Lect 20

**Hart Dworkin debate**

* set of problems – to what extent is there law even though officials disagree about what it is
* To what extent do judges exercise discretion in hard cases?
* how does morality hook up to law?

Dworkin offers three theses about positivism/Hart

* law of a community can be identified by criteria that are based on pedigree not content
* if a matter is not covered by a valid legal rule then judge must exercise discretion
* to say someone has a legal obligation means that his case falls under a valid legal rule

This actually goes beyond what Hart explicitly says

* But there is another way of putting the debate
* Does the law consist of standards socially designated as authoritative?
* Hart says yes – there will be discretion when it runs out
* Dworkin says no
1. Henningsen v. Bloomfield Motors is an example
	1. the court held an automobile maker liable for injuries sustained as the result of defective manufacturing despite the fact that the injured plaintiff signed a waiver of liability
	2. It appealed to moral principles
		1. “in a society such as ours the automobile manufacturer is under a special obligation in connection with the construction, promotion, and sale of his cars”
	3. There was disagreement about the correct answer to the case
		1. But no one treated the matter as subject to judicial discretion
		2. They thought there was a preexisting correct legal answer
2. But perhaps judges simply lie about there being preexisting law?
	1. Otherwise they would seem to be acting on democratically
	2. And also unfairly because they would be applying a new legal rule retroactively to the parties
3. Dworkin tries to offer a theory of law that explains how what judges say about hard cases is correct
	1. will return to it
4. How does Hart explain right answer in Henningson
	1. Inclusive legal positivism
	2. One needs to draw a distinction between the existence of the rule of recognition and the criteria within the rule of recognition
		1. The existence of the rule of recognition as a matter of social fact
		2. But that does not mean that the criteria for law within the rule of recognition need refer only to social facts
		3. They can refer to morality, but morality is relevant ultimately only because of social facts about official practice
		4. There is no disagreement about the criteria for law but there is disagreement about how those criteria are applied
			1. application disputes
* An alternative approach is exclusive legal positivism
	+ The exclusive legal positivist accepts that judges might be under a legal obligation to look to morality to resolve hard cases
	+ But the exclusive legal positivist insist that morality cannot be law
	+ Simply because the judges under a legal obligation to look to a certain consideration does not make the consideration law
	+ Judges are under an obligation to use the rules of mathematics when determining damages but that does not make mathematics law
	+ Why exclusive legal positivists insist that morality cannot be law, we will deal with later

What is D’s second argument against Hart

* Tennessee Valley Authority v. Hill
* q was absurd consequences of statute
* According to Burger, the plain meaning of the text should control even when absurdities follow unless compelling evidence can be found to show that Congress did not intend the absurd result.
* Powell, on the other hand, argued that plain meaning should not control when absurdities follow unless compelling evidence can be found that Congress did intend the absurd result.
* can we explain this as agreement about content but disagreement about application?
* hard - there was disagreement about the ultimate criteria of law
* But nevertheless the participants bought that there was a preexisting right legal answer