

WHAT IS LAW? – Judges have much discretion in interpretation & how do they do it?
Literal (e.g. **Pound**) vs purposive (e.g. **Fuller**) interpretations, OR Weigh different purposes of one stated law (**Fish**), OR Stay consistent with rules backed by legal principles (ex: chain novel) (**Dworkin**), OR Social interest vs preservation of legal principles (**Cardozo**)
Marmor looks at: a) What are conditions of legal validity?
- LP: Include non-normative facts on people's conduct/beliefs (**Social Thesis**)
- NL: Social origins + moral content of norms = conditions for legal validity
b) Where does law's normative force come from? (Ex: *Oppenheimer v Cattermole*)

LEGAL POSITIVISM – **Hart's five principal views of LP and other thinkers' views:**
a) Laws = command of humans; general orders backed by sanction/threat of force (**Austin**)
- Sovereign w/ de facto power w/o considering if has moral right to rule (**Bentham/Austin**)
b) No necessary connection between laws and morals (**Separation Thesis**)
- Whether a law or legal system is good DOES NOT determine whether it exists (**Green**)
- Only laws/rights govt.-establ. (political/real rights) have determinate meaning (**Bentham**)
- Criteria for validity: Given by the legal system in power and its officials
- **Hart**: Feel obliged (fear of conseq.: **Bentham/Austin**) vs have obligation (feel ought to do)
- **Primary/secondary rules**: 1^o: substantive law/govern behaviour; 2^o: rules about rules (e.g. adjudication). Primitive systems: no 2ndy rules (**Hart**)
c) Worth analyzing legal concepts, is distinct from socio./hist. enquiries, critical evaluation
- Rules give justif./purpose of action, **habits** don't: **Hart** critical reflexive attitude re: validity
d) **Closed logical system**: Can deduct correct decisions from predetermined rules by logic
- If law vague/ambiguous: Judge can use **hard discretion** to make law (**Hart**: look for gaps to insert morals; ex: Apartheid judges)
e) Moral judgments cannot be established by rational argument/evidence ("non-cognitivism in ethics"); suspend it 'til establish what we seek to explain (**Kelsen**: Legal and moral discourse inherently different, can't confront legal "ought" with moral "ought")
Davies' critique of Austin: 1. Assumes identifiable sovereign who creates law: N/A to modern legal systems with few vertical relations, 2. Command theory omits enabling (e.g. contract), 3. Can't explain customary laws
Hart's critique of **Austin**: 1. Highest officials all subject to law, so hard to identify **sovereign**: someone habitually obeyed/doesn't obey others. What is sovereignty? 2. Continuity when another takes over: New sovereign no history of being obeyed. How does habit emerge?
Hart's rules of recognition in lieu of sovereign: Set of criteria (e.g. Constitution) determine rules are/aren't part of legal system. **Davies**: But does it impose duty or confer power? Can there be more than one in a given legal system? **Bix**: This criteria allows us to identify laws without having to consider their moral standing/content. or ideal state

FEMINIST LEGAL STUDIES – Drawing on fem traditions to make sense of how legal institutions impose masc roles in the **legal patriarchy** (gives power/privilege to men)
Four ways of attacking the problems that FLS have with modern legal theory
a) How law exacerbates/legitimizes fem oppression; operation effectively treats men and women differently. Men more capable of trad legal (i.e. abstract, impartial) reasoning
- Emphasis on precedent and consistency will keep law gendered, divisive (**Francis, Smith**)
b) Highlighting how patriarchy influences law, legal institutions; traditional juris, legal theory, CL, LP all inextricably male, influence is deeply normalized/embedded
c) Challenge common ideas of normality based on patriarchal/masculine conceptions of social and legal world (e.g. wording of provocation, domestic violence)
d) Highlighting wrongs done to women normally unrecognized (sexual harassment, catcall)
- All humans have = moral worth → = treatment under the law
Lib fem: Call for law reform for formal equality for women
- Critiques: May undermine existing social/cultural institutions, other societies' customs. LF recommendations for equality at odds with personal autonomy (**Davies**). Not enough focus on eroticization of dom/subordination at foundation of gender discrim. (**Mackinnon**)
Rad fem: Feminist rights oppressed by patriarchal structure of society, which presupposes universal male subject (**Irigay**)
- Since law is product of male domination, it's inherently male and thus acts to legitimate existing oppressive systems (**Smart** rape trials)
- Rule of law blinds us to structural inequality at heart of the legal system

RACE AND LAW – **Cornell** def' **Race**: Human group defined by self or others (no bio factors) w/ inherent common physical characteristics; 1 can include many ethnic. **Ethnicity**: Common ancestry based on culture (e.g. linguistic, religious, kinship, maybe physical traits)
- Differ in level of agency that individuals exercise in choosing their identity (race = immediate visual impact, less choice; whereas people can choose whether to express the cultural practices associated with their ethnicity)
White hegemony in law (**Davies**) has resulted in: 1. Failure of law to treat individuals equally in public and private spheres. 2. Western idea of law predicated on values favouring one culture (WASP) over others, inbuilt hierarchical presumptions that don't acknowledge others' existence/legitimacy
Key features of CRT – Delgado:
a) Liberalism's formal equality not enough to overturn systemic bias
b) Colour blind doesn't work; recognize and respond to different cultures and their lived experiences, acknowledge difference from Anglo-norm
c) Focus on victim's story in discussion of race and law
d) Focus on insights social sciences bring to looking at race/racism from legal perspective
Indigenous legal traditions – Borrows: Counters Western conceptions of separating law and morals and of focus on status of individuals
- Better understanding of their sophistication will overcome prejudices
- Draw on sources of law like sacred, natural, deliberative (communal, councils), positivistic (authority figures, rules, teachings), customs (social practices)

COMMON LAW – Judges can't change or refuse to apply the law; their wisdom inadequate compared to the accumulated wisdom of historical principle
- Source of law's authority: Maxims & custom since time immemorial; also legislation
- Role of judges: Oracles whose role is to discern CL from precedent and custom
- Form of reason: Artificial reason, requires study and experience to master

NATURAL LAW
a) ... **Objective moral principles**...
- "Higher law" independent of LP, human beliefs, time, location (**Cicero**)
- **Greenawalt**: There are significant cultural/historical variations
b) ... That depend on nature of the universe...
- Rules of nature guide human conduct: Exist independently of recognition/attitudes)
c) ... Which can be discovered by **application of natural reason** by all (ex: avoid pain)
- When consistent with objective moral standards and precedent, **Aquinas/Finnis** support human choice (Ex: Setting speed limit); **Finnis** supports **personal autonomy** in self-regarding decisions (Ex: Withdrawal of med treatment vs euthanasia)
NL standards come from humans, natural world, applying natural faculties like reason
How to justify deriving "ought" (law, expectations for behaviour) from "is" (objective truth, normative standard)? – If it's natural for humans to act a way → Ought to act morally this way (Ex: Reproduction is good) – Ethical framework
- Humans have proper function ("ought") discoverable thru application of reason → Better able to see description, normative relationship, good
- NL's/goods are self-evident (Ex: Slavery is wrong)
Aquinas' four types of law: a) Eternal Law: God; b) Natural (higher) Law: God's will in Nature; c) Divine Law: Law in scripture, prophet interpretations; d) Positive Law
Just, thus valid, law 3 basic conditions: Ordered for common good (consistent with NL principles), maker hadn't exceeded his authority, law is fairly imposed on all citizens
Unjust law = inconsistent w/ higher law (doesn't carry same weight as); sometimes follow only to extent necessary, or undermine entire legal system (**Finnis**)
Hart: Legal systems without min. protections die; all systems have similar key norms
Finnis' "basic goods" (intrinsic, not consequentialist; universal; what humans pursue not-instrumental): Life, Knowledge, Play, Aesthetic experience, Sociability, Practical reasonableness – makes sense of the goods, their scope, Religion/spirituality
What if law not in accordance with transcendent principles? No: Can be ignored or struck down (**Cicero**). Yes: Judges can't change established rules, Parl can (**Dworkin**)

LEGAL REASONING – Lamond
a) **Precedent**: Decision of adjudicative body that lays binding **ratio (Lamond)** for future courts to follow. Can be viewed as applying underlying rules, predictable
- Precedents are binding since represent justification for earlier decision
Justifying precedent: Consistency, expectations, replicability, need for law making
Theor. authority: If facts of later case = facts in earlier, can believe same decision applies in later case, VS **Pract. authority**: Precedents regarded as partly constituting CL (**stare decisis**), so must be followed even if judge thinks they were wrongly decided
Distinguishing: Not following even though later facts fall within scope of earlier ratio; rule modification to fit different current facts, narrower ruling
Over-ruling: Claim original decision wrong, or another decision possible on same facts
b) **Analogy**: Not binding. **Lamond**: Complements precedent arguments. When facts of case don't fit ratio of a precedent but assimilate the result to ratio in analogical case; OR when facts of case fall within ratio of precedent, as a basis for distinguishing the case from precedent (Ex: Tattoo to decorative branding, but not boxing to BDSM)
- Justified by referring to the underlying principles OR similar reasons that were basis for previous approach
c) **Interpretation**: Omnipresent in law since it's open-textured and based on context
- **Dickson**: Balance back-looking conservative w/ forward-looking creative aspect
d) **Coherence** of set of legal norms = Related either in realisation of common values or fulfilling common principle (**MacCormick**) = Unified principles underlying court decisions/legislative acts (**Raz**)
- Related to interpretation (esp. creative): When interpreting = Decide how much coherence matters to us

LAW AND MORALITY
- **Fuller**: Those following morally bankrupt laws (=/= laws) still guilty; ex: Nuremberg
Harm Principle: Power can only rightfully be exercised over a member of a civilized community against his will if it's to prevent harm to others (**Mill**)
- All have right to individual liberty, balanced with right of others to not be harmed
- Moral progress more likely where societies allow ethical confrontation, i.e. co-existing morality, politics, culture
- **Feinberg**: Law only justified in prohibiting conduct both harmful and wrong (harm necessary but insufficient condition)
Critical morality: State what is morally true
Conventional morality: Capture what most people believe to be morally true
Hart-Devlin Debate over morality:
- **Devlin**: Society held together by shared commitment to moral values → Undermining this = undermining stability of society → Can use law to enforce conventional morality to protect itself
- **Hart**: Suggested D had two theses: 1. Moderate: Society can enforce morality thru law to prevent dissolution (no empirical way to test its claims). 2. Extreme: Society can enforce morality thru law to preserve particular set of communal values (it would prevent social/moral change; it hints that society can enforce set of morals simply because they're widely held – violation of HP)