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Midterm Paper 2

A central point of contention among legal philosophers is the conceptualization of morality in law. While both sides believe that law ought to be just or moral, nonpositivists assert that law and morality are intertwined, whereas positivists argue they are distinct concepts. Legal positivism is partially true but it does not capture the full scope of the nature of law. Though this doctrine elucidates the fact that law is formulated based on social facts of a given society at a certain time, it fails to recognize that law cannot function separately from morality because morality affects social conditions, interpretation of law necessitates moral considerations in cases regarding unclear legal rules, and law functions as the state's imposition of morality onto its subjects.

First, the main claim of positivists is that laws are a matter of social fact, or more precisely, form a social institution (Kelsen 5). According to Hans Kelsen, law is a social technique to bring about the desired social conduct of people through the threat of coercion which is applied in case of contrary conduct (Kelsen 18). Therefore, law is an open system which adjusts to the changing needs of society. When unprecedented situations arise, legislators and judges create and interpret law, respectively, to fit the needs of society.

By definition, these broad stroke "social facts" are the circumstances in which a society exists. Positivism fails to acknowledge that humans' moral perspectives influence social conditions and vice versa. A society's conception of what is right or wrong and good or bad can sway legislation to reflect these attitudes. For example, Hitler and the Nazi party exploited the economic desperation and insecurities of the German nation to rise into power, propagating their extremist views such as aryan superiority ("The Nazi Rise to Power"). In Nazi Germany, the far-right extremist positions on morality and harsh economic conditions influenced the law to enforce tyranny and uphold dictatorship. Such moral views supporting radical measures, such as genocide, created the social facts underlying the highly immoral law of the Nazi regime ("The Nazi Rise to Power"). Holmes intuitively understood this connection, as he believed that a society's legal history represented its moral development (Holmes 992). Even from his positivistic viewpoint, it follows that moral development creates the social conditions necessary to create new laws. Therefore, law cannot be regarded as distinct from morality because the moral views of a society affect social facts, which inspire the creation of law.

Positivists also emphasize the distinction of law as it exists and how it should exist. Some positivists, such as John Austin, believe that law and morality are completely separate because law is ultimately determined by those who possess political power (Austin 35). Other moderate positivists, such as H. L.A. Hart, acknowledge that law and morality intersect, meaning the law may incorporate moral standards (Hart 608). While both represent partial truths, law is really the merger of state power with morality. According to Lon Fuller, positivists skew the reality of law

as social information around the human experience rather than directives guiding human behavior (Fuller 632). This is seen in cases where law requires the use of morality for justification or further elaboration of unclear legal rules. In *Riggs v. Palmer*, defendant Elmer Palmer murdered his grandfather to receive his portion of the inheritance. The Court of Appeals of New York ruled that Palmer could not inherit the will because he violated the moral principle “no one should benefit from their own wrongdoing,” (*Riggs v. Palmer*, 1889). Therefore, the law utilized a moral principle to guide future behavior, using moral argument to protect inheritance laws from exploitation. As a result, the practice of precedent refines law to incorporate morality, which shows that judges create law as it should be, at least when moral considerations present compelling justification for their decisions.

Positivists would disagree with the point that law is inseparable from morality because law can still serve as a technique to bring about social order without including morality. Because the powerful create law, they can utilize it for immoral purposes under the threat of state coercion for disobedience (Austin 22). Their claim is that without morality, law still exists and legal subjects remain bound to its orders. However, law cannot truly exist without morality because morality allows law to be coherent. In other words, coherence exists better in a just system than an unjust system.

Fuller supports this notion, arguing that the order of law cannot be separated from good order (Fuller 644). Law which corresponds to the “demands of justice, morality, or notions of what ought to be” supports effectiveness of its rule (Fuller 644). As Fuller explains, when judges justify their decisions, the general tactic is to explain them in terms of their goodness. This natural tendency causes difficulty for judges of an immoral legal system to refine legal rules on a case-by-case basis through justification by immoral or evil standards. The common law cannot “‘work itself pure from case to case’ toward a more perfect realization of iniquity,” (Fuller 636).

An example of a legal system’s incoherence is the deeply morally corrupt law of the Nazi regime. A disgruntled wife reported that her husband talked poorly about Nazi leadership in their own home (Hart 618). Under a law prohibiting speaking out against the regime in public, the man was sentenced to death. However, authorities did not enforce the punishment, instead sending him back to the front lines (Hart 619). The court considered private speech to be banned under the law even though the statute explicitly banned speech in public areas (Fuller 654). In addition, the courts did not carry out the punishment because he was sent back to the battlefield, undermining the court’s credibility in enforcing the law. Therefore, the Nazi law was incoherent for applying to cases which it should not have applied and failing to carry out its sanction.

Because law conforms with morality to provide coherence in a legal system, law is the merger of state power and morality. Law represents codified morality in statutes and precedents. Morality also plays an essential role in further defining legal rules, as seen in *Riggs v. Palmer*. Kelsen states that the purpose of law is to promote social conduct of people through the threat of coercion (Kelsen 18). This is true, but what may permit the social conduct of people besides morality? Moral convictions inform people what they should or should not do, so the state, as a human institution, utilizes morality to dictate what subjects can or cannot do. As such, law is,

fundamentally, an institution guiding social practices. For example, criminal law is the most straightforward codification of morality. The universal belief that humans should not kill each other is the basis for murder laws. The state decides how moral beliefs define the law, especially in areas such as criminal law where morality essentially is the law.

To further illustrate, postwar German leaders faced the issue of Nazi laws still being codified in the legal system. In the case of the Nazi wife, she was brought to trial for causing the imprisonment of her husband (Hart 619). The court ruled that Nazi laws were not a valid basis to punish her husband because she attempted to deprive her husband's liberty through a statute "contrary to the sound conscience and sense of justice of all decent human beings," (Hart 619). The German court decided that Nazi laws were invalid because the regime disregarded the human right to liberty. This invalidation promotes good order of the legal system, which provides a sense of legitimacy in subjects of the law (Fuller 657). Reforming German laws after the Nazi regime required the restoration of coherence in the legal system, which relies upon morality.

Positivism's distinction of law and morality is unrepresentative of law because morality permeates aspects of law creation, interpretation, and the legal system as a whole. While law is created based on the social facts or conditions of a society, morality itself affects those social conditions, provides a basis for further elaboration of the law, and supports the coherence of a legal system. Thus, law is the state's imposition of morality onto citizens.

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