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Chapter 1 : What is JURISPRUDENCE? definition of JURISPRUDENCE (Black's Law Dictionary)

The Unaccountable State of Surveillance: Exercising Access Rights in Europe (Law, Governance and Technology Series) The Life of Hersch Lauterpacht Extra info for Legal Symbolism: On Law, Time and European Identity (Applied Legal Philosophy).

You can read four articles free per month. To have complete access to the thousands of philosophy articles on this site, please Articles Paternalism and the Law Barbara Hands considers whether it is ever right for the law to limit your freedom of choice and action, for your own good. Fred and Bob are a gay couple who have been together for 15 years. Fred has asked Bob to relieve him of his misery now so that he does not have to be in pain and a burden to Bob for the next three months or so. Fred and Bob are aware of the law prohibiting physician-assisted suicide. They consider the law paternalistic and find themselves wrestling with the question of whether or not it is morally justified. What does it mean for a law to be paternalistic? This article will examine these issues and attempt to resolve them. Shiffrin all have thoughts about paternalism. Mill believes there is no justification for paternalism under any circumstances; Dworkin claims that to be justified, paternalistic laws need to meet two criteria; and Shiffrin makes a general case for paternalism. I will compare their ideas and analyze them with respect to physician-assisted suicide. Paternalism is not controversial when applied to children or the mentally ill, under normal circumstances. But paternalism is otherwise thought by many to be a threat to individual autonomy, liberty, rights and privacy. With regard to the ban on physician-assisted suicide, in deciding that it is better for someone to continue to live a few more months even though it means resultant suffering, a government is acting paternalistically. This is not so different from a father who prohibits his son from driving with friends to a concert miles away. There are many laws that fall under the umbrella of paternalism. Some of these laws prohibit us from doing things, such as prohibiting us from swimming when no lifeguard is stationed at the beach. Some of these laws require us to do something, such as wearing seatbelts in a car, or wearing helmets while riding motorcycles. Some of these laws benefit the person restricted by the law, such as laws which prohibit underage smoking this is called pure paternalism. Some of these laws benefit persons other than those restricted â€" such as laws which regulate the licensing of those who practice medicine this is called impure paternalism. But this may not necessarily be the case. Children and those with an infirmity are not always able to recognize what is best for them, for example. And in many other everyday cases people cannot always recognize the best course of action. My church must sell a portion of its property to the state of North Carolina for a road expansion project. We have enlisted the services of an attorney to aid in the legal matters. The parent of a severely disturbed person may care for that person more than that person cares for herself. We are not experts in all scenarios, and so must sometimes rely on the directions and decisions of others to ensure the best path for us. Firstly, the paternalism must be intended to protect against irrational propensities â€" deficiencies of cognitive and emotional capacity and ignorance, both avoidable and unavoidable. Secondly, to be justified, paternalistic intervention must be restricted to decisions that are far-reaching, potentially dangerous, and irreversible. These three conditions for decisions are all necessary, and jointly sufficient. One could be guilty of having an evaluative illusion, for example â€" of being irrational by attaching incorrect values and weightings to certain actions, causing a gross miscalculation of costs and benefits. For instance, if Mary determines that the costs of wearing a seatbelt â€" discomfort of the shoulder and stomach, crumpling of clothing, etc â€" are higher than the benefits of wearing it â€" surviving a car wreck without permanent disabilities â€" then she has acted irrationally because she has evaluated wrongly. Another type of irrationality is when a person is unable to act on or in accordance with her preferences. For example, if I had decided that I truly did want to quit smoking, but kept finding excuses to begin tomorrow instead of now, I would be experiencing a weakness of will. According to Dworkin, this is acting irrationally. Now a person contemplating physician-assisted suicide may not seem to be experiencing a weakness of will. He knows what he wants and appears to be willing to follow it through. Neither does he appear to be having an evaluative illusion. So far, Dworkin has not justified the outlawing of physician-assisted suicide. But Dworkin also claims paternalism is justified to protect against diminished

cognitive or emotional capacity. If I decide I can step off the roof and plummet to the ground, yet get up and walk away, as I have seen Wylie Coyote do many times, I would be suffering from a cognitive deficiency. You would be perfectly justified in stepping in to try and stop me, even though you are interfering with my choice. After a friend consumes ten beers and an equal number of bourbon chasers, it is not unjustified, and is in fact expected, for one to prevent that friend from driving home. After she looses her duel with the telephone pole, the friend could be paralyzed for the rest of her life, with no hope of recovery. Here, concerning the protection of someone unable to make rational decisions for herself, Dworkin may have a plausible justification for paternalistic laws. It is plausible that an attempt to climb El Capitan in Yosemite National Park is potentially dangerous and could cause far-reaching, irreversible consequences. Even experienced climbers have accidents. So should there be a law against certain kinds of mountain climbing? But Sue has heard horror stories from her parents and grandparents of what it was like to live through the Depression, and she wants to make sure her family does not suffer in a similar manner if there is a modern-day banking failure. Should we have laws against stuffing our mattresses with money, requiring all individuals to use a bank? Remember that Dworkin claimed that paternalism is justified only for decisions that are far-reaching, potentially dangerous and have irreversible consequences. To be potentially dangerous it would seem that there must be some reduction in the quality of life. Though the emotional states of loved ones may be in disarray for a time, the overall quality of their lives is improved when the burden of caring for a terminally-ill person is removed. Shiffrin believes that neither a violation of autonomy nor interference with liberty are necessary for paternalism, and that a violation of autonomy is also not sufficient for paternalism. She further claims that even though some behaviors are freedom-enhancing they can also be paternalistic. For instance, if I have declared that I only want to serve chips and pretzels and one brand of beer at my party, but you show up with hot wings, a veggie tray and a cooler full of Heinekens and Coronas, you are treating me paternalistically. You decided that I could not make proper choices and that you would make them for me. For Shiffrin, paternalistic acts also need not be contrary to the desires an agent actually has. If you are hiding my cigarettes while I am trying to quit, then you are treating me paternalistically even though it is my desire to quit smoking anyway. Furthermore, a paternalist need not even be motivated by a concern for the welfare or interests of the paternalized agent. Shiffrin discusses paternalism in relation to the Unconscionability Doctrine UD , a rule sometimes applied by courts in the United States. The UD is a decision not to enforce a contract because it is deemed excessively one-sided, exploitative, or otherwise grossly unfair. The standard objection to the UD is that applying it is paternalistic; but Shiffrin believes that even if it is a case of paternalism, it is justified. This claim concerns the nature of contracts in general. Legal institutions such as contract-making require the cooperation of the community, and enforcement of contracts provides assurances that there will be no abuse of this mutual trust. This is how I am able to enter into an agreement or make a deal with a stranger, a person I have no previous reason to trust. But Shiffrin claims that the state does not need to be prepared to enforce all such contracts: In a similar way, I may paternalistically refuse to help you find your cigarettes, but it may simply be that I do not want to be implicated in your self-destructive decision to smoke, rather than a genuine concern on my part for your health. If there is no law banning physician-assisted suicide, someone might even suggest that the state is facilitating such suicidal decisions. And if there is no law banning physician-assisted suicide, there would certainly have to be rules and regulations governing when, by what methods and who could partake of such an action. These rules and regulations would be passed by some state or national agency. This could also be interpreted as the government facilitating your choice to end your life. Shiffrin therefore believes that some paternalistic acts are justified. But is her argument strong enough to counter one last argument against paternalism? Back To Mill Returning to Mill, we find that in addition to his utilitarian, consequentialist argument against paternalism, he also has a non-consequentialist one too. Mill believes that the value of a life comes from that life having been chosen by the person who leads it, not by the consequences of the choices the individual makes. Thus Mill celebrates the autonomy of the individual, and anything interfering with or diminishing that autonomy is unjustified. This includes paternalistic laws. Fred is not able to make the decision to live or not, and in the same way, Dr Bob cannot make the decision to help Fred as Fred requests. I will agree with Mill, that it is autonomy which makes my life valuable. Lacking such

autonomy, the life of a chicken on a battery farm or even the life of a person in a permanent vegetative state would be much less valuable. Such provisions would need to be written into the law. But for a rational individual like Fred, who is destined for a life that will qualitatively continue to deteriorate, a law against physician-assisted suicide is both paternalistic and unjustified.

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Chapter 2 : Jurisprudence | Wex Legal Dictionary / Encyclopedia | LII / Legal Information Institute

*Legal Symbolism: On Law, Time and European Identity (Applied Legal Philosophy) [JiÅ™Ã- PÅ™ibÃ¡Åˆ] on blog.quintoapp.com *FREE* shipping on qualifying offers. JirÃƒÂ- PribÃƒÂ¡n's book contributes to the field of systems theory of law in the context of European legal and political integration and constitution-making.*

Analytic jurisprudence[edit] "The principal objective of analytical jurisprudence has traditionally been to provide an account of what distinguishes law as a system of norms from other systems of norms, such as ethical norms. Several schools of thought have provided rival answers to this question, the most influential of which are: Natural law theory asserts that there are laws that are immanent in nature, to which enacted laws should correspond as closely as possible. This view is frequently summarized by the maxim: Legal positivism is the view that the law is defined by the social rules or practices that identify certain norms as laws. One of the early positivists was in the early nineteenth century John Austin , who was influenced by the writings of Jeremy Bentham. Austin held that the law is the command of the sovereign backed by the threat of punishment. Contemporary legal positivism has long abandoned this view. In the twentieth century, two positivists had a profound influence on the philosophy of law. On the continent, Hans Kelsen was the most influential, where his notion of a "grundnorm" ultimate and basic legal norm, still retains some influence. In the Anglophone world, the pivotal writer was H. Hart , who argued that the law should be understood as a system of social rules. Hart argues that this last function is performed by a "rule of recognition", a customary practice of the officials especially judges that identifies certain acts and decisions as sources of law. Legal realism was a view popular with some Scandinavian and American writers. It has some affinities with the sociology of law. In recent years, debates about the nature of law have become increasingly fine-grained. One important debate is within legal positivism. One school is sometimes called "exclusive legal positivism", and it is associated with the view that the legal validity of a norm can never depend on its moral correctness. A second school is labeled "inclusive legal positivism", and it is associated with the view that moral considerations may determine the legal validity of a norm, but that it is not necessary that this is the case. Some philosophers used to contend that positivism was the theory that there is "no necessary connection" between law and morality; but influential contemporary positivists, including Joseph Raz, John Gardner, and Leslie Green, reject that view. As Raz points out, it is a necessary truth that there are vices that a legal system cannot possibly have for example, it cannot commit rape or murder. In fact, it is even unclear whether Hart himself held this view in its broad form, for he insisted both that to be a legal system rules must have a certain minimum content, which content overlaps with moral concerns, and that it must attain at least some degree of justice in the administration of laws. A second important debate in recent years concerns interpretivism , a view that is associated mainly with Ronald Dworkin. An interpretivist theory of law holds that legal rights and duties are determined by the best interpretation of the political practices of a particular community. To count as an interpretation, the reading of a text must meet the criterion of fit. But of those interpretations that fit, Dworkin maintains that the correct interpretation is the one that puts the political practices of the community in their best light, or makes of them the best that they can be. But many writers have doubted whether there is a single best justification for the complex practices of any given community, and others have doubted whether, even if there are, they should be counted as part of the law of that community. Normative jurisprudence[edit] In addition to analytic jurisprudence, legal philosophy is also concerned with normative theories of law. What moral or political theories provide a foundation for the law? Three approaches have been influential in contemporary moral and political philosophy, and these approaches are reflected in normative theories of law: Utilitarianism is the view that the laws should be crafted so as to produce the best consequences. Historically, utilitarian thinking about law is associated with the philosopher Jeremy Bentham. In contemporary legal theory, the utilitarian approach is frequently championed by scholars who work in the law and economics tradition. Deontology is the view that the laws should protect individual autonomy, liberty, or rights. The philosopher Immanuel Kant formulated a deontological theory of law but not the only one possible. A contemporary deontological approach can be found in the work of the legal philosopher Ronald Dworkin.

Aretaic moral theories such as contemporary virtue ethics emphasize the role of character in morality. Virtue jurisprudence is the view that the laws should promote the development of virtuous characters by citizens. Historically, this approach is associated with Aristotle. Contemporary virtue jurisprudence is inspired by philosophical work on virtue ethics. There are many other normative approaches to the philosophy of law, including critical legal studies and libertarian theories of law. Philosophical approaches to legal problems[edit] Philosophers of law are also concerned with a variety of philosophical problems that arise in particular legal subjects, such as constitutional law , Contract law, Criminal law , and Tort law. Thus, philosophy of law addresses such diverse topics as theories of contract law , theories of criminal punishment, theories of tort liability, and the question of whether judicial review is justified. Notable philosophers of law[edit].

Chapter 3 : Paternalism and the Law | Issue 71 | Philosophy Now

Philosophy of law is a branch of philosophy and jurisprudence that seeks to answer basic questions about law and legal systems, such as "What is law?".

In general, however, especially in legal philosophy, the term "positive law" is used more broadly. There is overlap to be sure. But the meaning of the term as used generally is not identical to the meaning of the term as used with respect to the Code, and the distinction must be understood to avoid confusion. The term "natural law", especially as used generally in legal philosophy, refers to a set of universal principles and rules that properly govern moral human conduct. Unlike a statute, natural law is not created by human beings. Rather, natural law is thought to be the preexisting law of nature, which human beings can discover through their capacity for rational analysis. Within the context of the Code, the term "positive law" is used in a more limited sense. A positive law title of the Code is a title that has been enacted as a statute. To enact the title, a positive law codification bill is introduced in Congress. The bill repeals existing laws on a certain subject and restates those laws in a new formâ€”a positive law title of the Code. The titles of the Code that have not been enacted through this process are called non-positive law titles. Non-positive law titles of the Code are compilations of statutes. The Office of the Law Revision Counsel is charged with making editorial decisions regarding the selection and arrangement of provisions from statutes into the non-positive law titles of the Code. Non-positive law titles, as such, have not been enacted by Congress, but the laws assembled in the non-positive law titles have been enacted by Congress. In both positive law titles and non-positive law titles of the Code, all of the law set forth is positive law in the general sense of the term because the entire Code is a codification of Federal statutes enacted by Congress, and not of preexisting natural law principles. The answer involves a historical solution to a statutory drafting problem. For generations, Congress has used the term "positive law" when it enacts a title of the Code, as such, into statutory law. For example, section 1 of the Act of July 30, 1 U. More literally, this distinction might be expressed as "enacted title" versus "non-enacted title", but those literal terms are problematic since they incorrectly suggest that provisions set forth in a "non-enacted title" of the Code have not been enacted. Those provisions have been enacted, but as part of a number of freestanding statutes rather than as part of an enacted positive law title. The specialized use of the term "positive law" in this situation captures the abstract distinction between the two types of titles in the Code, and the use of the term in this way is now well established. The term derives from the medieval use of positum Latin "established" , so that the phrase positive law literally means law established by human authority.

Chapter 4 : Law justice and miscommunications essays in legal philosophy syllabus

JirÃ- PribÃ¡n's book contributes to the field of systems theory of law in the context of European legal and political integration and constitution-making. It puts recent European legislative efforts and policies, especially the EU enlargement process, in the context of legal theory and philosophy.

Jurisprudence Overview The word jurisprudence derives from the Latin term juris prudentia, which means "the study, knowledge, or science of law. Legal philosophy has many aspects, but four of them are the most common: The first and the most prevalent form of jurisprudence seeks to analyze, explain, classify, and criticize entire bodies of law. Law school textbooks and legal encyclopedias represent this type of scholarship. The second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics, religion, and the social sciences. The third type of jurisprudence seeks to reveal the historical, moral, and cultural basis of a particular legal concept. The fourth body of jurisprudence focuses on finding the answer to such abstract questions as "What is law? Realism Apart from different types of jurisprudence, different schools of jurisprudence exist. Formalism, or conceptualism, treats law like math or science. Formalists believe that a judge identifies the relevant legal principles, applies them to the facts of a case, and logically deduces a rule that will govern the outcome of the dispute. In contrast, proponents of legal realism believe that most cases before courts present hard questions that judges must resolve by balancing the interests of the parties and ultimately drawing an arbitrary line on one side of the dispute. This line, realists maintain, is drawn according to the political, economic, and psychological inclinations of the judge. Some legal realists even believe that a judge is able to shape the outcome of the case based on personal biases. Naturalists Apart from the realist-formalist dichotomy, there is the classic debate over the appropriate sources of law between positivist and natural law schools of thought. Positivists argue that there is no connection between law and morality and the the only sources of law are rules that have been expressly enacted by a governmental entity or court of law. Naturalists, or proponents of natural law, insist that the rules enacted by government are not the only sources of law. They argue that moral philosophy, religion, human reason and individual conscience are also integrate parts of the law. Some have attempted to break down schools of positivism and naturalism aka: Inclusive legal positivism is a form of positivism because it holds that social facts are the ultimate determinants of the content of the law, and that the law might be determined by social facts alone. But it allows that people might choose to have the content of their law depend on moral facts, as they seem to do, for example, when they prohibit punishment that is cruel, or confer rights to legal protections that are equal. The above mentioned schools of legal thoughts are only part of a diverse jurisprudential picture of the United States. Other prominent schools of legal thought exist. These include but are not limited to:

Chapter 5 : Law - Wikipedia

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Chapter 6 : Law, Philosophy of | Internet Encyclopedia of Philosophy

Applied Legal Philosophy The principal objective of this series is to encourage the publication of books which adopt a theoretical approach to the study of particular areas or aspects of law, or deal with general theories of law in a way which is directed at issues of practical, moral and political concern in specific legal contexts.

References and Further Reading 1. Analytic Jurisprudence The principal objective of analytic jurisprudence has traditionally been to provide an account of what distinguishes law as a system of norms from other systems of norms, such as ethical norms. As John Austin describes the project, analytic jurisprudence seeks "the essence or nature which is common to all laws that are properly so called" Austin , p. Accordingly, analytic jurisprudence is concerned with providing necessary and sufficient conditions for the existence of law that distinguish law from non-law. While this task is usually interpreted as an attempt to analyze the concepts of law and legal system, there is some confusion as to both the value and character of conceptual analysis in philosophy of law. As Brian Leiter points out, philosophy of law is one of the few philosophical disciplines that takes conceptual analysis as its principal concern; most other areas in philosophy have taken a naturalistic turn, incorporating the tools and methods of the sciences. To clarify the role of conceptual analysis in law, Brian Bix distinguishes a number of different purposes that can be served by conceptual claims: Bix takes conceptual analysis in law to be primarily concerned with 3 and 4. In any event, conceptual analysis of law remains an important, if controversial, project in contemporary legal theory. Conceptual theories of law can be divided into two main headings: Natural Law Theory All forms of natural law theory subscribe to the Overlap Thesis, which is that there is a necessary relation between the concepts of law and morality. According to this view, then, the concept of law cannot be fully articulated without some reference to moral notions. Though the Overlap Thesis may seem unambiguous, there are a number of different ways in which it can be interpreted. The strongest form of the Overlap Thesis underlies the classical naturalism of St. Thomas Aquinas and William Blackstone. As Blackstone describes the thesis: This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: In this passage, Blackstone articulates the two claims that constitute the theoretical core of classical naturalism: On this view, to paraphrase Augustine, an unjust law is no law at all. Finnis believes that the naturalism of Aquinas and Blackstone should not be construed as a conceptual account of the existence conditions for law. According to Finnis see also Bix, , the classical naturalists were not concerned with giving a conceptual account of legal validity; rather they were concerned with explaining the moral force of law: Accordingly, an unjust law can be legally valid, but cannot provide an adequate justification for use of the state coercive power and is hence not obligatory in the fullest sense; thus, an unjust law fails to realize the moral ideals implicit in the concept of law. An unjust law, on this view, is legally binding, but is not fully law. Lon Fuller rejects the idea that there are necessary moral constraints on the content of law. A system of rules that fails to satisfy P2 or P4 , for example, cannot guide behavior because people will not be able to determine what the rules require. Accordingly, Fuller concludes that his eight principles are "internal" to law in the sense that they are built into the existence conditions for law: Legal Positivism Opposed to all forms of naturalism is legal positivism , which is roughly constituted by three theoretical commitments: The Social Fact Thesis which is also known as the Pedigree Thesis asserts that it is a necessary truth that legal validity is ultimately a function of certain kinds of social facts. The Conventionality Thesis According to the Conventionality Thesis, it is a conceptual truth about law that legal validity can ultimately be explained in terms of criteria that are authoritative in virtue of some kind of social convention. Thus, for example, H. Hart believes the criteria of legal validity are contained in a rule of recognition that sets forth rules for creating, changing, and adjudicating law. Borrowing heavily from Jeremy Bentham , John Austin argues that the principal distinguishing feature of a legal system is the presence of a sovereign who is habitually obeyed by most people in the society, but not in the habit of obeying any determinate human superior. Hart takes a different view of the Social Fact Thesis. As Hart points out, the rules governing the creation of contracts and wills cannot plausibly be characterized as restrictions on freedom that are backed by the threat of a sanction. Most importantly, however, Hart argues

Austin overlooks the existence of secondary meta-rules that have as their subject matter the primary rules themselves and distinguish full-blown legal systems from primitive systems of law: They specify the way in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined Hart , p. Hart distinguishes three types of secondary rules that mark the transition from primitive forms of law to full-blown legal systems: As we have seen, the Conventionality Thesis implies that a rule of recognition is binding in S only if there is a social convention among officials to treat it as defining standards of official behavior. The Separability Thesis The final thesis comprising the foundation of legal positivism is the Separability Thesis. In its most general form, the Separability Thesis asserts that law and morality are conceptually distinct. This abstract formulation can be interpreted in a number of ways. This interpretation implies that any reference to moral considerations in defining the related notions of law, legal validity, and legal system is inconsistent with the Separability Thesis. More commonly, the Separability Thesis is interpreted as making only an object-level claim about the existence conditions for legal validity. As Hart describes it, the Separability Thesis is no more than the "simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so" Hart , pp. Insofar as the object-level interpretation of the Separability Thesis denies it is a necessary truth that there are moral constraints on legal validity, it implies the existence of a possible legal system in which there are no moral constraints on legal validity. Though all positivists agree there are possible legal systems without moral constraints on legal validity, there are conflicting views on whether there are possible legal systems with such constraints. Prominent inclusive positivists include Jules Coleman and Hart, who maintains that "the rule of recognition may incorporate as criteria of legal validity conformity with moral principles or substantive values In contrast, exclusive positivism also called hard positivism denies that a legal system can incorporate moral constraints on legal validity. Exclusive positivists like Raz subscribe to the Source Thesis, according to which the existence and content of law can always be determined by reference to its sources without recourse to moral argument. On this view, the sources of law include both the circumstances of its promulgation and relevant interpretative materials, such as court cases involving its application. In deciding hard cases, for example, judges often invoke moral principles that Dworkin believes do not derive their legal authority from the social criteria of legality contained in a rule of recognition Dworkin , p. Nevertheless, since judges are bound to consider such principles when relevant, they must be characterized as law. Dworkin believes adjudication is and should be interpretive: There are, then, two elements of a successful interpretation. First, since an interpretation is successful insofar as it justifies the particular practices of a particular society, the interpretation must fit with those practices in the sense that it coheres with existing legal materials defining the practices. Second, since an interpretation provides a moral justification for those practices, it must present them in the best possible moral light. Thus, Dworkin argues, a judge should strive to interpret a case in roughly the following way: A thoughtful judge might establish for himself, for example, a rough "threshold" of fit which any interpretation of data must meet in order to be "acceptable" on the dimension of fit, and then suppose that if more than one interpretation of some part of the law meets this threshold, the choice among these should be made, not through further and more precise comparisons between the two along that dimension, but by choosing the interpretation which is "substantively" better, that is, which better promotes the political ideals he thinks correct Dworkin , p. Thus, a legal principle maximally contributes to such a justification if and only if it satisfies two conditions: The correct legal principle is the one that makes the law the moral best it can be. In later writings, Dworkin expands the scope of his "constructivist" view beyond adjudication to encompass the realm of legal theory. The most familiar occasion of interpretation is conversation. We interpret the sounds or marks another person makes in order to decide what he has said. Artistic interpretation is yet another: The form of interpretation we are studying-the interpretation of a social practice-is like artistic interpretation in this way: Artistic interpretation, like judicial interpretation, is constrained by the dimensions of fit and justification: General theories of law must be abstract because they aim to interpret the main point and structure of legal practice, not some particular part or department of it. But for all their abstraction, they are constructive interpretations: So no firm line divides jurisprudence from adjudication or any other aspect of legal practice Dworkin , p. Hart

distinguishes two perspectives from which a set of legal practices can be understood. A legal practice can be understood from the "internal" point of view of the person who accepts that practice as providing legitimate guides to conduct, as well as from the "external" point of view of the observer who wishes to understand the practice but does not accept it as being authoritative or legitimate. Hart understands his theory of law to be both descriptive and general in the sense that it provides an account of fundamental features common to all legal systems-which presupposes a point of view that is external to all legal systems. For his part, Dworkin conceives his work as conceptual but not in the same sense that Hart regards his work: We all-at least all lawyers-share a concept of law and of legal right, and we contest different conceptions of that concept. Positivism defends a particular conception, and I have tried to defend a competing conception. We disagree about what legal rights are in much the same way as we philosophers who argue about justice disagree about what justice is. I concentrate on the details of a particular legal system with which I am especially familiar, not simply to show that positivism provides a poor account of that system, but to show that positivism provides a poor conception of the concept of a legal right Dworkin , These differences between Hart and Dworkin have led many legal philosophers, most recently Bix , to suspect that they are not really taking inconsistent positions at all. Normative Jurisprudence Normative jurisprudence involves normative, evaluative, and otherwise prescriptive questions about the law. Here we will examine three key issues: Freedom and the Limits of Legitimate Law Laws limit human autonomy by restricting freedom. Criminal laws, for example, remove certain behaviors from the range of behavioral options by penalizing them with imprisonment and, in some cases, death. Likewise, civil laws require people to take certain precautions not to injure others and to honor their contracts. John Stuart Mill provides the classic liberal answer in the form of the harm principle: The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. Over himself, over his own body and mind, the individual is sovereign Mill , pp. While Mill left the notion of harm underdeveloped, he is most frequently taken to mean only physical harms and more extreme forms of psychological harm. Many philosophers believe that Mill understates the limits of legitimate state authority over the individual, claiming that law may be used to enforce morality, to protect the individual from herself, and in some cases to protect individuals from offensive behavior. The most famous legal moralist is Patrick Devlin, who argues that a shared morality is essential to the existence of a society: For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price. Hart points out that Devlin overstates the extent to which preservation of a shared morality is necessary to the continuing existence of a society. Devlin attempts to conclude from the necessity of a shared social morality that it is permissible for the state to legislate sexual morality in particular, to legislate against same-sex sexual relations , but Hart argues it is implausible to think that "deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society" Hart , p. While enforcement of certain social norms protecting life, safety, and property are likely essential to the existence of a society, a society can survive a diversity of behavior in many other areas of moral concern-as is evidenced by the controversies in the U. Legal Paternalism Legal paternalism is the view that it is permissible for the state to legislate against what Mill calls "self-regarding actions" when necessary to prevent individuals from inflicting physical or severe emotional harm on themselves.

Chapter 7 : Philosophy of law - Wikipedia

Read "Legal Symbolism On Law, Time and European Identity" by JiÅ™Ã- PÅ™ibÃ¡Åˆ with Rakuten Kobo. JirÃƒÂ-PribÃƒÂ¡n's book contributes to the field of systems theory of law in the context of European legal and political in.

First page of the edition of the Napoleonic Code. Civil law is the legal system used in most countries around the world today. In civil law the sources recognised as authoritative are, primarily, legislationâ€”especially codifications in constitutions or statutes passed by governmentâ€”and custom. Modern civil law systems essentially derive from the legal practice of the 6th-century Eastern Roman Empire whose texts were rediscovered by late medieval Western Europe. Roman law in the days of the Roman Republic and Empire was heavily procedural, and lacked a professional legal class. Decisions were not published in any systematic way, so any case law that developed was disguised and almost unrecognised. From â€” AD the Byzantine Emperor Justinian I codified and consolidated Roman law up until that point, so that what remained was one-twentieth of the mass of legal texts from before. As one legal historian wrote, "Justinian consciously looked back to the golden age of Roman law and aimed to restore it to the peak it had reached three centuries before. Western Europe, meanwhile, relied on a mix of the Theodosian Code and Germanic customary law until the Justinian Code was rediscovered in the 11th century, and scholars at the University of Bologna used it to interpret their own laws. Both these codes influenced heavily not only the law systems of the countries in continental Europe e. Greece , but also the Japanese and Korean legal traditions. Common law and equity[edit] Main article: Common law King John of England signs Magna Carta In common law legal systems , decisions by courts are explicitly acknowledged as "law" on equal footing with statutes adopted through the legislative process and with regulations issued by the executive branch. The "doctrine of precedent", or stare decisis Latin for "to stand by decisions" means that decisions by higher courts bind lower courts, and future decisions of the same court, to assure that similar cases reach similar results. In contrast , in " civil law " systems, legislative statutes are typically more detailed, and judicial decisions are shorter and less detailed, because the judge or barrister is only writing to decide the single case, rather than to set out reasoning that will guide future courts. Common law originated from England and has been inherited by almost every country once tied to the British Empire except Malta, Scotland , the U. In medieval England, the Norman conquest the law varied-shire-to-shire, based on disparate tribal customs. The concept of a "common law" developed during the reign of Henry II during the late 12th century, when Henry appointed judges that had authority to create an institutionalized and unified system of law "common" to the country. The next major step in the evolution of the common law came when King John was forced by his barons to sign a document limiting his authority to pass laws. In , for instance, while the highest court in France had fifty-one judges, the English Court of Common Pleas had five. From the time of Sir Thomas More , the first lawyer to be appointed as Lord Chancellor, a systematic body of equity grew up alongside the rigid common law, and developed its own Court of Chancery. In developing the common law, academic writings have always played an important part, both to collect overarching principles from dispersed case law, and to argue for change. William Blackstone , from around , was the first scholar to collect, describe, and teach the common law. Religious law Religious law is explicitly based on religious precepts. Examples include the Jewish Halakha and Islamic Sharia â€”both of which translate as the "path to follow"â€”while Christian canon law also survives in some church communities. Often the implication of religion for law is unalterability, because the word of God cannot be amended or legislated against by judges or governments. For instance, the Quran has some law, and it acts as a source of further law through interpretation, [88] Qiyas reasoning by analogy , Ijma consensus and precedent. This is mainly contained in a body of law and jurisprudence known as Sharia and Fiqh respectively. This contains the basic code of Jewish law, which some Israeli communities choose to use. Nevertheless, Israeli law allows litigants to use religious laws only if they choose. A trial in the Ottoman Empire, , when religious law applied under the Mecelle Main article: Since the mids, efforts have been made, in country after country, to bring Sharia law more into line with modern conditions and conceptions. The constitutions of certain Muslim states, such as Egypt and Afghanistan, recognise Islam as the religion of the state, obliging legislature

to adhere to Sharia. I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou givest up, thy right to him, and authorise all his actions in like manner. Thomas Hobbes, Leviathan, XVII The main institutions of law in industrialised countries are independent courts , representative parliaments, an accountable executive, the military and police, bureaucratic organisation, the legal profession and civil society itself. John Locke, in his Two Treatises of Government , and Baron de Montesquieu in The Spirit of the Laws , advocated for a separation of powers between the political, legislature and executive bodies. Judiciary A judiciary is a number of judges mediating disputes to determine outcome. Most countries have systems of appeal courts, answering up to a supreme legal authority. The European Court of Human Rights in Strasbourg allows citizens of the Council of Europe member states to bring cases relating to human rights issues before it. For example, in Brown v. Board of Education , the United States Supreme Court nullified many state statutes that had established racially segregated schools, finding such statutes to be incompatible with the Fourteenth Amendment to the United States Constitution. In most countries judges may only interpret the constitution and all other laws. But in common law countries, where matters are not constitutional, the judiciary may also create law under the doctrine of precedent. The UK, Finland and New Zealand assert the ideal of parliamentary sovereignty , whereby the unelected judiciary may not overturn law passed by a democratic legislature. By the principle of representative government people vote for politicians to carry out their wishes. Although countries like Israel, Greece, Sweden and China are unicameral , most countries are bicameral , meaning they have two separately appointed legislative houses. In the UK the upper house is appointed by the government as a house of review. One criticism of bicameral systems with two elected chambers is that the upper and lower houses may simply mirror one another. The traditional justification of bicameralism is that an upper chamber acts as a house of review. This can minimise arbitrariness and injustice in governmental action. Normally there will be several readings and amendments proposed by the different political factions. If a country has an entrenched constitution, a special majority for changes to the constitution may be required, making changes to the law more difficult. A government usually leads the process, which can be formed from Members of Parliament e. However, in a presidential system, the government is usually formed by an executive and his or her appointed cabinet officials e. The executive in a legal system serves as the centre of political authority of the State. In a parliamentary system , as with Britain, Italy, Germany, India, and Japan, the executive is known as the cabinet, and composed of members of the legislature. The executive is led by the head of government , whose office holds power under the confidence of the legislature. Because popular elections appoint political parties to govern, the leader of a party can change in between elections. Examples include the President of Germany appointed by members of federal and state legislatures , the Queen of the United Kingdom an hereditary office , and the President of Austria elected by popular vote. The other important model is the presidential system , found in the United States and in Brazil. In presidential systems, the executive acts as both head of state and head of government, and has power to appoint an unelected cabinet. Under a presidential system, the executive branch is separate from the legislature to which it is not accountable. In presidential systems, the executive often has the power to veto legislation. Most executives in both systems are responsible for foreign relations , the military and police, and the bureaucracy. Military and police[edit] U. Customs and Border Protection officers While military organisations have existed as long as government itself, the idea of a standing police force is a relatively modern concept.

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Get this from a library! Legal symbolism: on law, time and European identity. [JiÅ™Ã- PÅ™ibÃ¡Åˆ] -- PribÃ¡n's book contributes to the field of systems theory of law in the context of European legal and political integration and constitution-making.

Precedent and analogy in legal reasoning Arguments from precedent and analogy are characteristic of legal reasoning. Legal reasoning differs in a number of ways from the sort of reasoning employed by individuals in their everyday lives. It frequently uses arguments that individuals do not employ, or that individuals employ in different ways. Precedent is a good example of this. In individual reasoning we do not normally regard the fact that we decided one way in the past as raising some presumption that we should decide the same way in the future. Of course there can be special circumstances that have this effectâ€”someone may have relied on what we did before, or may have had their expectations raised that we would do so againâ€”but absent these special considerations we do not regard ourselves as being committed in the future to make the same decision. It is always open to us to reconsider a decision and change our minds if we no longer think our original judgement was correct. Law of course is not alone in attributing a special significance to precedent. Many institutional and quasi-institutional practices place weight on what they have done previously in determining what they should do now. Individuals, by contrast, will often disregard what they did on an earlier occasion. If they do make reference to the past, this will normally be due to their belief that what they did in the past was the right thing to do, or at least is a good guide to what is the right thing to do now. Normally, then, individuals will merely be using their past decisions in the belief that they are a reliable short-cut to working out what is the right thing to do. If they harbour doubts as to the correctness of the earlier decision then they will reopen the matter and consider it afresh on the merits. In institutional settings, on the other hand, decision-makers will often refer to what has been decided in the past as constraining what should be done now, regardless of whether they think the original decision was correct. Equally, institutional decision-makers often regard earlier decisions as being relevant even when the decision at hand is different from the original ones, by citing them as analogies. They will argue that since an earlier decision was made on some matter, it would be inconsistent now to decide the present case differently. Individuals, by contrast, will often simply attend to the merits of the particular question before them and try to get the decision right. If it is pointed out that their current decision seems to be inconsistent with how they treated an earlier question, this may prompt them to reconsider, but is not in itself a reason to change their decision. At the end of the day they may conclude that their earlier decision was a mistake, or they may even embrace the apparent inconsistency, believing that both the earlier and the later decisions are correct even though they are not sure how they can be reconciled. Legal reasoning, then, gives a weight to what has been decided in the past that is usually absent from personal decision-making. We care about whether we made the right decisions in the past, but we seek to make the right decisions now, unconstrained by our earlier views. Precedent Arguments from precedent are a prominent feature of legal reasoning. A precedent is the decision of a court or other adjudicative body that has a special legal significance. A decision has theoretical authority if the circumstances in which it was made the identity of the decision-makers, those involved in arguing the case, the availability of evidence or time provide good reasons for believing the decision to be correct in law. If there are good reasons to believe that an earlier case was correctly decided, and if the facts in a later case are the same as those in the earlier case, then there are good reasons for believing that the same decision would be correct in the later case. In some legal systems earlier decisions are, officially, treated in just this way: As a consequence the decision in an earlier case is not in itself regarded as a justification for reaching a decision in a later case. Simplifying somewhat, the law is what the court stated it to be because the court stated it to be such. Putting the matter in these terms is over-simplified, however, because a it may be that what the court did, rather than what it said, that alters the law, and b there are normally a number of limitations on the capacity of a decision to constitute the law depending upon the content of the decision and the status of the body making them. This is commonly known as the doctrine of precedent, or stare decisis i. It should be noted that the modern Common Law endorses a

particularly strong version of stare decisis, one that requires later courts to follow earlier decisions even if those cases were wrongly decided according to the pre-existing law. It is often assumed by Common Lawyers that a doctrine of stare decisis necessarily requires that later courts be bound by such erroneous decisions. This follows from the following line of thought. But an earlier correct judgment simply reaches the conclusion that the law already supported when it was delivered. So to direct courts to follow cases that were not erroneous would simply be to direct them to do what they are legally bound to do anyway i. The flaw in this argument lies in the assumption that in every case there must be a single legally correct outcome, with other outcomes being wrong. This overlooks the possibility of cases in which the merits of the dispute are legally indeterminate, so that there is more than one possible outcome that would not be wrong. In cases such as these the decision alters the law without making any error. The Common Law, then, might have limited its doctrine of stare decisis by holding that later courts were not bound by earlier decisions that were wrongly decided. Nonetheless the idea of being bound to follow even erroneous decisions is a common feature of many institutions decision-making, and will be the focus of this entry. The precise operation of stare decisis varies from one legal system to another. It is common for courts lower in a judicial hierarchy to be strictly bound by the decisions of higher courts, so that Federal Court judges in the United States are bound by decisions of the Federal Court of Appeals for their circuit, and the English Court of Appeal is bound by decisions of the House of Lords. Equally, most appeal courts are bound by their own earlier decisions, though they are generally entitled in certain circumstances to overrule those decisions. There is enormous variation in the circumstances that are necessary for a court to overrule one of its own decisions: Finally, courts are generally not bound by the decisions of lower courts: It is agreed on all sides that if two cases are the same then the precedent applies, whereas if they are different it does not. What makes two cases the same, however, is a matter of considerable debate, and goes to the root of the question of the nature of precedent in legal reasoning. In saying that two cases are the same, it cannot be that they are identical. It is obvious that no two situations are identical in every respect: In practice the differences between any two cases will be much more significant than this, and yet they mayâ€”legally speakingâ€”still be the same. This problem is easier to understand if a number of distinct aspects of legal cases are taken into account. Most cases do not create precedents: In these cases the job of the court is to decide on the evidence before it whose version of the facts to endorse. The parties in such cases agree about the law that applies to their dispute, they simply disagree about what actually happened. In other cases there can be a dispute over the applicable lawâ€”one side claiming that on the facts the appropriate law supports a decision in their favour and the other side disputing this account of the law and arguing that on those facts the law supports a decision in favour of them. It goes without saying that there are also cases with disputes over both the facts and the law. Precedents are those cases which require the courts to resolve a dispute over the law. A precedent is the decision on the law in a case before a court or some similar legal decision-maker such as a tribunal. Paradigmatically in Common Law legal systems a judicial decision is given in a judgment which has five aspects to it: For a more detailed discussion, see MacCormick , ff. To take an example, the court may be faced with a case in which the trustee of property held on behalf of the plaintiff has wrongfully transferred that property to the defendant. The plaintiff sues the defendant to recover the property which was transferred in breach of trust. The plaintiff argues that since i the defendant has received trust property ii in breach of trust and iii has not paid for the property, she should restore the property to the trust. The defendant argues, on the other hand, that since iv the trustee had a good title to the property, v the power to transfer it and vi the defendant acted in good faith, unaware of the breach of trust, she is entitled to retain it. The court will assess the situation and may rule that factors i â€” iii do give the plaintiff a good action, i. In its reasoning the court will explain why the fact that the defendant received the property as a gift means that it should be restored to the trust, despite the trustee having the legal power to transfer the title. The identification of the subset of factors i â€” iii that constitute the ruling is not always a straightforward task: In particular it can be difficult to ascertain the appropriate level of abstraction of the descriptions of factors i â€” iii. A person is made ill by drinking an opaque bottle of ginger beer containing a decomposing snail. What is the key characterisation of the vehicle of harm on these facts? The bottle of ginger beer is a beverage, but it is also a consumable, an article for human use and something capable of causing injury if negligently produced. See

further Stone , Generally the judgment needs to be read as a whole to determine the appropriate level: In some cases, however, the level of generality will not be clear and it will not be possible to give a very precise account of the ruling. In other cases the category may be incompletely characterised: This point brings out an important aspect of the study of precedent. Lawyers are mostly preoccupied with two issues: The most interesting philosophical questions, however, concern how precedents operate when, as is often the case, there is no doubt about what the precedent is authority for, and the later court is not free or is unwilling to overrule the earlier decision. There are three ways in which it has been argued that precedents should be understood: For versions of this view, see Raz ; MacCormick especially 82â€"6, â€"28 and ; Alexander ; and Schauer , â€"71 and , â€" The case decides a particular dispute, but the court creates a rule to deal with that type of dispute and applies it to the case at hand. On this view, then, precedents are akin to statutes in that they lay down rules which apply to later cases whose facts satisfy the conditions for application. Obiter dicta, by contrast, represent other statements and views expressed in the judgment which are not binding on later courts. On this view of precedent, the rule laid down in the earlier case is represented by the ratio. There are a range of criticisms of the rule-making account of precedent which argue that it does not fit legal practice very well see e. Two issues stand out: Judgments are highly discursive texts and very rarely identify their own rationes. What is more, even if a court chooses to explicitly formulate the ratio of its decision, this precise formulation is not itself regarded as binding on later courts. It is often said that this creates a marked contrast with statutes, where a canonical formulation of the legal rule being laid down is provided. Given the flexibility open to later courts to determine the ratio of the earlier decision, it is misleading to think that decisions lay down binding rules for later courts. However, although there is a contrast with legislation here, it can be exaggerated. In both situations the propositions of law for which a case or statutory provision is authority must be derived from the case or statute and is not identical with the text of either. The real difference between precedent and statute lies in the fact that in the case of statutes legal systems have elaborate conventions of interpretation to assist in the process of deriving the law from a legislative text, whereas in the case of precedents they do not. But this simply shows that the law derived from precedents may be vaguer and more indeterminate than that derived from many statutes; it does not establish that precedents do not create legal rules. Distinguishing involves a precedent not being followed even though the facts of the later case fall within the scope of the ratio of the earlier case. As the later case falls within the scope of the earlier ratio i. In legal reasoning using precedents, however, the later court is free not to follow the earlier case by pointing to some difference in the facts between the two cases, even though those facts do not feature in the ratio of the earlier case. Take the trust example: The later court may hold that the recipient is entitled to retain the property and justify its decision by ruling that where i the defendant has received trust property ii in breach of trust and iii has not paid for the property, but has vii relied upon the receipt to disadvantageously alter her position, then the defendant is entitled to retain the property.

Chapter 9 : Legal Paternalism - Oxford Scholarship

Philosophy of law (or legal philosophy) is concerned with providing a general philosophical analysis of law and legal institutions. Issues in the field range from abstract conceptual questions about the nature of law and legal systems to normative questions about the relationship between law and morality and the justification for various legal.

The Social Thesis asserts that law is, profoundly, a social phenomenon, and that the conditions of legal validity consist of socialâ€"that is, non-normativeâ€"facts. Law, they thought, is basically the command of the sovereign. Later legal positivists have modified this view, maintaining that social rules, and not the facts about sovereignty, constitute the grounds of law. Most contemporary legal positivists share the view that there are rules of recognition, namely, social rules or conventions which determine certain facts or events that provide the ways for the creation, modification, and annulment of legal standards. These facts, such as an act of legislation or a judicial decision, are the sources of law conventionally identified as such in each and every modern legal system. One way of understanding the legal positivist position here is to see it as a form of reduction: Natural lawyers deny this insight, insisting that a putative norm cannot become legally valid unless it passes a certain threshold of morality. Positive law must conform in its content to some basic precepts of natural law, that is, universal morality, in order to become law in the first place. In other words, natural lawyers maintain that the moral content or merit of norms, and not just their social origins, also form part of the conditions of legal validity. And again, it is possible to view this position as a non-reductive conception of law, maintaining that legal validity cannot be reduced to non-normative facts. The Separation Thesis is an important negative implication of the Social Thesis, maintaining that there is a conceptual separation between law and morality, that is, between what the law is, and what the law ought to be. The Separation Thesis, however, has often been overstated. It is sometimes thought that natural law asserts, and legal positivism denies, that the law is, by necessity, morally good or that the law must have some minimal moral content. The Social Thesis certainly does not entail the falsehood of the assumption that there is something necessarily good in the law. Legal positivism can accept the claim that law is, by its very nature or its essential functions in society, something good that deserves our moral appreciation. Nor is legal positivism forced to deny the plausible claim that wherever law exists, it would have to have a great many prescriptions which coincide with morality. There is probably a considerable overlap, and perhaps necessarily so, between the actual content of law and morality. Once again, the Separation Thesis, properly understood, pertains only to the conditions of legal validity. It asserts that the conditions of legal validity do not depend on the moral merits of the norms in question. What the law is cannot depend on what it ought to be in the relevant circumstances. Many contemporary legal positivists would not subscribe to this formulation of the Separation Thesis. A contemporary school of thought, called inclusive legal positivism, endorses the Social Thesis, namely, that the basic conditions of legal validity derive from social facts, such as social rules or conventions which happen to prevail in a given community. But, inclusive legal positivists maintain, legal validity is sometimes a matter of the moral content of the norms, depending on the particular conventions that happen to prevail in any given community. The social conventions on the basis of which we identify the law may, but need not, contain reference to moral content as a condition of legality. The natural law tradition has undergone a considerable refinement in the 20th century, mainly because its classical, popular version faced an obvious objection about its core insight: The idea that law must pass, as it were, a kind of moral filter in order to count as law strikes most jurists as incompatible with the legal world as we know it. Therefore, contemporary natural lawyers have suggested different and more subtle interpretations of the main tenets of natural law. For example, John Finnis views natural law in its Thomist version not as a constraint on the legal validity of positive laws, but mainly as an elucidation of an ideal of law in its fullest, or highest sense, concentrating on the ways in which law necessarily promotes the common good. As we have noted earlier, however, it is not clear that such a view about the necessary moral content of law is at odds with the main tenets of legal positivism. To the extent that there is a debate here, it is a metaphysical one about what is essential or necessary to law, and about whether the essential features of law must be elucidated in teleological terms or not. Legal positivists do not tend to

seek deep teleological accounts of law, along the lines articulated by Finnis, but whether they need to deny such metaphysical projects is far from clear. His core idea is that the very distinction between facts and values in the legal domain, between what the law is and what it ought to be, is much more blurred than legal positivism would have it: Determining what the law is in particular cases inevitably depends on moral-political considerations about what it ought to be. Evaluative judgments, about the content law ought to have or what it ought to prescribe, partly determine what the law actually is. This conception went through two main stages. In the s Dworkin argued that the falsehood of legal positivism resides in the fact that it is incapable of accounting for the important role that legal principles play in the law. Legal positivism envisaged, Dworkin claimed, that the law consists of rules only. However, this is a serious mistake, since in addition to rules, law is partly determined by legal principles. The distinction between rules and principles is a logical one. If it does not apply, it is simply irrelevant to the outcome. On the other hand, principles do not determine an outcome even if they clearly apply to the pertinent circumstances. Principles provide judges with a legal reason to decide the case one way or the other, and hence they only have a dimension of weight. The most interesting, and from a positivist perspective, most problematic, aspect of legal principles, however, consists in their moral dimension. It is, in fact, partly a moral consideration that determines whether a legal principle exists or not. Because a legal principle exists, according to Dworkin, if the principle follows from the best moral and political interpretation of past judicial and legislative decisions in the relevant domain. In other words, legal principles occupy an intermediary space between legal rules and moral principles. Legal rules are posited by recognized institutions and their validity derives from their enacted source. Moral principles are what they are due to their content, and their validity is purely content dependent. Legal principles, on the other hand, gain their validity from a combination of source-based and content-based considerations. As Dworkin put it in the most general terms: The validity of a legal principle then, derives, from a combination of facts and moral considerations. The facts concern the past legal decisions which have taken place in the relevant domain, and the considerations of morals and politics concern the ways in which those past decisions can best be accounted for by the correct moral principles. Needless to say, if such an account of legal principles is correct, the Separation Thesis can no longer be maintained. But many legal philosophers doubt that there are legal principles of the kind Dworkin envisaged. There is an alternative, more natural way to account for the distinction between rules and principles in the law: Legal norms can be more or less general, or vague, in their definition of the norm-act prescribed by the rule, and the more general or vague they are, the more they tend to have those quasi-logical features Dworkin attributes to principles. More importantly, notice that if you make the legal validity of norms, such as legal principles, depend on moral argument, you allow for the possibility that an entire legal community may get its laws wrong. Any moral mistake in the reasoning leading to a legal principle might render the conclusion about the principle unsound, and the principle itself thus not legally valid. Since there is nothing to prevent judges and other legal actors from making moral mistakes, there is nothing to prevent a result whereby an entire legal community, and for a long time, gets its laws wrong Marmor , chapter 4. Perhaps Dworkin would have not found this problematic, but others might; the idea that an entire legal community can be systematically mistaken about its own laws might strike legal theorists as deeply problematic. The main argument consists of two main premises. The first thesis maintains that determining what the law requires in each and every particular case necessarily involves interpretative reasoning. Now, according to the second premise, interpretation always involves evaluative considerations. More precisely, perhaps, interpretation is neither purely a matter of determining facts, nor is it a matter of evaluative judgment per se, but an inseparable mixture of both. Clearly enough, one who accepts both these theses must conclude that the Separation Thesis is fundamentally flawed. If Dworkin is correct about both theses, it surely follows that determining what the law requires always involves evaluative considerations. Some legal philosophers have argued that legal reasoning is not as thoroughly interpretative as Dworkin assumes. Interpretation, according to this view, long maintained by H. Hart , chapter 7 , is an exception to the standard understanding of language and communication, rendered necessary only when the law is, for some reason, unclear. However, in most standard instances, the law can simply be understood, and applied, without the mediation of interpretation Marmor , chapter 6. Note, however, that although both Dworkin and inclusive

legal positivists share the view that morality and legal validity are closely related, they differ on the grounds of this relationship. Inclusive positivism, on the other hand, maintains that such a dependence of legal validity on moral considerations is a contingent matter; it does not derive from the nature of law or of legal reasoning as such. Inclusive positivists accept the Social Thesis; they claim that moral considerations affect legal validity only in those cases where this is dictated by the social rules or conventions which happen to prevail in a given legal system. Legal validity, according to this view, is entirely dependent on the conventionally recognized factual sources of law. It may be worth noting that those legal theories maintaining that legal validity partly depends on moral considerations must also share a certain view about the nature of morality. Namely, they must hold an objective stance with respect to the nature of moral values. Otherwise, if moral values are not objective and legality depends on morality, legality would also be rendered subjective, posing serious problems for the question of how to identify what the law is. Some legal theories, however, do insist on the subjectivity of moral judgements, thus embracing the skeptical conclusions that follow about the nature of law. According to these skeptical theories, law is, indeed, profoundly dependent on morality, but, as these theorists assume that morality is entirely subjective, it only demonstrates how the law is also profoundly subjective, always up for grabs, so to speak. This skeptical approach, fashionable in so-called post-modernist literature, crucially depends on a subjectivist theory of values, which is rarely articulated in this literature in any sophisticated way. This conspicuous feature of law made it very tempting for some philosophers to assume that the normativity of law resides in its coercive aspect. Even within the legal positivist tradition, however, the coercive aspect of the law has given rise to fierce controversies. Early legal positivists, such as Bentham and Austin, maintained that coercion is an essential feature of law, distinguishing it from other normative domains. Legal positivists in the 20th century have tended to deny this, claiming that coercion is neither essential to law, nor, actually, pivotal to the fulfillment of its functions in society. How to understand these claims about the essence of law, and the question of whether these claims are about metaphysics or something else, perhaps about morality, will be discussed in section 2. John Austin famously maintained that each and every legal norm, as such, must comprise a threat backed by sanction. This involves at least two separate claims: In a second, though not less problematic sense, the intimate connection between the law and the threat of sanctions is a thesis about the normativity of law. In addition to this particular controversy, there is the further question, concerning the relative importance of sanctions for the ability of law to fulfill its social functions. Twentieth century legal positivists, like H. Hart and Joseph Raz, deny this, maintaining that the coercive aspect of law is much more marginal than their predecessors assumed. Once again, the controversy here is actually twofold: And even if it is not deemed essential, how important it is, compared with the other functions law fulfills in our lives? This emphasis on the reason-giving function of rules is surely correct, but perhaps not enough. Supporters of the predictive account could claim that it only begs the further question of why people should regard the rules of law as reasons or justifications for actions. If it is, for example, only because the law happens to be an efficient sanction-provider, then the predictive model of the normativity of law may turn out to be correct after all. The extent to which law can actually guide behavior by providing its subjects with reasons for action has been questioned by a very influential group of legal scholars in the first half of the 20th century, called the Legal Realism school. American Legal Realists claimed that our ability to predict the outcomes of legal cases on the basis of the rules of law is rather limited. In the more difficult cases which tend to be adjudicated in the appellate courts, legal rules, by themselves, are radically indeterminate as to the outcome of the cases.