IS LAW DETERMINED BY MORALITY?
Dworkin and Inclusive Legal Positivism
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- legal positivism
  - conventionality thesis: legal validity can ultimately be explained in terms of criteria that are authoritative in virtue of some kind of social convention
  - social fact thesis: legal validity is a function of certain social facts
  - separability thesis: there is no ‘necessary’ or ‘conceptual’ connection between law and morality
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- H.L.A Hart and judicial discretion
  - law is bound to run out
  - law cannot determine an outcome about every possible case
  - in principle, a ban on the denial of justice
  - thus, in some cases a judge is required to create, or at least modify, the law that would settle the case (judicial legislation)
  - the doctrine of judicial discretion
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- Dworkin’s critique
  - legal norms: legal rules + *legal principles*
  - legal principles do not derive their legal validity from any particular enactment
  - legal principles gain their legal validity by a process of (moral) reasoning
  - law never runs out and thus judges do not have discretion
  - legal principles cannot derive their legal validity from the rule of recognition
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- Categorical distinction between rules and principles (Dworkin)
  a) Rules operate in a kind of ‘all or nothing’ fashion; if a rule applies, it *determines an outcome*
  b) Principles only *provide a reason* to decide the case one way or the other; they do not necessarily determine an outcome
  c) Principles have a dimension of weight

- A distinction in degree?
  - Less general (more specific) and more general and/or particularly vague norms
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- principles are deduced by reasoning from certain facts and moral considerations (Dworkin)

1. a case unsettled by the existing legal rules
2. a judge looks at the legal history of the settled law in the relevant legal area
3. a judge figures out what are the best moral principles that would justify the bulk of the settled cases
4. the general principle that forms *the best moral justification* of the relevant body of law is the legal principle that bears on the case at hand
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- observing the relevant legal facts that are established by previous law
- reason to the principle that forms the best moral justification of the relevant body of law
- the conclusion of this, partly but essentially, moral reasoning is a legal principle
- legal principles form part of the law
- law never runs out because the kind of reasoning that leads to legal principles is one that is always available
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- Dworkin’s description of judicial reasoning does not necessarily mean that judges *identify what the law is*
  - arg. from judicial rhetoric
- an alternative interpretation: the identified principle becomes part of the law because of the judicial decision that applies it
- thus, Dworkin’s description is compatible with the view that judges *create* new law
  - in line with the general idea that the law consists of authoritative directives
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- thought experiment:
  - 13 judges of the Constitutional Court of the RC
  - 7 in favour of a moral principle $M$, 6 in favour of $N$
  - decision rendered according to $M$
  - the majority has made a *moral* mistake (principle $N$ should have been applied)
  - What is the law: principle $M$ or $N$?

- a legal error (Dworkin)?

- What if the Constitutional court systematically errs?
  - a great deal of the law would be legally mistaken!?
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- inclusive legal positivism
  - it is at least *conceptually possible* for a given legal system to include moral criteria of validity
    a) law can incorporate moral conditions on legal validity explicitly (by decreeing so)
      - constitutions
    b) moral conditions of legal validity can be determined by the rule of recognition
      - conventionality of the rule of recognition?
      - law as an authoritative institution?
      - a possibility that a substantial part of the law in a given legal system amounts to a legal error
Thank you for your attention!