

## Lecture Notes – Critical Legal Studies and Critical Race Theory

- One of the questions that's been lurking in the background since the beginning of the semester is that of the role that extra-legal materials play (and ought to play) in legal reasoning.
  - For Aquinas and the Natural Lawyers, the only binding law is law that is in accord with natural law or morality, so there is a clear sense in which natural lawyers take extra-legal materials to be of central importance in legal reasoning. Legal reasoning is just continuous with moral reasoning.
  - Positivists (Austin and Hart) rejected this relationship between law and morality. They conceived of legal reasoning as applying law (in the form of statutes and precedent) to the facts of cases in order to reach a conclusion. The law might require interpretation, but interpretation here just means semantic interpretation, i.e., determining the core meanings of the words used in legislation and then deducing from them the precise way the rule applies in the present case. This is the judge fulfilling her role of answer “questions of law” as opposed to “questions of fact” and is to be distinguished from rule making or judicial legislation.
  - Holmes problematizes the positivist's clear distinction between adjudication and legislation. Judges, he argued, rightfully make law, for in any of the cases worth adjudicating at the appellate level the law will be ambiguous. Judges need to extend the law to cover such cases, and the way they do that is by considering how the laws in question serve the public good/interest.
  - Dworkin also recognizes that judges make law, but he argues that the way they do it is by relying on principles that are implicit in the body of law in the sense that a coherent interpretation of the body of law will make evident the political principles it embodies.
- Why does this question matter?
  - The role of extra-legal materials in legal reasoning matters to the distinction between legislation and adjudication.
    - Legislation –
      - What legislatures do
      - Method of decision – making law via some political process.
    - Adjudication –
      - What courts do
      - Method of decision – applying law to the facts
  - Why do we care to maintain a separation between legislation and adjudication?
    - The distinction is a fundamental building block of Liberalism (that is, liberalism as a political tradition emanating from the Enlightenment in general and Locke, in particular, that rejects the divine right of kings and hereditary privilege in favor of liberty, equality, individual rights (life, liberty, property), representative democracy (majority rule), and the rule of law (opposed to the rule of men)).
    - Rule of law requires the separation of powers in order to protect individual rights under majority rule.
      - Legislatures should legislate
        - Make law by making value judgments within the constraints of a constitution and under a norm of accountability to constituents.

- Courts should adjudicate
  - Determine the rights of parties in disputes without the taint of subjective political preferences of the majority.
  - Judges need to be objective – their opinions need to be free from personal *ideological* sympathies.
    - Because they are protected from the popular will, not elected.
- There is a worry, then, about **judicial legislation**
  - Use of force or violence against citizens must be justified in two ways.
    - By appeal to a norm produced by the democratic decision-making process that is embodied in the legislature or the process of constitution making.
    - By the application of the norm to the facts in a process that is independent of the very decision making process that generated int.
    - Judicial legislation violates the first requirement.
- BUT judges are forced to resolve gaps, conflicts, or ambiguities in the system of legal norms.
  - Sometimes this merely requires reformulation of rules...semantic or deductive reformulation.
  - But sometimes the judge “makes” a new rule and then applies it to the facts rather than merely applying a pre-existing rule.
  - IS THIS ALWAYS the bad form of judicial legislation???
- It depends on *how* they make law... it’s possible there is a *middle term* between applying law and judicial legislation.
- Kennedy recognizes five extant positions in the literature that try to answer this question:
  - Hart: No middle term. What is not application of law is judicial legislation.
    - Implausible. Even if judges do more than deduction from core meanings, the institutional context of adjudication ensures that the judge’s ideological motives will be different than the legislators.
    - Different in what way?
  - Collapse distinction between adjudication and legislation because there is no rule application that can be insulated from subjective influence, including that of ideology.
    - No rule can determine the scope of its own application.
      - Regress of rules.
    - But the experience of core meanings survives the loss of its metaphysical grounding.
  - Holmes – no middle term, but law making is nonetheless distinct from legislations because it is bounded in its substance...judges can’t get away with too much.
    - Interstitial law making vs. macro law making

- But how is this distinction made by judges? Is it not ideological too?
- Coherence (Dworkin, Fuller, Llewellyn): Resolve ambiguities, gaps, etc, by treating the whole existing corpus of rules as the product of an implicit rational plan and asks which of the proposed rules best furthers that plan.
  - But this rational plan will likely only be coherent as the working out of an ideological conception.
  - Ideological, but not personal.
  - Judge does the ideological business of the prior judges, relying on the legislature to change the ideology if it wants to.
  - Judge may have to rely on personal political theory.
  - 4A) English version: judges obliged to decide all cases that come before them. The right thing to do is what he thinks right when law “runs out”
  - 4B) American version: Some cases are beyond the purview of the court. Defendant wins “as a matter of law”
- Civil Law – role of the judge is to apply the relevant code to the facts using a presumption of gaplessness
  - Doesn’t entertain possibility that there is no right answer.
  - Treats body of law as coherent conceptual structure.
- Kennedy thinks that this whole exercise is ideological through and through. It is an attempt to stabilize the larger Liberal conceptual structure that distinguishes law from politics. How we understand the relationship of adjudication and legislation has ramifications for controversies over various conservativisms, liberalisms, and radicalisms.