

3. Value and Convention

A. Hard Positivism I: Discretion

Essential

- Hart, *CL* Ch. 7
- Raz, 'Legal Principles and the Limits of Law' in Cohen (ed.), *RDCJ* (1984), with reply by R. Dworkin
- Dworkin, *TRS* Ch. 4
- Mackie, 'The Third Theory of Law' in *RDCJ*, with reply by Dworkin

Further

- Dworkin, *MP* [*A Matter of Principle*] Ch. 5
- Raz, *AL* [*The Authority of Law*], pp. 68-77 and Ch. 10
- Stavropoulos, 'Hart's Semantics', 88-98

B. Soft Positivism: Conventional Incorporation

Essential

- Hart, *CL* Postscript
- Coleman, 'Incorporationism, Conventionality, and the Practical Difference Thesis', in Coleman (ed.) *Hart's Postscript*, 114-33
- Dworkin, 'Thirty Years On', *Harvard Law Review* 115 (2002), 1655 – 1665

Essay:

What is the difference between easy and hard cases? How does that difference affect the way in which judges decide?

Discussion Questions:

What kind of choice do judges make in deciding hard cases, according to Hart? Does it differ from the sort of choice Dworkin describes them as making? If so, in what way?

Why does Hart think that law is necessarily open-textured? How does he think that hard cases are decided? How should they be decided?

What makes it the case that automobiles are clearly within the range of application of 'vehicle' in Hart's example?

If the rule of recognition only identifies the legal materials, how do positivists determine what the law requires?

What is the role of controversy over the application of a legal provision in connection with the exercise of judicial discretion?

Is it important that answers to difficult legal questions be demonstrably correct? What if they aren't? Would that imply that no correct answer exists?

Does the existence, in itself, of easy cases demonstrate that they are decided on the basis of conventions?

What does Dworkin think judges do in hard cases? What does he think they ought to do? What are the materials on which right answers are based? Are these materials different in easy and in hard cases?

Do judges attempt to show how their decisions in hard cases are based on principles that best explain and justify past decisions? What does this tell you about the distinction between easy and hard cases?

Do lawyers ever need to justify *easy* cases in terms of defensible similarities with other easy cases?

Does Dworkin think that morality plugs in the law's gaps?

Is Dworkin's theory a hard case theory? Does he accept positivism as a theory of easy cases?

How does the controversial nature of morality affect Dworkin's right-answer thesis?

What can make values part of the law, according to soft positivists?

Why does Raz think that soft positivism does not work? Why does Dworkin think that it does not work?