - When you're following a social rule, you think you *should*
  - Judge other people's conduct in this way as well
- Internal POV is not just the insider's POV, but a particular insider: somebody who's internalized the norms of their group
  - Take the group's standard as the standard that guides your conduct and the standard to judge others' conduct
- Social rule is a behavioral regularity and a critical, reflective attitude characterized by internal POV
  - You don't just act like everyone else does. You are guided by standard that you're taking as the way that you ought to act
- Hart says the internal POV is not necessarily the moral POV
  - Can take internal POV because you think it might advance your career, or because people will judge you if you don't
  - Can accept a behavioral regularity as a standard for any reason, but when you've taken it as a standard, you've taken internal POV
  - It's normative, but not a *moral* statement
- Social rule is a social practice: behavioral regularity accepted from internal POV

The rule of recognition

Introduction

- Austin's theory: ignores existence of power-conferring rules, can't explain true nature of duty-imposing rules, can't explain continuity of legal authority, etc.
- Can't explain intelligibility of law: we speak about law as institution that confers rights and imposes duties
  - Can't render normative nature of law intelligible because the theory is based on the non-normative, purely descriptive concept of power
  - Power does not give you enough conceptual apparatus to explain rights, duties
  - Category mistake: just because sovereign can force you to do something doesn't mean you *ought* to do it
  - Need to have law that gives us reasons to act: internal point of view
- Hart says we take law as a guide to conduct and a way to evaluate others' conduct
  - Social rule is not just behavioral regularity, it's accepted from internal POV
- At foundation of law: social rules/practices taken as guides of conduct, reasons for action
- Imagine pre-legal society. All rules are customary: share food in a certain way, choose mates in a certain way, all accepted from internal POV
  - Problem of uncertainty: one part of group says act this way, other says different, no way to resolve this other than by counting heads
  - Problem of stasis: no way to change the rules quickly, have to wait until people's behavior changes and accept it from internal POV
    - You want to be able to change behavior by changing rules. But if the rules are how people act, then the only way you can change rules is by changing behavior
  - Problem of inefficiency: no mechanism, institution to resolve disputes
- Law is a solution to these three problems
  - Uncertainty: rule of recognition is the rule that tells you which rules are binding
  - Stasis: rule of change is the power-conferring rule that says who has ability to change the rules
  - Inefficiency: rule of adjudication is the social rule that designates institution/person to decide whether rules have been obeyed

Properties of the rule of recognition

- Rule of recognition: identifies properties of rules that make it authoritative within group
  - In US: if Congress enacts legislation and signed by President (or overridden), then it's law, and judges have duty to apply/adjudicate it
  - Secondary rule: a rule about other rules
  - Social rule: practiced by group, accepted by internal POV
  - Practiced only by officials. The rule of recognition is addressed to officials, like judges
    - Citizens do not accept the rule of recognition
  - Ultimate rule: its existence does not depend on any other rule
  - Supreme rule: if anything conflicts, rule of recognition wins
  - Tells you order of precedence of laws (ex: federal vs. state)
  - Duty-imposing rule: imposes duty on officials to apply certain rules to cases that arise before them
- Rule of change, adjudication are power-conferring

- Constitution is not rule of recognition – it's a collection of rules of change and adjudication
- Resolve Austin's puzzles:
  - Continuity: Austin cannot explain continuity of legal authority because thinks all sovereignty is derived from habits
    - Hart: rule of recognition says whatever Rex II says becomes law when Rex I dies
    - Continuous practice of rule recognition in the background
  - Persistence: Austin can't explain how rules made 100 years ago still bind, since the threat is no longer valid
    - Hart: rule of recognition says that if rule bears certain properties, then it is still a rule
  - Rule of recognition is a supreme rule, don't need idea of habitual obedience to a sovereign
  - What makes a law a law? Validated by group's rule of recognition
  - Can explain how rules apply to their makers
    - Legal rules are standards validated by rule of recognition, and you can make a standard that applies to yourself
  - Doesn't imply sovereign is above the law, because for Hart, sovereign is *created* by the law

The rule of recognition rules

- Rule of recognition, change, adjudication are not validated by anything else. They are ultimate rules that exist by virtue of being practiced
- Hart: two conditions for existence of legal system
  - Need secondary rules: rule of recognition, change, adjudication
  - Officials have to accept these from internal POV
    - Non-officials don't have to accept these (not addressed to them)
    - They have to follow the law most of the time, but not from internal POV
      - Can obey because afraid of being punished, or habit, doesn't matter
  - Bifurcation: officials have to accept from internal POV, subjects have to obey law for any reason whatsoever
- Hart: essence of law is the union of primary and secondary rules
  - Primary rules are those validated by rule of recognition

Critique of Hart's theory

Hart's solution to the chicken-egg puzzle and Hume's challenge

- Austin's solution: chicken came first, i.e. all law rests on sovereign, who is habitually obeyed and obeys nobody else. No further rule that makes sovereign the sovereign
- Hart says that doesn't work. We need an egg: secondary social rules like the rule of recognition: a duty-imposing rule that sets out the criteria of legal validity
- Who made secondary rules? Hart says nobody deliberately made them, rather, they are just social practices
  - Rule of recognition is created by legal officials listening to certain rules with certain characteristics, criticizing others when they don't
  - Social rules are social practices

- Can a pattern of behavior impose duties? Let's say some judge doesn't follow the Constitution. All judges defer to Constitution and have critical reflective attitude towards that practice. That's a descriptive fact about the world – where is the normative fact, that the judge *ought* to follow the Constitution? This is Hume's challenge
  - How can you get the legal "ought" from the descriptive "is" of social practice?
  - Hart opts for expressivism: there are no normative facts in the world
    - But we can take different attitudes towards descriptive facts – a descriptive attitude or a normative attitude
  - Suppose someone has coronavirus. You can say "this person has an infection and if you get near them, you could catch the virus" (descriptive attitude)
    - Or you can take normative attitude: "Stay away from that person"
    - Not an additional fact – it's a different attitude to the fact that they are contagious
    - Social practice can be engaged with either descriptively or normatively
      - You can take external POV or you can take internal POV – take the social practice as a "to-be-followedness"
    - Law: taking social practice of rule recognition as binding is deriving an ought from the general internal POV of approaching social practice from perspective of "ought"-ness

Are social rules social practices?

- Are social rules social practices? No
  - Seem like a category mistake: rules are abstract entities, but practices are concrete particulars
    - Rules have infinite domains, but practices are finite entities
  - Hart is trying to respond to Scandinavian realism: skeptical about rules
    - They wanted to say rules are just predictions about people would do
    - Hart thinks this is a mistake – rules have internal aspect. But Hart identified the rule with the practice
  - Maybe he should have said rules are *created* by social practices
    - This doesn't work either
    - Can have social practices without rules: don't take your laptop into the shower
    - Some social practices give rise to rules. But we need to know what kinds of social practices give rise to social rules
      - Does the rule of recognition fall into this category?
- Perhaps the kind of social practices that give rise to social rules are *coordination conventions*, which are recurring solutions to coordination problems
  - Practice/convention to drive on the right side leads to a social rule
  - Everyone tips 20 percent leads to a social rule
  - Perhaps following same rule of recognition is a coordination problem and gives rise to social rule
    - This is incorrect
    - You follow a coordination convention because other people do so. Do officials in US follow Constitution because other officials do so?
    - It's not arbitrary, like driving on right side of the road – officials have allegiance/respect for Constitution
  - Theory of law should not insist that judges are motivated for this particular reason

Expressing yourself legally

- Hart's solution to Hume's challenge: legal facts are just social facts but where we take a particular normative attitude (internal POV)
  - You can take internal POV for any reason, as long as you're committed to those social facts
  - Causes problems:
    - Suppose bad man only follows the law because doesn't want to get punished. You don't have to be committed to law to figure out what law is
  - Hart's solution is not right – can engage in legal reasoning without taking internal POV
  - Can have selfish reasons for internal POV. Defendant says to judge: the only reason you're saying I broke the law is that you want to pick up your paycheck. How can I be punished because you just want to pick up your paycheck?
    - Judge criticizes defendants for reasons that don't apply to them
- But Hart was right to say the law rests on rules, which rest on normative commitments

The Hart-Dworkin debate

Principles in hard cases

- Dworkin says Hart didn't answer "what is law"
  - Critiques Hart's positivist view, which Dworkin says has 3 theses
    1. Every legal system has master test which distinguishes legal norms by pedigree (the way they were created rather than what they are)
       - Pedigree is the institutional source
       - C.f. content, which asks, is it a good rule?
    2. When rules run out, judges exercise discretion
    3. There are no legal obligations in the absence of legal rules
  - Dworkin takes positivism to be a model of rules and argues law contains more than just rules
- 1st thesis: Alludes to Hart's rule of recognition
  - Dworkin doesn't specify it must be a social rule, like Hart does
  - Hart doesn't say anything about pedigree of rules, which Dworkin imputes

Rules vs. principles

- 2nd thesis: seems trivially true
- Dworkin uses specific characterization of a "rule": a norm that has an all-or-nothing character, c.f. a principle with "dimension of weight"
- Speed limit is a rule, applies in all-or-nothing manner
- Principles can conflict, unlike rules
- Dworkin says positivists think law is just rules, not principles
- Weak discretion: exercise judgement in order to carry out an order
  - "Do this at your discretion" means your decision is not subject to review, but you're under an obligation to do *something*
- Strong discretion: under no duty/obligation at all
- Positivists say when rules run out, judges exercise strong discretion

  - No more rules, thus judges not under any duty to apply rules, thus they choose whatever standards they want
  - Dworkin thinks this is a bad description of legal practice. Judges don't follow 2-step procedure: (1) check if rules apply (2) if not, make new law
    * They always act *as if* there is law to apply
    * Because law consists of principles as well as rules
- In hard cases, rules run out but legal principles do not. Judges must weigh them against each other to figure out what to do
  - Exercising weak discretion
- Does Dworkin mischaracterize Hart?
  - Hart would have accepted that in addition to all-or-nothing standards, there are legal principles
  - Dworkin trying to explain why Hart insisted judges exercise strong discretion
  - Hart thought the law often runs out, so judges often exercise discretion and act like legislators
- If you're a positivist, you have to insist the law runs out since it depends on social facts alone
  - There is a limit to guiding people's conduct through social guidance
- Legal principles are legal because of their content, not because of their pedigree
  - Dworkin says this conflicts with first thesis
- In hard cases, judges look to principles
  - Thus the law doesn't consist of just rules (no strong discretion)
  - Thus the rule of recognition can't identify principles as legal principles because legality derives from content, not pedigree

Exclusive vs. inclusive legal positivism

- What can positivists say in response? Dworkin assumes all norms that courts under duty to apply are law
  - But can be under duty to apply norm that is not a *legal* norm
  - When court looks outside the law to morality, judge is not converting moral principles into the law
  - When pedigreed rules run out, judges are under obligation to look to morality, but this doesn't make morality law
  - Exclusive legal positivism: moral rules can never be legal rules
- Another response is to deny Dworkin's characterization: inclusive legal positivism
  - Rule of recognition says that when pedigreed standards run out, non-pedigreed standards win
  - Accepts the idea that rule of recognition can incorporate non-pedigreed norms
- ELP: just because you're under obligation to apply moral principles, that doesn't convert moral principles to legal principles
- ILP: rule of recognition can carry non-pedigreed standards. Law can be picked out by moral facts as long as social facts tell you to pick them out

Hart on interpretation

Formalism and open texture

- Hart is trying to find middle ground between formalism and legal realism
- What is formalism? Committed to 4 theses:

1. Judges must always apply the law and can't override it
2. Determinacy: for any question, law has an answer. There is always law to apply
   - Thus, law can't just be a list of rules, or it would have to be infinite
3. Conceptualism: In order to derive the law, one has to know a set of general principles from which it is possible to interpret concepts to derive the answer in a particular case
   - There are not an infinite number of rules, just a handful of general principles in any area of law
4. Amorality of adjudication: judges are not supposed to engage in moral reasoning

- People think legal positivism (law rest on social facts alone, not moral facts) implies formalism
  - If law doesn't depend on moral facts, there are no moral facts to use when judges are deciding cases, so positivists are necessarily formalists; therefore positivism is wrong
- Hart says positivism is not committed to formalism
- Why is formalism dumb? Judicial opinions are filled with moral arguments about "what justice requires" or "virtuous behavior" or "obscenity"
- Hart wants to argue positivism implies *anti*-formalism
  - If you think there's always law to apply and judges are always supposed to apply it and never use moral reasoning, then it follows that law doesn't depend on moral facts
  - But that's because you've assumed formalism is true (formalism $\rightarrow$ positivism)
- There are 2 ways to guide conduct, both incomplete:
  1. Precedent or authoritative example
     - Pointing to some person/action and saying "do that"
  2. General rule
     - Say "men are supposed to take their hats off in church"
  - In either case, there are gaps in guidance
    - Precedent: how similar to precedent does it have to be? Narrowly, broadly?
    - General rule: what do you mean by "hat," "church," etc.?
  - Hart: General terms in natural language have "open texture" or vagueness
    - No way in natural language to get rid of this vagueness
    - General terms have a "core" of settled examples and a "penumbra," an area of vagueness
    - Can't get around this by introducing more rules, since more natural language would have its own open texture
    - What if you say "when it's vague, decide in favor of defendant"?
      - But "vagueness" and "open texture" are themselves vague and open-textured, leading to higher-order vagueness
- "Limits of the social" argument: insofar as positivism believes that law is a set of standards that are picked out socially, law is going to be necessarily indeterminate because it can't cover every conceivable case
  - Because either you pick out law through authoritative example or you're using general terms in natural language
- Positivism implies anti-formalism: judges are going to have to rely on moral judgement to decide cases because they're going to run out of law to apply
- Judges may act like they're finding the law, but when they apply morality to decide cases, they're making new law
- Legal realism: reaction to formalism. Judges take principles and use them to make decisions based on policy considerations
- Can't get from principles to a specific case without using normative reasoning, and it's disingenuous to

pretend otherwise
  - When judges look at past cases, there just aren't enough cases to say "this is what we should do"

Rule skepticism

- Hart says you can't be a skeptic about primary rules
  - You can't say courts never follow the law, because there wouldn't be courts without the law that establishes the courts
- Mistake to point to open texture as proof that law is indeterminate
  - Yes, law has area of open texture, but also has area of settled meaning, a core
  - So you also can't be a thoroughgoing skeptic about secondary rules
- Can be skeptic about complicated cases: Supreme Court decisions, cases in the penumbra – no law to apply in these cases
- Hart: people confuse finality with infallibility
  - Decision can be final but wrong
  - E.g. impeachment: what is a high crime or misdemeanor? Whatever the Senate says it is? No. It is true that nobody can challenge the Senate's decision about conviction. The decision is final, but it could be wrong
- Dworkin challenges the idea that when judges are looking to moral principles, they are making law
  - He thinks they're still *finding* law, it's just that law depends on moral facts as well as social facts
- When it comes to resolving questions regarding the rule of recognition, judges make a decision, and if others accept it, it is the law going forward, because a new extension of social practice will have been formed
  - When it's accepted, it becomes part of the rule of recognition
  - The fact of acceptance makes it correctly decided (retrospectively)

Fuller's critique

- Judges are supposed to think about the purpose of the law
- Because we think judges should approach legal interpretation by considering statute's purpose, it's a mistake to think law and morality are separate
  - The judge, in looking to purpose, is trying to figure out what you *ought* to do
- Hart's positivism can't explain intuition that looking to purpose is important
  - This is wrong. It is possible to talk about purpose of statute without thinking about morality, e.g. what were legislators trying to achieve in enacting a regulation? These are social facts

Hart on law and morality

Justice in law

- Law is necessarily indeterminate. Social acts of guidance run out because
  1. For guidance via example/authoritative precedent, we don't know how close your case is to the precedent
  2. For guidance via general rules, natural language has open texture
  - Judges look to morality when law runs out

  - But when they figure out what the law is, they look to the core; not the same as looking to morality
- For Hart, legal positivism means law and morality are not necessarily connected
  - Our definition of positivism is different: legal facts rest on social facts alone, not moral facts
  - Law and morality are obviously connected in certain ways
- Law and justice have an important connection, seem to go together
  - Not everything that is morally bad is unjust, like tripping somebody
  - Justice is maintaining or restoring balance of benefits and burdens
    - Lots of different types: distributive, retributive, etc.
    - Formal justice: treating like cases alike
    - Law seems to involve an element of formal justice
      - When you follow the law, you necessarily treat like cases alike
      - Hart calls this "justice in application"
  - But there is a difference between justice in application and justice in the rules themselves
    - E.g. Jim Crow laws
- Law and morality are similar, but have important differences
  - Similarities:
    - Legal and moral rules often coincide: ther are rules against assaulting people, engaging in fraud, destroying others' property...
      - Morality tends to be more general (doesn't specify how fast you should drive)
    - Binding without consent: you don't agree to moral rules or to the law
    - Constitute floors of acceptable behavior
    - Supported by social pressure for conformity
  - Differences:
    - Moral rules are almost always important; legal rules can be trivial
    - Morality immune to deliberate change: can't repeal morality
    - Morality has an element of voluntariness: you can always say "I couldn't help it"
    - Moral rules are backed socially; law is backed by financial and physical sanctions (in addition to social pressure)

Minimum content of the natural law

- Natural law typically seen as the opposite of legal positivism: argues there is a necessary connection between law and morality
  - Again, our definition is different: legal facts rest on moral facts
  - "Natural law" sometimes taken to mean that morality is objective and discoverable by human reasoning
- Hart: doctrine of the minimum content of the natural law
  - Hart: law and morality are nomologically connected – it's *necessary* that human beings will have to have moral rules as part of their laws
  - Law is geared towards social survival, hence there are rules to protect life, limb, and property
  - 5 features that necessitate these kinds of rules: We are...
    1. Physically vulnerable to one another
    2. Roughly equal
    3. Altruistic to a limited degree

4. Living in a world of scarcity
5. Rational to limited degree

- Need rules to live together
  - Survival of group protected by rules, but that doesn't mean rules are just to everyone
- Nomological necessity doesn't imply a morally just legal system

Normative legal positivism

- Every legal system requires not just coercive power, but acceptance of authority
  - 2 claims: some have to take internal POV, and some have to accept legitimacy of authority
  - First claim doesn't imply law and morality are connected
    - Some people have to take internal POV, but they can be small subset
    - Can take internal POV for reasons that don't deal with morality
  - Second claim: Weber argued that any legal system must be based not just on coercion but on acceptance of authority by majority of population
    - This is again nomological but not metaphysical
- Law contains many moral terms, but this doesn't mean law and morality are necessarily connected
- When judges exercise moral discretion:
  - They can make mistakes, which leads law and morality to come apart
  - They go beyond the law – morality plays a role precisely because law has run out
- Seems as if our standards for evaluating legal systems use moral considerations
  - A "good" legal system is a *morally* good legal system
  - True that we evaluate law based on moral considerations, but law may fail to actually be good and it's still a legal system
- Law implies justice in application
  - But again, formal justice doesn't imply rules themselves are just
- Hart: If a law is unjust, you shouldn't obey it, so it seems as if law and morality are necessarily connected
  - True, but the law you're not supposed to obey is still the law
  - Shouldn't confuse the idea that one is *legally* obligated to follow the law, with the idea that one is *morally* obligated to follow the law
  - Natural lawyer says if law is not just, it's not law; positivist says it's still law, it's just law you shouldn't obey
    - How do you critique unjust law if, under the natural law view, it's not law?
- "Normative legal positivism": the reason we should be legal positivists is that, morally speaking, we act better if we treat unjust laws as laws instead of denying that they're laws
  - Argument on moral grounds for being legal positivist
  - But this is a bad way to argue for positivism
    - How do we know the best way to get people to act morally and disobey unjust rules?

Law's Empire strikes back

Recap

- View that positivism implies formalism
  - Formalists believe that judges never use moral reasoning
  - Seemed that positivists are committed to this idea since they think law rests on social facts alone
    - So positivists would say judge should never rely on moral reasoning
  - Hart says positivism actually implies *anti*-formalism
    - Social facts can't pick out comprehensive standards of guidance ("limits of the social")
    - Picking exemplars or using general terms always has areas of indeterminacy
    - So judges inevitably have to rely on moral reasoning
- Dworkin says judges *never* act as though the law is indeterminate
  - Always act as though there is law to find by looking to principles that are valid because they are morally appropriate
  - Not as though the law is indeterminate and judges make new law
  - So formalism is true and therefore positivism must be false
- Inclusive legal positivism: judges do look to morality, but social facts say that moral facts are relevant
  - Rule of recognition says that when socially designated standards run out, they should look to morality
- Exclusive legal positivism: the fact that judges look outside the law does not make these extra-legal standards the law

Dworkin's critique of legal positivism

- Dworkin shows why the legal positivist response won't work using a new critique: "the problem of theoretical disagreements"
  - Most powerful objection to positivism
- Dworkin distinguishes *propositions of law:* statement of a legal fact in a particular jurisdiction, which can be true or false by virtue of the *grounds of law*: the facts that render a proposition of law true
  - Ex: Propositions of law in California are true if a bill that expresses the proposition is approved by a majority of the legislature, signed by governor, etc.
  - In Hart's terminology, grounds of law are part of the criteria of legal validity
- Dworkin says people can disagree about the grounds of law in 2 ways:
  1. Empirical disagreement about whether grounds of law are satisfied in a given case
  2. Theoretical disagreement about what the grounds of law *are* in a particular legal system
- Dworkin says according to positivism, all disagreements about propositions of law are really empirical, never theoretical
  - But it is common for legal actors to have theoretical disagreements and positivism can't explain this
- Dworkin says positivists accept "plain-fact" view of the law:
  - Grounds of law are the facts that people agree render propositions in that jurisdiction true
  - Grounds of law must refer to matters of historical fact/pedigree
    - This is saying all positivists are exclusive legal positivists
    - But most people are inclusive legal positivists

- Dworkin says there are disagreements about grounds of law: which facts you look to in order to determine whether a proposition is true or false
  - Positivists can't explain this because for them because for them grounds of law are determined by consensus
  - If there's disagreement, then something cannot be a ground of law
  - For positivists, disagreement about grounds of law leads to incoherence

Constructive interpretation

- No way out of this by being an exclusive or inclusive legal positivist: for both, the grounds of law are determined by consensus
  - Difference between them is on what kinds of things there can be consensus on
    - Inclusive legal positivist says consensus on moral facts is still law
- Counterargument: positivism is correct but legal actors are incoherent
  - But this is not a small disagreement, this is a fundamental feature of law: it is determined by consensus among legal actors
- Another counterargument: legal actors argue for things they don't believe in, even if they involve conceptual mistakes
  - But it's not the fact of the theoretical disagreement itself that is insincere, it's that they're arguing for a specific position
- Analogy to literary criticism: theoretical disagreements about what Shakespeare meant, not empirical disagreements about what he said
  - At bottom, having a disagreement about what makes literature valuable and what kind of methodology would make it the most valuable it could be
  - Constructive interpretation: "imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong"
  - Ask "what makes literature great?" and then pick a methodology that reflects that
  - In law: imposing moral theory about what makes law valuable, grounds of law are the ones that make law morally the best that it can be
    - How do you make legal practice the best it can be? The interpretation that best *fits* and *justifies* legal practice
- Fit: extent to which it approves of the object's existence or its properties
  - One purpose fits better than another when it recommends behavior that more closely matches observed conduct
  - Ex: 2 interpretations of Christmas: rank commercialism vs. goodwill and peace on earth
    - Former fits better because practice of Christmas is more in line with rank commercialism than peace on earth
- Justification: which of the purposes is more morally justified
  - Goodwill and peace on earth is more justified than rank commercialism
- How to balance the two? Maybe justification is more important: Christmas is better when we see it as goodwill and peace on earth

Law as integrity

Concept vs. conception

- Positivists say law ultimately depends on social facts
- Dworkin says no, morality is at the foundation of law – judges look to morality in hard cases
  - Positivists say rule of recognition has moral principles as criteria for validity
  - Exclusive positivists: judges using moral principles doesn't make them into legal principles
- Both exclusive and inclusive legal positivists accept the idea that criteria for legal validity (grounds of law) are determined by consensus
  - Dworkin: that assumes there is consensus, but there are theoretical disagreements about what the grounds of law are
  - Positivists can't explain the possibility of disagreements
- Constructive interpretation: imposing purpose on social practice so it can be the best possible example of the thing it is
  - Of the law: make legal practice the best it can be, morally
  - Need fit and justification
- Which grounds of law fit and justify legal practice?
- For Dworkin, 2 stages to legal interpretation:
  1. What are the grounds of law?
  2. In a given case, do the grounds of law apply? In order to figure out which propositions are true and decide the case
- Dworkin approaches the first state in two substages: figure out concept of law, then the right conception of law
  - Concept: what would make the law the best it can be at very abstract level
  - Conception: more precise characterization
    - 3 different conceptions, ask which one makes the law the best it can be
- Concept of law: law is about ensuring that the state does not use coercion unless it is compatible with the rights and responsibilities that flow from past political acts
  - Dworkin thinks everyone will sign onto this, but maybe this doesn't hold up
    - Law doesn't just *limit* the state, but *guides* the state

Conventionalism

- 3 conceptions that purport to make law the best it can be
  1. Conventionalism
  2. Pragmatism
  3. Law as integrity
- Conception: interpretation of a particular legal practice (e.g. American law), purports to identify 2 things:
  - The moral purpose of the practice
  - The sets of facts such a purpose commends as the grounds of law
- A conception of law should fit and justify the practice
  - Fits: facts it identifies are actually the grounds of law recognized by officials
  - Justifies: purpose it assigns to law is morally justifiable

- Conventionalism: rights and responsibilities flow from past political acts when they are specifically decided by those acts
  - To identify rights and responsibilities, look to the conventions of the system
  - Purpose: to give people fair warning and protect their expectations about how the state is going to act
  - Grounds: those given by convention
  - If you respect convention, then you will be protecting people's expectations and giving them fair warning because everyone knows what the conventions are
  - Sounds like exclusive legal positivism, but it isn't
    - Positivism: convention determines what the law is, but not because this makes the law the best it can be
    - Conventionalism is the "Dworkinian spin" on positivism
  - When conventions run out, act in the way you think is best
    - Gives judges flexibility
  - Does it fit?
    - No. Even when conventions run out, people still disagree about what the grounds of law are, and judges still feel constrained by the law
  - Is it justified?
    - No. Balance between fair warning and flexibility doesn't track cases where there's convention or no convention
      - Sometimes good to have flexibility even when conventions are clear
      - Sometimes good to protect expectations even when there are no conventions
- Pragmatism: Richard Posner's theory of interpretation – rejects the idea that the past constrains the present
  - Judge should make the decision that maximizes community welfare
  - Skeptical conception of law: what legal officials did in the past doesn't matter
  - This doesn't fit the way judges think of past political acts, nor does it seem justified
- Law as integrity: rights and responsibilities flow from past political acts when they are conferred and imposed by principles and policies that portray these political acts in their best light
  - If we want to know what makes the law the best it can be, law as integrity says: grounds of law should be determined by the principles and policies that make the law the best it can be
  - The purpose that is furthered by those grounds of law is the ideal of integrity
    - Integrity: acting according to the set of principles and policies that are consistent across all members of the community in all cases
    - "Requires governments to speak with one voice, act in principled and coherent manner towards all its citizens"
  - If we treat some members of a community some way, even if we treated them that way mistakenly, ideal of integrity requires that we treat other members that way too

Hercules

- Rawls's theory of justice: justice as fairness
- Dworkin: like the best interpretation of justice is fairness, the best intepretation of law is integrity
- Grounds of law are those which present past political acts in their best light
- Does it fit?
  - Dworkin says yes, because it can explain something that other conceptions of law can't: our

abhorrence of "checkerboard statutes"
    * Checkerboard statute makes arbitrary distinctions on matters of important principles
  – This is an unfair comparison. Conventionalism fits some aspects of legal practice just like law as integrity fits some aspects of legal practice
  – You could say law as integrity doesn't fit because of federalism, which is a kind of checkerboard solution
- Is it justified?
  – Wny is state justified in imposing coercion? Not because we consented, not because it's fair, but because we're part of "fraternal community" where we live according to same set of principles
  – Generates associative obligations to obey the law
  – To investigate this, you need to do serious political philosophy
- If you accept law as integrity, how do you intepret the law? This is the second stage
  – Dworkin says look at principles that will put past political acts in their best light
    * Need to take into account *all* past political acts – need to be superhuman
    * Dworkin calls his judge "Hercules"
    * Thinks of the judge as a moral-political philosopher; legal issues always pose philosophical issues

Why I am not an inclusive legal positivist, part I

Raz on authority

- Possible content of rule of recognition
  – Inclusive legal positivism: criteria of legal validity can be anything, as long as legal officials accept them
  – Exclusive legal positivism: law has certain constraints, so a norm is not a legal norm just because it's morally appropriate – need some institutional source
- Most positivists are inclusive legal positivists
  – Seems like it's descriptively superior: constitutional provisions of many legal systems formulated in moral terms (e.g. "cruel and unusual punishment", "human dignity shall be inviolable")
  – Easiest way to respond to Dworkin: judges look to principles in hard cases because rule of recognition requires them to do so
- Joseph Raz's argument against inclusive legal positivism
  – A necessary feature of all legal systems is that they claim justified practical authority over a population
    * Claim moral authority to impose obligations on citizens to obey its directives
  – If that claim is to be intelligible, legal system must be capable of exercising authority
  – When does the law have legitimate authority?
    * When legal officials are believed in their claim to authority by some part of the population – they are *de facto* authorities
  – Service conception of authority: legal systems have legitimate authority when they provide a service
  – Each of us constantly faced with the question "what should I do?"
  – We balance the "first-order reasons for action" and choose the best-supported action
  – Sometimes rationality suggests that we should not attempt to engage in balancing of first-order

reasons; sometimes we should ignore the reasons we have
    * Why? If doing so would enable us to act on balance of first-order reasons better than if we complied with them directly
    * Second-order reasons to exclude first-order reasons
        · Ex: make a plan in advance because you know in the moment you'll mess up the balancing of first-order reasons
  - Raz says legitimate authorities provide us with second-order, exclusionary reasons
  - Normal justification thesis: normally, authorities give us directives so that, by following them, we better conform to reasons we have independent of those directives than if we tried to conform to those reasons directly

The argument from authority

- When is it possible to have legitimate authority? When directives are second-order exclusionary reasons that help you fulfill first-order reasons. 2 cases:
  1. Coordination: by following directives of authority, can contribute to realization of public goods
  2. Expertise: authorities know how the first-order reasons apply to us better than we do (public health, national security, environmental protection)
- Necessary that interpretation of authoritative directives can't depend on first-order reasons they are intended to exclude and replace
  - But this is what inclusive legal positivism allows subjects of authority to do
  - Inclusive legal positivism says criteria of legal validity could be moral fairness of a norm
  - But the whole point of a legal directive is to replace those reasons and exclude them from your deliberation
    * Fairness is a first-order reason for action – law is supposed to consider these and issue a directive that excludes and replaces that first-order reason
    * But the inclusive legal positivist says you can consider those first-order reasons when you decide whether that directive is authoritative
    * That undoes the very idea of having the authoritative directive
  - If in order to know what directive is you have to answer the question the authority is claiming to answer, the purpose of having legitimate authority evaporates
- 2 problems with this:
  1. Links two things a positivist wouldn't have linked: conceptual question of what law is with the moral question of when it's legitimate
     - Conceptual: all law claims legitimate authority
     - Moral: theory of when law generates moral obligation to obey
     - Linking the two: in order to know what the law is conceptually, you have to know when it's justified
       * Weird for positivist to say that what the law is depends on the political philosophy of when it's justified
       * Sounds much more like Dworkin
  2. To claim legitimate authority, you must have it
     - Makes anarchism an incoherent theory because anarchism says law claims authority but doesn't have it

The practical difference thesis

- Inclusive legal positivism: certain legal rules can't guide conduct, only *pedigreed* rules can
- Positivists think function of law is to guide conduct
  - Norms cannot guide conduct
  - Law must make a practical difference to our reasoning
- In order for a rule to guide conduct, it has to motivate you to act in a way differently than if you hadn't appealed to the law
- Can't say law is guiding conduct if appealing to it never makes a difference in how you act or how you're motivated to act
- Moral principles that lack institutional sources can't make practical differences
- If inclusive rule of recognition makes a practical difference, the moral principle validated by it can't make a difference
  - Rule of recognition tells judge to follow morality, so regardless of whether they follow the actual moral principle, they do the same thing
- Argument doesn't work for exclusive rule of recognition
  - Law passed does make a difference: if law is repealed, judge might act differently
  - Doesn't work for moral principles because these can't be repealed

Planning theory of law I

Planning

- Conclude neither positivist theory (Austin, Hart) are successful
- Dworkin's alternative: legal facts ultimately depend on moral facts as well
  - Possibility of theoretical disagreements
- Alternative positivistic theory that tries to integrate law with other phenomena in non-legal sphere – activity of planning
  - One area where everyone is a positivist: plans
  - If we plan to take the train to the beach, morality has nothing to do with it
  - We can think of legal activity as social planning
- Starting point: "legal activity" is what legal officials, legislatures, courts, administrative agencies do
  - Creation, application, enforcement of legal norms
  - Legal activity is activity of social planning
    - Deciding actions we may or may not do and which people have the authority to decide what we may or may not do
- What is planning? Michael Bratman says what makes human beings unique is not just that we're rational (means-ends calculations) but that we have the ability to plan
  - Incremental: we fill in our plans over time
  - Past decisions form a framework that guides new decisions
  - Hart: we don't want all legal rules to answer every question, want to leave open texture for judges to decide
  - This is the way planning works: leave degree of flexibility to fill plan in as future becomes the present
  - Legislation also has this "fill in as you go along" structure – it becomes more specific, determinate

over time

Law as a planning organization

- Legal activity is not just the activity of social planning, but also a *shared* activity
  - Something that legal officials do together
  - Legal officials are following shared plan, which tells them what each of their roles are
  - Hart's rule of recognition is part of this shared plan, part of the way legal officials coordinate
- Legal activity is *official* – those who engage in social planning inhabit offices, stable/permanent positions of authority where turnover of occupants is possible and expected
- Legal activity is *institutional* – legal relations obtain independent of intentions of people involved
  - If shared plan validates a proposed plan (e.g. a majority of legislators vote yes), then the law is legally valid regardless of why the legislators voted that way
  - Laws are not commands because you can enact laws without knowing what they are
    - Social plans can be created as long as people follow the shared plan – they may not intend to create the plan they are creating
- Legal activity forms an *organization*
  - Parents are not legal systems: they are shared planners, but they don't form an organization
  - Their planning is not institutional (you have to *know* what you're planning for your kids)
- Legal activity is a *compulsory* planning organization – you can't say you didn't consent to a particular law

The moral aim thesis

- What kind of compulsory planning organization is the law?
- If you think of law as an organization, participants engaged in collective activity because they accept a shared plan, then it's easy to see why legal positivism makes sense: organizations are created through intentions/actions of groups (social facts)
  - Morality seems to play no role
  - Positivism becomes an obvious position to take
- But purpose of legal organization is moral in nature
  - Fundamental aim of law is to rectify moral deficiency associated with circumstances of legality
  - Meet moral demand of circumstances of legality in efficient manner
    - Enable communities to solve numerous, serious problems that would otherwise be too costly/risky to resolve
  - Doesn't give up on positivism: law has a moral aim, but it doesn't have to satisfy that moral aim in order to be law
    - Constitutive aim of an assertion is to tell the truth, but it's still an assertion if the person is lying
    - Legal systems that don't solve moral problems they're supposed to solve are still legal systems, they're just bad/unjust
  - Motivations/justifications
    1. Modern life needs law because we have complicated moral problems
    2. Legal systems unable to solve serious moral problems are criticizable
    3. Consider criminal organizations. They are institutional, compulsory, but they are not legal systems because we don't think of them as aiming to solve a moral problem – they are part of

the moral problem of the circumstances of legality
    * When organized crime does something good, we think of it as serendipitous, but not so with the law
    * We think the law is *supposed* to solve moral problems, unlike criminal organizations
- So far, what is law: compulsory planning organization with a moral aim
  - But not all compulsory planning organization with a moral aim are legal systems
  - Consider a condo board: creates rules for residents, applies them in cases of dispute. Constituted by officials whose intentions are irrelevant, rules binding irrespective of consent. Aim to solve problems that can't be solved through other forms of social ordering. But not a legal system! Why not?
  - Maybe: legal systems always claim *supreme authority*, and Florida law trumps the condo rules
    * This argument doesn't work because then Florida wouldn't have a legal system either, since federal law supersedes Florida law
- Although state law must comply with federal law, federal law automatically presumes state law complies with federal law
  - Federal law gives states the benefit of the doubt, allows them to make and enforce law without first checking
  - By contrast, states afford nothing comparable to private actors
  - Not enough for rules made by private actors to be in compliance with state law. They are not allowed to enforce laws unless private actor demonstrates compliance with state laws
  - State police can yank skinny dipper from pool. Condo board can't do that – they need to call police, prosecutor needs to be involved
    * Condo board doesn't enjoy same presumption of validity/compliance as state government
- Legal systems are *self-certifying* systems
  - Planning organization is self-certifying when it enjoys *presumption of validity* from superior planning organization
  - Thus, condo board is not a legal system, but Florida law is

Planning theory of law II

Solving the puzzles

- Possibility puzzle: legal authority needs norm that confers power, but need someone with legal authority to confer that power
  - Planning theory follows "egg" principle: all authority comes from norms of instrumental rationality
  - We are planning creatures, able to coordinate across time and people, and through this form of partial-staged deliberation we solve problems we couldn't otherwise solve
  - The foundation of legal system is a shared plan – most officials accept their part in the plan
  - Ability to adopt and share a plan is unmysterious
  - Planning theory rests legal authority on power of planning agents to adopt norms to coordinate activities over time and across persons (instrumental rationality)
- Austin: all laws backed by sanctions, ultimately rest on power
  - Plans can be duty-imposing or power-conferring
  - No problem with continuity/persistence (sovereign dies, power passed on because shared plan says new person is sovereign)
- Hart: assimilated social rules of recognition, change, and adjudication to behavior of legal officials

  - We said norms/behaviors are different things, practices are not rules
  - Plans are something separate from behavior conforming to the plans
  - Not all social practices generate social rules – e.g. shouldn't drop the toaster in the bath
    - Hart failed to specify what kinds of practices generate rules
  - Plan has to be created with group in mind, accepted by most of officials. Thus not all social practices generate shared plans, only the ones that involve plan adoption and sharing
  - Unlike Hart, planning theory melds all secondary rules into "master plan" for the system
- Hume's challenge: how is it that merely by adopting a plan, legal authority and obligations can be generated?
  - How do we get obligations, rights from social facts alone?
  - Plan could be highly unjust
  - Doesn't generate *moral* obligations, but generates normativity that comes from instrumental rationality (rational obligations)
  - How do you get legal obligations out of mere instrumental rationality? You don't
  - 2 roles that the word "legal" plays:
    1. Adjectival interpretation: "authority" and "obligation" are moral concepts,so "legal authority" is a moral authority of a certain sort, but a legal moral authority – arises by virtue of being part of legal system
       - Can't get moral obligations from mere social facts
    2. Perspectival interpreation: way of distancing from claims of moral obligation/authority
       - From the perspective of the law, have moral authority/morally obligated to do something
       - From the *legal* POV, you're obligated to do something – way of being agnostic towards claims of the law
       - Legal POV is a moral theory according to which the shared plan of legal system allocates rights and responsibilities correctly
         - This POV says the shared plan is the morally right plan
       - Social facts that generate shared plan also generate a normative perspective that sees shared plan as morally appropriate
       - So can generate moral obligations if using the word "legal" perspectivally

Why I'm not an inclusive legal positivist, part II

- A plan cuts off deliberation about what you're supposed to do under certain circumstances
  - Don't balance reasons; point of the plan is to answer the question for you
- Simple logic of planning: the existence and content of a plan can't be determined by facts whose existence the plan aims to settle
  - If you have to deliberate in order to discover the plan, then you don't have a plan
  - Inclusive legal positivism violates this: if the point of having law is to settle matters about what morality requires so people can realize certain goals and values, then legal norms would be useless if the way to discover them is to engage in moral reasoning
  - Legal norms without institutional content are like can openers that only work when the can is already open
  - Requires you to know what the law is supposed to answer in order to know what the law is
  - Exclusive legal positivism doesn't violate this: no danger that the process of legal discovery will violate the purpose of having the law
    - Social facts are determined by empirical observation, not moral deliberation

    - Enables law to play plan-like function of answering questions about what we ought to do
  - But ELP doesn't rule out possibility that legal norms have social foundations that can have moral concepts
    - "Unconscionable contracts" is a moral concept; says it is grossly unfair to hold people to terms of this contract
    - No problem with exclusive legal positivist accepting this. Doesn't tell us *when* contract is unconscionable but says that unconscionable contracts should not be enforced
    - Judges not engaged in unrestricted moral delibation: judges ask whether contract is unconscionable, law still serves as plan because it takes some moral issues off the table
    - Deliberation is *channeled* in a certain direction
  - ELP rejects idea that a norm without institutional pedigree can still be a law
    - E.g.: Contracts that charge 20% interest rate are unconscionable
    - But no legal institution has decided that 20% is usurious and therefore unsconscionable
    - ILP: since 20% is unconscionable, any contract that charges 20% is legally unenforceable
    - ELP says the fact that no legal institution has picked that interest rate as being unconscionable means that it cannot be illegal
    - Once an institution has decided 20% is unconscionable, then it's the law that 20% contracts are legally unforceable

Logic of planning

- If you think laws are plans, you must reject Dworkin's theory
- General logic of planning: when are circumstances complex and contentious, alternative forms of social planning increase costs of deliberation to the point that we never get anything solved
  - So we need a sophisticated institutional form of social planning: the law
- Dworkin's constructive interpretation is about discovering content of law by engaging in moral deliberation
  - Figuring out grounds of law requires figuring out what would make legal practice the best it can be – what fits and justifies legal practice
  - If we're thinking about moral fit and justification, this is introducing the considerations the law is supposed to take off the table
  - Interpretation of any member of system of plans cannot be determined by facts any member of that system aims to settle
    - Recall the simple logic of planning: existence and content of plan can't be determined by facts that plan aims to answer
    - This takes it further: interpretation of any member can't be determined by *other* member of the system either
- Dworkin really violates this, even more than ILP does
  - ILP permits moral considerations to determine existence and content of legal norms even though legal norms aim to settle these moral considerations
  - Dworkin *unsettles* questions that have been settled – have to delve into moral philosophy to answer questions about legal practice, renders previous decisions by legal institutions on these issues moot
    - Puts issues back on the table, frustrates ability to guide conduct in complex circumstances

Meta-interpretation

Interpretive methodologies

- What is legal interpretation? The process of telling you what the law is
- The method you use is an *interpretive methodology*: a function that takes legal texts and produces the law
  - Originalism, textualism, living constitutionalism, intentionalism, etc.
- It could be that there's one interpretive methodology valid for every legal system
  - But we will assume that every legal system has its own interpretive methodology – might need to distinguish federal system, state, etc.
- Interpretive methodology doesn't just take text into account. Ex: originalism, take into account original understanding
  - Other events, mental states of those who framed the provisions are important
- So, interpretive methodology is more precisely a function that takes legal texts, mental states, events, social practices as arguments and delivers legal norms
- Legal interpretations/methodology either give you the law or *extend* the law
  - Ex: prohibition against cruel punishment. Say the death penalty is cruel, but no court has ruled this
    - ELP: law doesn't prohibit death penalty until court says so
    - Moral fact that death penalty is cruel, so court should extend law to have it cover the death penalty
    - So when you decide death penalty is cruel, you're extending the law in applying moral reasoning
  - When a court has to decide that the death penalty is cruel and therefore prohibited, the court is interpreting the law
    - ELP considers this *extending* the law
    - So we don't want to say interpretation is just finding the law (like Ronald Dworkin would say)
- Meta-interpretive theory: not a methodology for interpreting legal texts, but a methodology for figuring out which interpretive methodology is proper
  - Dworkin's constructive interpretation is a theory of meta-interpretation – interpretive methodology is the right one when it places legal principles in their best light, which is law as integrity
    - First stage of legal interpretation is meta-interpretation: Dworkin thinks you do constructive interpretation here
    - Second stage is applying the interpretive methodology, and for Dworkin, meta-interpretation gives you law as integrity, so at stage 2, you apply law as integrity to figure out what the law is
  - Dworkin doesn't really distinguish between the 2 stages

The standard picture

- Standard picture of legal interpretation: legal content is linguistic content, so if you want to know what the law is, figure out what the legal texts mean
  - Hart: If you want to understand legal texts, explain what it means in natural language
  - You get the standard picture when people talk about judges: "judges should stick to the text," and if they don't, they will be creating law and that's not their role
    - If they don't, imposing their own moral and political views on the law
  - Hart: open texture and vagueness of natural language means law has indeterminacy

        - Get judicial creativity because judges have to make new law to plug the holes left open by language
    - Standard picture needs to argue why they're choosing the meaning they choose, but they often don't
    - Bad at dealing with case law: contribution a case makes to the law is just what it says? Often what a court *does* is more important than what it says
- Two kinds of meta-interpretive theories: one says look at social facts (maybe linguistic meaning, maybe what a court did), or look at moral facts too (more of a natural law approach to meta-interpretation)
    - Dworkin's theory of constructive interpretation (at least stage one) is well-developed natural law theory: thinks right interpretive theory is the one that puts legal practice in its morally best light
    - We have yet to see a meta-interpretive theory from a positivist
- Dworkin thinks the reason theoretical disagreements are common is that meta-interpretation involves moral reasoning, which is highly contested

Economy of trust

- Hart says the right interpretation is given by rule of recognition
- Suggest another positivistic theory based on planning theory. Right meta-interpretive theory depends on identity of law, and according to planning theory, law is a planning system
    - So the right way to interpret the law is the right way to interpret plans
- We know how to interpret plans. One idea is to interpret plans according to their purpose - Flawed because plans are adopted not just to achieve a certain purpose, but also because they are trying to deal with certain constraints that make decisions on the spot difficult - Ex: lack of trust - More distrustful the plan is in the subject of the plan, the less discretion they should have in interpreting the text
- Expand to the law: think of legal systems as distributions of trust and distrust
    - If we are more distrustful in legal officials, we leave them less discretion to interpret the law in accordance with its purpose
    - Call this the "economy of trust"
    - Goal of meta-interpretation is to find interpretive methodology that best harmonizes with that system's economy of trust
    - Textualists and orginalists say judges shouldn't have a lot of discretion because the American legal system is highly distrustful
- Trust is not the only thing that matters in planning. Also level of conflict of interest between the planners and the planned
    - When we disagree with one another, if we plan, we can still coordinate
    - More pluralism means there's less discretion judges should have, since plans were generated precisely because there was disagreement about deeper issues, and you don't want interpreters to go to deeper issues in cases of doubt, because then you're undoing what the plan was meant to solve
- Meta-interpreter should figure out the economy of trust of a legal system and level of pluralism, and accord enough discretion to interpreters that is appropriate
- Disagreement about interpretive methodology can be reconstructed as disagreements about level of trust and the level of conflict of values
- These are social facts, so this is a positivistic theory