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TOPIC 1: JURISPRUDENCE AND THE NATURE OF LAW
(1) Valuable for its own sake
(2) Provides intellectual framework for thinking about the law- and its boundaries- look to other sources of social control
(3) Consider how else the law might look-
(4) Allows you to better understand various assumptions underlying different legal arguments
(5) Courts do incorporate legal theory into their judgements- particularly into
(6) Understanding legal theory lets you better understand how it operates and what to do when there seem to be no ready legal solution
- law

Law and validity: to define law, look at the activities this word usually applies to; though may not be particularly useful for explaining- instead Hart (for example) describes a working model of a standard legal system- and it's necessary and sufficient conditions
→ be aware of the ideology of the chooser and their underlying premises/social/political beliefs
→ 3 related questions are often conflated when defining law: (1) definitions- find it's meaning; (2) criterion for validity of law; (3) general plan to find things that validate any legal system; (2 + 3) Effectiveness?= sufficient for validity?- valid laws may be guides to action, have normative force; key point of validity is that it must bind all
Law and Regulatory: law requires a minimum level of regularity and continuity- at a certain point 'law' may be not considered law if it's excessively capricious
Law and Morals: how can we distinguish between legal and moral norms?
→ Law may be indifferent on certain moral questions; there may be insufficient moral sentiment to convert them into law; the existence of sanctions sometimes listed as a distinguishing feature of laws and morals, however morals also have group sanctions
→ Others argue that morals are enlaced w/i legal system as underlying principles that are applied to legal rules, and this moral content can be drawn out of legal rules
-> legal process may be said to have a "power to reject immoral rules as non-legal," but once legal rule determined, it doesn't stop being a law just because conflicts with morals
Raz- various theoretical approaches
→ *Linguistic*- analyze the nature of law by trying to define it and/or its meaning- problem is that 'law' has a wide variety of meanings in non-legal contexts
- studying nature of law therefore isn't just about studying terms; from lawyer's perspective, law is just "those consideration it's appropriate for courts to rely on when justifying their decisions

→ *Institutional*- rather than taking lawyer's approach as endpoint, look at how courts interact with the rest of society and their role in society- first explain the political system, then explain law by placing it in the political system
- Why are courts important within policiational organizations? (1) Adjudicate disputes and attempt to resolve them; (2) issue authoritative decisions to resolve them; (3) their activities should be at least somewhat guided by positivist considerations- that is those considerations you can find/understand without appeal to moral judgements (like statutes/precedents vs principles of justice)

0 nature of law has to account for and explain law within the context of wider socio-political organizations
Soper- Choosing a legal theory on moral grounds
→ Positivists claim a strong conceptual distinction between "legal validity and moral value"- no need to appeal to morality to determine the validity of a law- no necessary connection between the 2
→ however law seems to be morally loaded- difficult to argue that it's virtuous to obey the law (if only somewhat so) even if law has evil stuff in it

→ thus Hart/Fuller debates over positivism and its effect of causing people to abdicate “individual moral responsibility”- because law and morality seen as containing a separate set of considerations
→ Positivists like to separate law and morality because if we think of laws as having a minimum moral content, it will encourage the human tendency to externalize responsibility when bad things happen as a result of official orders

Riggs v Palmer- see written notes
→ Roscoe Pound- how can a court determine the intent of the legislature- purposive interpretation?
→ Fish- argues for 2 potential purposive interpretations- no literal interpretation of statute- there’s always some purpose behind reading a legislature
- if probate purpose is designating property, regardless of the morality, then statute can be read accordingly
- alternatively, if you assume no law ever operates to allow someone to benefit from their own wrong (fundamental rule of law), then i
→ principles vs rules- notionally they should support each other but what
→ Dworkin- when considering principles vs rules, and immediate answer isn’t available, judge should try to interpret in best possible light- judge reads statute consistently with the principles that underlie the law
- principles help to maintain the integrity of the law lest it lose its consistency- acts as a constraint on excessive judicial interpretation; answers positivists critique that judge’s can just fill gaps in the law, willy-nilly
→ Cardozo- courts should make the decision that maximizes social benefits
- whose social interest? How do they decide what social interest?

What is jurisprudence?
- law is localized, while jurisprudence is concerned with the general nature of law
    - raises question about what then law could be?

→ Why does our system have such a commitment to stare decisis
- law should be predictable and consistent so people can follow
→ *HLA Hart*- how does law differ from other ways we control human behaviour- eg. rule to stop at traffic lights vs habit of taking hat off in court- how would unaware visitor interpret this?
- moral vs legal rules?
→ *Lon Fuller*- eg. “just following orders” defense of Nazis- weren’t guilty under German legal regime of the time, however Fuller says that it didn’t constitute a legal regime as we understand it- too far away from basic elements
- echoed in ‘war on terror’- perhaps you can’t use legality as a defense for the use of torture, even if

Why study it?
→ for its own sake
→ Understand the assumptions grounding the assumptions of the law
- law depends on various moral orders, social conventions, which law will help to pull out
→ court also read legal theory extensively- see US SC courts especially
→ *R v Dudley and Stephens*-
- seems to †

Lon Fuller and the Speluncean Explorers
- Fuller considered a theorist of the purposive approach to law

→ clashed with HLA hart over relationship between law and morality; Fuller believed that law had to have a core of morality lest it lose its character of law
- even validly constructed law, if it produces a deeply immoral/evil result, it’s not law

→ Hart disagreed, taking a more positivist approach
→ Debate between Hart and Fuller was in context of Nazi legal regime and associated evils
eg. consider law that prohibits riding vehicles down the road
→ Fuller would look to purpose of statute- if intended to keep the road quiet/improve quality of living, would argue that therefore bicycle do not qualify as vehicle for the purposes of the statute
- more positivist approach

→ Why do they first turn to judge/doctor/priest?
- they appeal to authority of law but social contract fails them, returns them to the state of nature,
→ *Truepenny*- suggests that the court should convict them but it's the duty of the executive to pardon them;
- incorporates a vision of separation of powers
- takes a literal reading of the statute to require this- to get around the moral issues they should be able to plead for clemency to the executive (black letter approach)
- strict positivist approach to the law- law needn't incorporate a moral aspect which he but avoids by saying executive should be able to grant clemency; doesn't seem to agree with judicial discretion/interpretation of the law
  - assumes that the executive will in fact grant clemency
- suggests that the executive should take responsibility- essentially a political judgement which sees the executive as embodying the people's will who can step in when the law produces a discomfitting/unpopular result
→ *Foster*: No need to rely on Executive for clemency- because positive law premised on potential for man's coexistence in society, if this is impossible, the basic premise is removed and force of positive law disappears
- takes issue with Truepenny, arguing that the Commonwealth law could not apply in these circumstances; men were essentially in a state of nature where they were free to contract with each other- basic principle of gov.
- how do you decide when they are actually in a state of nature?
- No social contract between them and society- so they are not bound by society's rules any longer
- Consider state of emergency- executive can essentially suspend constitutional rights- who gets to decide when it begins and when/if it ends
- even if law applied they may not have violated it- looks to purpose of statute- it couldn't have been meant to apply to cases such as this one-
- purposive interpretation makes legislative will effective, rather than supplanting leg. supremacy
→ *Tatting*- critiques Foster's argument re. state of nature- how do you know when you enter it? And how do the judges adjudicate this law given that they aren't in it, and by whose authority?
- nor is the purposive approach particularly useful- how do you distinguish the most important purpose
→ *Keen*- positivist view that legitimacy of law doesn't arise from it's moral standing
- also disapproves of CJ's directions to Executive to grant clemency- based on separation of powers
- notes the disjoint between legality and morality of what the explorers did
- turning to the purposive interpretation is merely a means of avoiding a result the judges don't like, but that seems required by the law
- cautions against judicial dispensation simply b/c it seems like the desired/popular result- if judges do this it prevents people from demanding change from their representatives- delays the 'bringing-home' of the results of bad law to people
→ *Handy*- Judges may be some sort of conduit for public morality- though this can be problematic with minority rights
- despite the varying legal opinions of the judges, they all agree that morally speaking, the accused should likely receive mercy, even if the judges disagree as to whether or not they are guilty under the law

Marmor "The Nature of Law:"

→ General jurisprudence assumes law has certain universal features- by virtue of it being law
→ Apart from intellectual interest in studying law as well as investigating its normative power, jurisprudence also considers how law interacts with other normative forces- and how much it depends on them.
→ 2 main questions: (1) What is the source that might render a norm legally valid? and (2) how and why do legal norms compel people? (analysis of its normative force)
→ Legal positivism argues that legal validity depends entirely on social facts- natural law denies this, arguing that LV is also reliant to some extent on morality
Conditions of Legal Validity: LP claims that social facts determine LV- 2 main claims:
(1) *Social Thesis*: conditions of LV derive from social facts; early LPs argued that LV came from the sovereign- modern LPs claim that certain social rules/conventions (rules of recognition) control when legal standards are created/ended/modified
→ eg.leg. /judicial decisions are the sources of law; legal domain= facts about conduct/belief/attitudes
→ Natural lawyers (NLs) argue that norms aspiring to LV must contain min moral content- some essence that conforms to universal morality- norms rely on more than just social facts to become law- nonreductive
(2) *Separation Thesis*: conceptual separation b/w law and morality (b/w what is and what ought to be)
→ LP doesn't argue that it must be false that law has some necessary good, or that law may coincide with moral prescriptions in many ways
→ this claim is about the condition of legal validity; norm needn't necessarily be moral to be law
→ Inclusive LPs agree with social thesis but note that LV may depend on conventions/beliefs of the relevant community which may include moral content
→ NLs have had to adjust to acknowledge that morally bad law may still be law, but argue instead that NL is an aspirational type of law- highest/fullest iteration
Dworkin's Theories: contrary to LP, facts vs value distinction is somewhat unclear; LV will always rely on "moral/political considerations" about what the law should be- evaluative judgements
→ Argued that LPs overestimated the importance of legal rules, whereas Dworkin claimed legal principles highly important
→ Legal rules apply black/white fashion- if applicable, it will decide the legal outcome of a given situation, otherwise irrelevant; legal principles on the other hand, are not determinative even if applicable- they're not absolute but can give decision-makers reasons to decide an outcome in either direction.
→ For Dworkin, while legal rules needn't be moral, legal principles "are essentially moral in their content"- they arise"best moral and political interpretation of past judicial and legislative decisions in the relevant domain"- halfway point b/w legal rules and moral principles
→ Legal rules are validated by their source, moral principles by their content- legal principles validated by *both* their content and source- from both facts and legal considerations
→ Simpler way to distinguish /w legal rules and principles- consider the vagueness of the norm-act prescribed by a relevant legal norm- the vague/more general the way a legal norm definites its prescribed norm-act, the more it's like a legal principle
Dworkin's Interpretive theory of law: (1) find what the law require in any case requires interpretive reasoning; and (2) interpretation requires evaluative considerations; if both premises correct, separation thesis can't be correct- determining law always requires evaluative considerations.
→ Law is essentially interpretive such that LV depends on moral considerations- while ILPs say this dependence doesn't come from the nature of law but due to social conventions of a given system
- relevance of morality in a given system depends on the variable nature of that society's conventions
→ This is in opposition to exclusive LPs, where LV entirely contingent on conv. recognized sources of law
→ NL theories must assume obj. stance about morality- if subj, and law depends on it, renders law subj.
Normativity of law: Early LPs focused on the coercive aspect of law- believed therein drew normative force

→ Austin argued that every norm required a threat + sanction- saw law as only those norms backed by power of political sovereign- seemed to see law's normativity as reliant on ability of people to anticipate punishment

Can law fulfill its social functions without state monopoly on the use of force?

→ Kelsen + Austin focus on violence/coercion for law's normative force- later LP's (Raz + Hart) argued that coercive aspect was overstated

→ Hart objected to Austin (normativity of law arises from people's ability to predict sanctions) because deviations from rules are seen as justifying the reaction/sanction- why do people see legal rules as justifying this though?

→ Less likely that Austin/Kelsen position re. sanction as law's only function is correct- consider standard setting, symbolic expression of communal values, resolving factual disputes

→ American LR (legal realists) suggested that predicting outcomes based on legal rules if fairly difficult- at least using legal rules alone- lawyers who wanted to predict case outcomes needed psych/socio. research

Raz on authority and law's normative force: law= authoritative social institution= de facto authority

→ law as an institution that necessarily claims legitimate authority; leg. authorities help subjects to comply with the right reasons relevant to their actions- thus legitimacy of speed limit comes from its ability to help others to comply with the best reasons

→ Authority= legitimate if subjects are more likely to comply with the right reasons when doing an action, by following the authority's resolution rather than figuring it out on their own; for Raz, authorities should mediate between its subjects and the right reasons which apply to them in the relevant circumstances

What can claim legitimate authority? (1) directives must be identifiable as authoritative directives- can't make a practical difference unless its directives can be "recognized as such" without going to same reasoning process that reliance on authority is supposed to replace; (2) to claim legitimate authority, a thing must be able to form opinion about how subjects ought to behave- eg personal power

→ A norm is only legally authoritative if "validity doesn't come from the same moral/evaluative considerations it is there to settle

→ If LP= law comes from social conventions, how can it give rise to reasons for action and justify them?

- rules of recognition of law seen as just convention is unsettling given that they point to rules that courts are bound to apply- how do conventions figure in our reasons for action?

→ Conventional rules as "solutions to large-scale and recurrent coordination problems"; if so O to obey created thru people having obligations to solve the coordination problem that first created the convention

- however more likely these conventions are part of social values in given social practices- not just solutions to "pre-existing coordination problems"

→ Morally, recognition rules can't be source of Obligation to follow law

Oppenheimer Tax case:

→ O. loses German citizenship in 1941 under a Nazi law (post being in a concentration camp and after his release immediately fleeing to the UK) He becomes a naturalized British citizen in 1948.

→ 20 years later – German government addresses law 1941 by allowing those who lost citizenship to regain it – but they must apply; has O been

→ O awarded 2 pensions – one in 1953 for working as part of a Jewish group – one in the mid 60s for more general; has O had Germany nationality removed? If yes, no dual nationality and will need to pay tax on pension from FRG

→ Original Admin Body: He is a UK citizen, there is a strict application

→ Trial Court: holds the Nazi law as valid and finds loss of citizenship

→ Appeal Court: finding of loss of nationality = no tax (Denning – move to the UK = move of allegiance, move no more German citizenship)

→ Lords = agree with the original Commission, but in the obiter: reason they don't worry about validity of the Nazi law is because he had the chance to get back his citizenship- he chose not to be renaturalized; BUT if there was no second law it would matter and they would have struck down the 1941 law and let him keep his

citizenship; they acknowledged that the Nazi law violated HR such that they wouldn't consider it law- rejecting it on public polciy grounds
→ Questions: what are human rights? How does law create obligations- and are these obligations absolute, qualified, and if so, how?

Issues
→ Consider appeal to the executive and separation of powers
→ relationship between law and morality

Shklar- Legalism: ethical attitude that moral conduct is about followign rules
→ an individual code of conduct; guides the organizational standards and ideals of many social groups- and most modern legal sysytems
→ excessive legalism has led to the serveringof law and legal theory from the society it operates in- and historical thought and experience
- better to think of it as part of a continuum, with legalistic values and institutions on one end, and personal morality at the other end, with a wide spectrium of values/beliefs/institutions in between
→ Law becomes quite artificial if elevated and separated from other ideologies- when seen as a discrete thing, separate from morals and politics
- which is essentially the operative outlook of legla professionals, which grounds judicial institutions and procedures
→ Legalism structures human relations into claims and counter-claims; a highly conservative outlok because it tends to promote/protect the "security of established expectations
→ the judiciary strives towards neutral impartiality- and is amenable to serious adjustments if political/social climate requires it- consider English judiciary's enforcement and backing of socialist leglsiatlion
→ Expectations of public and professional ideology influences the conduct and procedures of the judiciary
- tend to aim to "seek rules" and public consensus
→ Because consensus is so rare, particullarly with respect to complex social issues, neutrality seems to disappear- the losing party in any legal dispute will blame judge for legislating
- both sides begin by presenting their view as the the true law
→ When legally argued expectations are upset and real interest involved, judges accused of not being neutral- in these situations its tempting to escape into formalism

TOPIC 2- NATURAL LAW THEORIES

` W→ NL theory has a long history and influence on jurisprudence

→ Is it a conservative theory that reinforces social institutions?

- Alternatively offers an external reference point to critique social institutions and legal institutions

Basic definition: natural law seems to believe that there are objective moral facts that laws must draw on

- assumes objective moral principles that can be attained through reasons
- NL theory assumes that there is a higher order of law that exists independent of human positive made law, against which human law can be judged (natural law and positive law)
    - positive law should aim to conform with this higher law- problem if it doesnt

3 basic questions:

(1) What is the content of higher order law?

→ Cicero: "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions…It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst punishment"

- Higher law exists independent of societies and of time- a fairly controversial claim for moral relativism
    - even if people's ability to follow/understand natural might be uncertain, there is only one higher law to which they should aspire to
- Natural law is accessible to everyone through the use of reason-
- Only just laws deserve to be called laws

→ Interpreting 'natural' aspect?

- (a) natural because they arise from human nature
- (b) natural because they are accessible through reason
- (c) natural because they derive from nature

(2) How do we know the content higher order law?

(3) What do you do when positive law conflicts with higher order law?

→ when is it correct to not obey positive law when such conflicts occur?

→ Hart looks to a minimum number of higher law principles required for people to live together in groups

→ NL places limits on law- by referring to external values/morals to human institutions, limits their ability to do injustice

- how far apart does positive law need to be before it becomes unjust- and who gets to decide whether the positive law is unjust or not? The individual based on their own consience

Criticisms:

(a) Morality is in fact relative

(b) NL tries to derive an 'ought' from an 'is'--- NL sees the world as existing in a certain way and from tht inferring how things should be --- derive the normative from the factual

- eg. People reproduce- it's part of nature and occurs, therefore it's something we *ought* to do- therefore positive law should help this, or at least not constrict it
- NLs see this as an almost inevitable shift or process
- NL try to find the content of NL by looking at facts present in world about human behaviour, condition, and then prescribing what should be based on this; further problem that positive law should follow the NL and protect these observed facts;

        - Hume notes that this is permissible- facts and moral claims needn't be kept separate- however to move from descriptive claim to normative one requires some sort of ethical framework or assumption (eg. if reproduction is assumed to be good and opportunity is valuable, NLs claim that law should protect/promote reproduction seems stronger)

→NL response to these critiques?

- If we observe how people function, we can see that humans behave in certain ways, and thereby assess conditions humans need to flourish and become fully functional- this natural order can be observed
- look at what naturally occurs and thereby derive what are objective moral goods that the law should then promote, or at least not hinder
    - flourishing, good life, etc are relative terms- NL tends to assume that there is a rough consensus
- Self evident truths- certain intrinsic; eg. killing, stealing ,etc

Where do objective moral principles come from?

→ Depends on the version of moral law being considered

- some NLs look to moral principle from religious texts
- Others argue that moral principles can be found through the "application of reasons" to the human condition/world

How do we discover objective moral principles?

→ Aristotle- consider what constitutes a good life, and then look for what traits contribute to this, these are moral virtues

→ Finnis- apply reason to come up with a number of intrinsic goods

What is law? NLs begin with positive law- created by human institutions like parliaments and courts- and checks to see if the law was created pursuant to the correct rules about making laws- here positivists stop

→ NLs then ask if the positive law is consistent with the higher law.

What occurs if there is conflict b/w positive law and higher law?

- Can you comply with just parts of them? Perhaps just comply with the law only insofar as its necessary
- Consequences of disobeying

Relevancy? Many legal thinkers (even if not officially NLs) rely on NL reasoning when addressing conflicts b/w law and morality- NL also used to support moral positions

Actions when faced with immoral laws:

Aquinas- Christian thinker and i

→ Divided law into, (1) eternal law- basic premise that there is a god; (2) natural law- essentially God's will manifested in nature and discoverable through reason applied to natural world; (3) Divine law- law found in scriptures; and (4) positive law- law created by humans

- Natural, Divine law, and positive law had to accord; and positive law was to be derived from natural and divine law; Divine to positive less controversial, however argued that god's law also found in nature
    - NL in its modern iteration asks if natural law can still be a source for positive law, absent DL and EL

→ In some cases the various laws accord fairly easily- killing is bad as evidenced in facts found in the world- positive law against killing can be deduced in a straightforward manner from natural law and divine law

- But in less clear cases, how are day-to-day regulatory laws connected to natural law?
    - Aquinas argued that human life is valuable (deduced from natural law) and therefore it followed that certain regulatory measures were needed- and inferrable from natural/divine law- even if

the particulars could be left up to general human choice, natural law created the broad ambit within which human choice is exercised

- local conditions do matter in that regionalized communities can set out their own laws, etc provided they more or less accord with broader values drawn from divine/NL

→ To be just (and thus valid) a law must: (1) be consistent with NL principles; (2) law-makers must not exceed their authority; (3) law should imposed fairly on all citizens

Finnis- Natural Law Theories: set out new framework for NL theory

→ No way to answer 'what is law?' without taking a purposive approach- for Finnis the purpose of law is to help people give good lives

- What goods are essential to living good/valuable/meaningful lives? Inherent/intrinsic goods
    - Life (bodily health, freedom from pain, ability to reproduce);
    - knowledge- inherent good, play- for its own sake;
    - aesthetic experience;
    - sociability- fundamental good in making meaningful relationships with others;
    - practical reasonableness- ability to make informed choices about how to live your life- a good and one you need to interpret other goods;
        - structures general pursuit of goods
        - helps to develop coherent lifeplans
        - helps to avoid arbitrary preferences with respect to people and to values
        - helps to pursue goods but change them if necessary
        - helps to understand consequences
        - helps to show basic respect for every value in every act
        - helps you to follow your own conscience
    - religion- spirituality etc

→ Law should promote these basic goods- or at least not create barriers in pursuit of these gods

- Finnis believes these are universal, timeless goods
- Positivist legal theorists often describe PL as in opposition/distinct from NL- which doesn't see the same opposition
- NL agrees that law can be both a social fact involving power + practise, and a set of reasons to act that may be good, and thus normative grounds for action
    - Finnis- reason for PL theorist to set themselves against NL- both acknowledge same realities
- *Orrego*- both NL and PL share a few basic propositions: (1) law creates reasons for actions; (2) its rules can and do create moral obligations; (3) if a potential rule is truly unjust, its legal and moral O will be defeated; (4) judicial- and other legal thinking/reasoning/judgement includes NL and PL
    - PL distinguishes itself from NL by denial that theory of law must address all these issues
    - This view of NL explains it as a theory of law which is more complete- deals w/ issues necessary to understanding law
- How and why does law give people good reasons to act follow it?
    - Law's sources in legislation, custom, and judicial precedents is important for its capabilities to do good (common good, protect human rights, the vulnerable, etc)
    - However can also be morally problematic in capacity to do evil through unjust governments
- **First principles of practical reasoning**- basic things/actions that should be done to promote flourishing in life/health/knowledge/helping others- these are basic fundamental goods
    - This basic list is what you come up with given enough effort: Life, knowledge, play, aesthetic experience, practical reasonableness, friendship/sociability, friendship, religion
        - Basically intrinsic goods
    - How can you give these basic principles moral forces to advance them? (united directivness)

        - General articulations through broad principles like the golden rule, categorical imperative
            - specify further by finding out what they entail- and rationally selecting a few of the alternative specifications of advancing what's entailed by these principles
- Political communities are the best site for collaborative action- can be seen as required by these basic moral and foundational principles
    - in these communities, governmental authority, through legislation and other laws, is how the alternatives specifications are selected and implemented
        - Helps to explain why we set up - and then accept- practical authority- to prevent the bad- basically what contradicts these "high level foundational moral principles"
- In NL theory-, natural can mean "of reason"/"law of reason" / "regulation" of reason- not a naturalist fallacy
- **Rule of Law**: Fuller, drawing on Aquinas and Aristotle, created list of requirements for rule of law
    - sees them as specifications of duty to treat people as entitled to be treated/ruled as free people/ equal to their rulers, and free from manipulation, fear, and uncertainty- also instrumentalist as it makes the law more effective
    - Raz and others argued the rule of law was morally neutral- though sometimes morally important and a virtue- but sometimes used by unjust rulers for unjust purposes
        - Somewhat debatable- see Fuller's 8th rule that rulers adhere to their own rules
- **Legal Rights/rules as necessary to legal system**: tho Fuller focuses on procedural NL, legal procedures and institutions do substantive good
    - Those legal principles that aim to do basic purposes common to most legal systems- restrict violence, theft, fraud, protect mentally ill, vulnerable, etc (*jus gentium*) are basically identified as reasonable and necessary for any society to live together in political community- often called higher law or fundamental human rights in modern law
        - At CL, mala se- things wrong in themselves; vs mala prohibitus- those things wrong because prohibited by positive law
    - Part of Hart's 'rational necessity'- what might be called the "minimum amount of positive law/minimum set of principles needed due to fundamental facts of human nature- that are aimed at purposes shared by all human societies and can therefore be called NL"
        - contains both positive and natural elements
- NL theorizes positive law, sourced in persons and institutions, but which contains a moral obligation to comply- Aquinas says these positive laws are derived from NL- even if only have force a given legal system
    - though this positive law might vary widely it has a rationally, necessary connection to NL
    - Once a determining principle is created (that rationally links NL and the variable parts of a given legal system) and validated in a legal systems condistition, it changes the law- through a new/amended legal rules that gives judges and people new reasons to act or not act
        - Even though this new rules depends on the social facts used by the determining principles to actualize, doesn't mean a new norm (ought) is being illogically brought from the basic "is"
            - The new rule is obligatory and normative where social fact is the 2nd premise in practical logical argument where the 1st premise is normative
                - "moral normativity of a principle replciated in a specific rule," created by determining principle
            - The rule is morally + logically normative because this normativity is entailed by the moral principle that the common good requires institutions (with the authority to do so) to create, apply, and enforce rules inc ertain maners
- **Obligatoriness**- legal-moral Os of a legal rule corresponds to the legal-moral authority of its source

- Look to the reasons to act given to subjects by exercises of authority
  - Exclusionary- these reasons are supposed to supplant (in subjects minds) other reasons they had for acting a particular way
    - This 'exclusionary power' comes not from just the reason, but its source- one that is entitled to obedience given its status- doesn't matter the content
    - The force of these reasons depends on basic human needs/goods and moral principles and norms- if the reasons given conflict sufficiently with these, they lose their exclusionary force- and obligatoriness
- For law to effective promote common good + solve problems and require obedience, it must be treated by both subjects and its administrators as legally and morally entitled "to prevail against all other reasons" except "competing moral obligations of greater strength"
  - Seriously unjust laws will thus lose their obligatoriness

- Law's point in humans- from classical jurisprudence to modern theories- is for the sake of all persons, meant to direct people towards morally sound judgements
  - some early LPs denied this (eg Kelsen- denied persons role in law, apart from being subjects of legal rules) but fundamental equality and dignitiy of human must be argued for as part of a rational understanding of law
    - One that emphasises the importance and status of humans as bears of rights
- **Remedying defective positive law**: exclusive LP may require judges to decide cases (if rule works injustice) by applying moral principles/rules which entails changing the law
  - Includisve LP says this is restricted (to deparat from law) to cases where "existing social fact rules direct them to do so
  - On this point NL suggests that any moral rule or principle that courts can apply in a court can be counted as law- doesn't matter whether a moral principle binding on courts should be part of law- if it can't be you might just say that judicially applicable moral rules and principles are rules of law- part of *jus gentium*.
  - Both NL and LP have become less strict on boundaries b/w posited law and other legitimate standards for adjudication-
  - *Nuremberg test*- various Ds charged w/ crimes against humanity at international law
    - Inclusive positivism- moral rules- Charter is positive law for court that requires court to apply moral values, also legal rules
    - Natural law- moral rules applied were of higher laws applicable everywhere- and useful as judgements when normal social fact sources of law were inadequate
  - Judicial reasonsing and moral adjudication draws on two major sources to find when a judgement is correct: (1) social fact sources- that is legal materials; and (2) moral standards- whether in decider's community, or just what judge will accept as moral- thus moral sources are applicted directly, objectively, as law
  - Green- policies that are just, wise, efficient aren't necessarily law, and vice versa
    - Principle of morality doesn't become law- must be accepted and shaped to fit with the rest of law
    - When should judges depart from social-fact law? And if this departure is warranted, does settled law lose its directiveness?
- **Do unjust laws bind?** If law loses its directiveness, does it lose legal validity?
  - "Unjust law is not law"- simply means that what is normally and presumably is law- a law in most normal respects, because justice is the entire point of law (and respecting justice) a law's lack of justice means that it lacks basic essence of what all law claims to have
    - if law=reason to act, a seriously unjust law is only law in a distorted, 2ry sense

- **Value/moral free general theories of law**: any general ccount of a broad sphere such as law requires prioritization of a particular set of concepts
    - NL theory makes clear its valuations in terms of its beliefs about the "basic aspects of human wellbeing and related practical truths"
        - Finnis believes moral reasons and valuations important when creating concepts in the social sciences- including general theories of law
            - this will influence analysis of bad law/institutions as a counterpoint to the morally good and the theory's ___ (see Hart- who apparently thought a valuation-based general ytheory of law would not address the bad)
            - Thus in ARistotle- acknowledges and depicts bad "social forms, practises, and institutions" amidst a descriptive theory of law grounded in moral judgements
    - NL theory tends to focus on identifying when law is justified- when a legal rule, principle, etc is better than other reasons to act
        - Critique of LP- complete of theory must explain what are merits of law, its role adjudication, its claims to our obedience, and what laws we should have- LP doesn't really do this
            - NL does account for these, as well as law's dependence on social facts
    - Basica human needs suggest we need norms/laws that depend on social facts (like custom, rule-making, and adjudication
- **Other elements of NL theory**
    - **Intention:** law rules are supposed to be taken as directions that can influence subjects judgements/actions/choices
        - A sound theory of law should understand relations b/w intended means, means chosen, ends as means and vice-versa
    - **Responsibility and Punishment-** criminal law and it's prohibitions aim to stop/discourage certain acts, however deterrence is not primary/only end of punishment- also about removing advantages/benefits that offenders get from breaking the law- and thereby giving htem unfair advantages over those who obey the law
        - Aims to balance relationship b/w wrongdoer and the lawful members of society

Greenawalt:

- Basic Questions of NL Theory?
    - Is NL more of a general inquiry about common good and human fulfillment- or more of a distinct tradition with its own approaches to solving moral and political problems?
    - Are forms of moral reasoning uni~ valid? And are categorical approaches of NL the same?
    - How culturally relative are specific moral conclusions?
    - What role do religious beliefs play in NL- and conclusions about moral and political issues?
- Basic Premises of NL:

(1) Human life is intrinsically related to all of existence;
(2) It's universal
(3) Our defining characteristic is our rationality
(4) We have certain inherent purposes and goods- discoverable through reason and human experience
(5) Morality is objective, universal, and accessible through reason
(6) Moral obligations are consistent w own purposes and true happiness
(7) Human law reflects NL- former interprets the details not included in NL- those laws that conflict w/ NL aren't law in some sense

- G suggests that when NL and PL conflict, immoral law is still law, but has no moral obligatoriness; however you may still have to obey it if disobedience has seriously negative consequences

- If we wish to consider how well conclusions of NL can be used to improve human law, consider how well NL accounts for morality- and how moral conclusions of this sort can help you explain human law- how should morality influence different legal/political actors
  - **Both** G and Finnis want to make a case for NL w/o reliance on God

NL to develop HL? How do you connect a moral proposition drawn from NL, into HL?

- Judges, in particular, have to consider their role amongst a large set of entities when interpreting legal materials- not just moral standards; eg. consider statutes, precedents, not just what is best ITO
  - may need to look to community sentiments, consider role of judges and courts in democracy, role of NL in the constitution, etc
- Role of legislature and executive do with their wide discretion to choose laws? eg. with laws that are immoral but that majority doesn't see as such- should they use their power to dictate moral outcomes or would this be wrong if went against legislature's wishes?

Can NL be used to resolve moral problems and develop laws? Some moral principles seem quite persuasive but not useful- others are the opposite; for G, the more general, the more plausible, yet less useful.

- On moral issue that human society should promote human autonomy, NLs agree with utilitarians that moral beliefs that are important to political and legal choices should start with general human good
- Certain premises of NL (Human nature is universal; human goods are discoverable through reason; obj. moral principles are accessible through reason) are heavily challenged by historicism and cultural relativism
  - These argue that moral beliefs are a product of cultue and society- no universal morality, human nature, or objective moral perspective- suggests that answers to moral questions will vary widely across cultures
- G uncertain- some human goods universal, others seem more dependent on culture- as do ideas about what is reasonable
  - Variations about what people consider good aren't just at an individual level but how much people think its appropriate to interfere with others- and good laws (thus societal) thus to some point moral principles must be culturally relatives
- Can such cultural variations accord with obj. moral answers?
  - NLs distinguish between fundamental and non-fundamental moral principles
  - On the former, institutional and moral opinions can differ across culture- the basic human goods can be facilitated through a variety of structures, which may vary depending on a given society's stage of economic development (eg. rights and duties of private ownership may vary)
  - NL doesn't require an overly restrictive format- moral sense about rights will vary across cultures, and how these moral senses are interpreted into law
- But what about moral conclusions claimed as universal values? Universal reactions don't help to solve difficult questions- not difficult if everyone seems to have the same reactions.
- Cross-cultural variations may challenge the NL shift from premise to conclusion; eg. take premises with strong cross-cultural agreement, but when translated to conclusions it can produce controversy
  - This reasoning used to defend beliefs in obj and universal moral beliefs

Is NL reasoning too abstract and categorical? G considers F's intrinsic goods, perceived as self-evident for humans with social experience (life, play, aesthetic experience, sociability, religion/spiritualist, practical R)

- Finnis' lists don't provide clear or useful answers to complicated moral questions
  - *Example (see handout)*: assisted suicide- Finnis says you can withdraw medical help out of respect for their autonomy- respectful of life; but if they intend to end their life then you can't because it's a violation of a basic good
    - Seems to value human autonomy as a basic good- but only to the extent that they don't intend to end their basic life- when they choose this this they're wrong.
      - The generalized/categorical nature of basic goods fails when you address

    - Greenawalt suggests that Finnis and other NLs incorporate other legal theories (directness, intention, etc) in order to clarify the broad moral principles- yet these legal theories are also somewhat undefined concepts
- Practical reasonable requires you never do anything that only serves to damage one of these goods or impedes realization/participation of 1 of the basic goods- G disagrees- in some situations you may need to choose between them (eg. permissible to save 5k over 1, but is it wrong to intentionally kill 1 to save the 5k?
- Absolutist approach of some NL theorists coexists uncomfortably with the complexities of moral choice- and conditions of life
- How much can we rely on personal experience to reach moral conclusions?
- NL relies excessively on abstract categories- rather than focussing on qualities of lived experiences and contextual distinctions drawn from that experience
    - Though you need to abstract and categorize to some point to make sense of experience, you can still consider experience to a greater or less extent depending how much it conflcits with abstract arguments
        - even the decision to rely more on abstractions vs experience (or viceversa) is a product of personal characteristics
    - Given that differences exist *within* a culture about the best approach to moral reasoning, it's not a stretch to expect greater differences across different cultures
    - No clear, self evidently correct universal form of moral reasonign to create moral norms based on widely shared judgements about human goods and moral obligations
- NLs may acknowledge this but argue that set of reasons and judgements of NL are the best yet developed- culture dependent but perhaps still the best available- however this means you can't expect moral norms to seem valid to people across all cultures
    - People from cultures that don't use forms of NL reasoning may not be persuaded to withc over, particularly if it leads to moral norms that don't accord with their own
- How can NLs be sure their form of moral reasoning is the best? Though some form of life may be the most fulfilling and some moral norms may in fact be the best, it may be "tough" to prove this through reason alone
- Perhaps if you argue for a culture-specific NL- begin with your own cultural premise- it may result in single answers to moral questions (what counts as "a" culture?) but this concedes a fairly basic NL premise- universality.

Religious Premises: sometimes used to support claims to universality- even if F believes his are independently persuasive

- Can be used to support a belief that obj. moral standards do exist- but can't expect everyone to accept them- religious perceptions are also culturally dependent
- Christin NLs might rely on Catholic moral norms and their attached moral reasoning given authority of tradition- or at least strengthen beliefs in objective moral beliefs
- G suggests that certain basiec premises about human nature might still lead to widely varying but specific moral norms- objective, universal standards that vary significantly in application
    - This flexible system could be grounded in (1) compelling, broad moral judgements about human good and reasoned development; and (2) best reasoned understand among culturally variable forms of reason; (3) religious convictions; (4) some comb of these
        - Less strict than traditional NL view of uni. validity for a number of specific moral norms
        - More plausible if you strictly limit the scope fo the basic premise (eg. people should care for each other

    - Still coudl be tough to move from fundamental premise to specific norms in specific cultures- may be easier in our own culture however G warns to be critical of our dominant forms of mroal reasoning and specific moral norms- consider the critiques of feminists and critical race theorists

Conclusions:

- However even if you can be sceptical about claims to universal morality and reasoning, correctness, etc, NL still offers interesting avenues to make the moral judgements we are oblgiated to make
- Before incorporating moral conclusions into official law, need to make compelx decisions about human law and the role of public officials, democracy, etc
- NL theory entails both: a (1) general inquiry into human fulfillment and common good; and (2) a tradition with specific and particular approaches to mroal and political problems
- Some moral conclusions are culturally relative- as are forms of moral reasoning (at least more than people think)
- Reason can lead to a basic NL but religious belief may be the only source for a belief in NL with claims to universal values and objective moral beliefs.

<u>Classical Common Law Theory</u>:

???

TOPIC 3- LEGAL POSITIVISM
Existence + content of L turns on facts, not merits; merits are important and knowable- but not determinative; depends on structures of gov. + social standards recognized as auth (leg./jud.decisions/custom)
Roots in Hume/Hobbes; Bentham + Austin- saw law as command of sov., backed by force
→ Kelsen/Hart/Raz- focus on courts, not leg.inst., + law's norm. + syst. force rather than coerciveness
Sources: B/A saw Ls as feature of lg societies w/ sovs w/ absolute power, obeyed + don't obey others; Ls are just growth of sovereign's commands that apply to people with coercive backing
→ Positivistic- still L system w/o moral recognition of sovs right to rule; Monistic- laws have 1 form- tho recognizes LSs may have non-L limits (eg pub.opinion); Reductivist- can analyze norm. aspects of law w/o normative terms- instead in statements re power and obedience; idea survived that L theory must grnded in pol. account; view of society under sov. rule less useful in modern societies- authority divided.
→ Sov.= normative concept; leg= something w/ authority to make laws- habits of obeying not enough to explain obedience, must also be explained due to its normativity; how are subjects guided by commands of sov? Sov. This sort of explanation is preferable to Bentham/Austin focus on coercion
→ Diff. Ls have diff. social fxns that aren't accounted by simplistic "all laws=commands"- similarly Ls still create Os when no chance sanctions; legal Os are a *reason* to impose sanctions- sanctions aren't just a consequence of them
Kelsen: If you can't ground law in force, law, or presupposed norms, where? Enter HART
Hart: says LS doesn't need sov- law is more than commands; law's authority is of social rule, existing b/c it's practised;Law isn't just about power but our feelings about law and its Os- requires a more complex RoR than Kelsen's model; 2 types of rules primary and secondary- primary what we normally think of as laws; while 2ry rules= meta rules, about rules;RoR doesn't require moral content- doesn't say whether the law is 'good'- just that its legally valid;determines basis for LV in LS-exists only b/c practised regularly- rules officials use to back their claims WRT which standards should apply; Hart sees L rules as social norms- at root or base is social norm with norm. force of custom- regularity of behaviour officials use to guide/evaluate behaviour; for Hart use of social norm shown by use of social pressure to support the rule and apply terms like duty and Obligation to it; BUT RoR=*official* custom- not necessarily used by wider community; law= tech.affair; all you need from subjects is passive compliance; for Hart all existence of LS requires: (1) rules of behaviour considered valid by criteria of validity-and obeyed; (2) RoRs that specify criteria for LV; (3) rules to change + decide what must be accepted as behavioural standards by public officials; Positivism= no inherent goodness to law; law= form of political order, not moral achievement- merits + needs depend on context+content
→ Laws have internal aspect- to understand legal system need to look to what people w/i think about its operations, command theory; obedience about more than fear of sanction but because we feel like it's good thing to do- we don't think the law is good, but following/obeying the law is good.
Critique: LP ignores moral elements of law (securing HR, advancing common good) + focuses instead on the sources; *Fuller*: (1) LSs can't rest on CSR b/c rules must be minimally consistent, clear, prospective (RoL)- but if moral principles provide these, it's b/c they're rule-likes- not law-like; these virtues found in in law but also other social practises; (2) worries no O to obey w/o morals- yet perhaps it doesn't create obligation but it claims to obligate; Rebut: many moral practises also create Os to obey; Social facts- whether society has practise of promising, what individual has promised to do- also creates moral O to obey; *Dworkin*: Basis- Abstract ideal of regulate gov. use of force- can only be applied in accord with principle already set out society has a legal system only to the extent it follows this ideal there can be no general theory of law's content + existence- no IDing law w/o looking for its merits; Theory of law= basically theory of how cases should be decided; Law= all considerations courts morally justified to apply when DM; IDing law req. moral+political discussion; given controversy + diversity of opinions re cases, Dworkin doubts law can rely on official consensus- no social rule can validate all reasons for judicial decisions; But LPs say RoR isn't about how to decide cases, or reasons relevant to a decisions- moral/pol/econ factors validate all reasons for JDs

IPs: include merit-based factors if source-based ones include merits as part of law (eg. judges told give Charter remedy if just/equitable); judge-made law also contains many implied references to morals (CL); but for IPs, part of law b/c sources make them so; if LV depends on morality, not because of conseq. of ideal about gov. use of force, but b/c sources used it customarily to find LV
→ But just b/c courts use moral language ≠ mean using moral tests- may be source-based- eg references to positive morality= customs of a given community- and once decision applying +ive morality, becomes source of law can...
→ MR still required by adjud.- courts asked to decide what is R, fair, just (statute, CL, or only way to decide); for Hart this happens mainly for tough cases- where L rules don't give answers, so Js have discretion to "make" new law; not arbitrary decisions- may include merit and L-based consid~; better to say source-based and non-source based reasons that act in every case; but even 'easy' cases may have discretionary elements- "residual discretion" can be quite important- good reasons to reject binary of "judges apply law, they don't interpret it"
→ RoR= ultimate set of criteria of LV, not const.; you can know some laws if you know const., but you can know the RoR w/o knowing any of its laws- constitution is also subject to the rules of recognition
→ Every ref. to morality= M test for LV? NO stop at social sources: (1) we assess blamed differently for bad choices when we think it's req. by sources, rather than J's moral beliefs; (2) coheres w/ features of L's role in practical reasoning- law must be at least candidate authority- that's what our political system says- and what it claims to be is legitimate authority; (3) challenges ability of legal order to run moral norms/political principles into legal norms and thus sources of law- by asking law-creating entities to respect/apply them- thus moral standards/logica/maths are not law, tho can be properly applied in cases; From this, law= open, normative system that adopts and enforces other standards- including moral values
Law + merits: Fallibility: should be just, but it needn't be; law can be essentially moral yet be morally deficient; Separability: no necessary link b/w L&M? link permitted but only if conceivable for it to fail- thus moral principle may be part of law; (2 incorrect theories of what positivism claimed to be)
→ Green rejects EP- many necessary connections b/w L&M- instead LP only rejects *dependence* of LV on merits: (a) L necessarily deals with moral matters; where law, morality- regulate same things; tho doesn't mean law deals well w/ morality's subject that the duties; (b) L makes moral claims re subjects- how to act, in public interest, at expense of self-interest= moral demands; (c) Law is necessarily justice-apt: given its norm. role in creating Os and rights, LSs properly critiqued as just/unjust- Distinct feature of law- even if it has internal merit, won't displace justice as ind. criteria to assess it- always acts as demand upon law= all necessary + import. links b/w law + morality, yet consistent with LP theorists that content + existence of Ldepends on social facts, not merits- separation thesis wrong
Hart B/A critiqued NL (ought/ is), L&M should be separate; b/c (a) obscures true nature of law + its social roots; (b) corrupting- weakens resistance to state practise; both utilitarian; separate L&M limited risk, L& its authority lost in ideas about how law should be + danger L supplant morality as test of good conduct- and be above reproach
→ Utes like B/A accepted: (a) LS dev. influenced by moral opinion- and vice versa; w/ result that L rules + M principles sometimes quite similar; (b) MPs may be put into LS thru explicit L rules, or courts may be bound to make decision based on ideas of justice;
→ 2 basic Ps: (1) W/o express leg./const. provision, fact that L rule violated rule of M ≠ not a RoL; (2) just b/c rule is morally good ≠ its law; utilitarian split thought make it easier to clarify law- and understand it as social control
Command theory theory: law= a command at base, with obedience; simple but inadequate; commands= laws if general + commanded by sov. (habitually obeyed, don't obey other)- Hart calls basically rule of gang;doesn't account for rules leg's must follow to pass Ls- aren't commands or habits but at heart of LS + widely accepted; doesn't account for non-vertical rules (just sees subjects & sov.) that help to structure rights/duties (K law) or promote wishes/choice/make claims etc;

LR: to express reg. intent, words used must have settled meaning; but hay "penumbra" cases where you can't be certain if certain words applicable; if rule isn't clear to DM, some1 must decide if they cover a case- and be resp. for the consequences; All Ls have some uncertainty- so applying can't be all logical; some way to make rational decisions, w/o logical conclusiveness- criterion to make good decision may need vision of what law should be- thus moral- legal connection; Fs fails to deal w/ penumbra uncertainty- sees JDM as merely deduction from premises
→ Rat~ L decision must consider what L ought to be, but aims/policies/purposes Js must appeal to, are part of a wider conception of law not necessarily moral; At penumbra J may need to consider what L *ought* to be, doesn't mean M standard- many other standards; intelligent JD (not F one) ≠ mean M defensible ones (eg. senting- J makes rat. decision w/ moral aims= clear of M judgement; but in regime, may be an intelligent, purposive decision, with view re how the law ought to be, yet that results in torturing; just b/c formalism creates errors ≠ utilitarian ought/is distinction is wrong → Fusing L + M suggests all L Qs= penumbral; as if nono central element of actual law in the core of a rule- as if nothing about L rule suggests can't reconsider all Qs in light of social policy- basically means rules lose authority
Nazi: Radbuch said LP led to Nazihorrors- fund. moral principles part of legality- no + L rule, even if conformed w/ formal criteria for LV, was LV- if it violated basic moral principles= such laws should be treated as w/o legal force/character→ Post WWII, prosecutions based on claim that statutes violated basic human decency/justice; Hart says doing this confuse 1 of most powerful forms of human criticism- utes say L=L, but L can be too evil to obey; arguing evil Ls ≠ L complicates things vastly; → Even if you can find P to judge a L, doesn't mean aren't laws that are evil/stupid yet still laws; + many rules M qualified, may still not be laws;
Fuller Reply: how is LP useful if all its says is that L&M are separate? Hart's theory needs to be further defined- LP don't seem to agree on the const. limits on sovereign's power
→ 'M' just any standard to judge human conduct that isn't law- (conscience, religion, prejudices, etc); Hart says if M&L, at penumbra in evil LS, might result in evil when Js apply underlying aims;
→ Fuller says no: (1) good ideas more coherent than evil - if required to justify/explain decisions, will be pulled towards ultimate good, w/e it is; (2) If blurring L&M might allow immoral M into L, what's stopping? (3) Even badLS, hesitance to make L cruelty- b/c of id. of law w/ most urgent/clearly justified demands of M; (5) in JD areas, little danger of M 'infusion'- but opposite, excess formalism; (6) How to resolve conflict b/w 2 rules, both claiming= authority? M foundation LS? Hart claims LO rests on fund. accepted rules re how make law- Fuller asks why aren't these M rules- create framework for law, accepted b/c considered right and necessary- but not L; A tries to avoid- sticks to command theory of law- instead of Hart's "fund. accepted rules re how to make law"- lest blur; Morality of law itself: Hs claims can be framed as order vs good order- but even if separate 2, notion of order itself contains M aspect which must be respected to create law- even bad law; yet Law, considered as order, alone can't create M; Therefore: (1) law-making authority must have support of moral attitudes that give it competency it claims (external M making it possible); (2) internal morality that must be accepted for law to be possible, in any sense.)
→ Consider experienced comm. trial judge, whose superior court issues ridiculous judgements in comm.; yet lower court judge has to obey- LP won't help, will just say obey the law, and maybe try to work in the penumbra to make proper decisions; only way to resolve problem is if duty to follow law is seen in context that he should also make law as it should be- not just as it is.

- divergence b/w law DM must apply + what they think correct/right- always exists, common to any adj. fxn

→ *Nazi Problem*: how to deal w/ nasty stuff done under N law? Fullers says look at how Nazis followed inner morality of law- frequently used retroactive law- isn't bad occasionally but constant retroactive statutes to fix problems with previous laws degrades legal morality- law loses its significance; legal M requires laws be known- at some point; Nazi law extremely loose- frequently retroactive and frequently secret; when didn't suit them, used thugs; when statutes were inconvenient, the courts ignored them
→M Implications of IP? German LP preclude discussion of moral ends of law- and ignored inner morality of law

→ If LS suff. departs from M of order and inner M of L, no longer LS; when it disregards regularly terms it's supposed to enforce, frequently retroactive laws, NOT LAW
→ Legal interpretation- most words have some constant core of common meaning but on the penumbra of meaning Js must interpret rule given its aim/purpose- margin of discretion;
→ LP seems to fear purposive interpretations- and fidelity to law may become impossible if you disregard "broader responsibilities" that accompany purposive intepretation of law- to avoid this keep in mind structure of a L- laws have structures either explicitly or thru relationship w/ other laws; w/i that structure judges can obey the law but be creative, but not go beyond it
→ F thinks L needs to have broad project of human values- Hs says great if law does that, but it's not needed for LV

TOPIC 4- LEGAL REASONING:

→ The background of a judge will determine to some extent how he frames questions- and how she answers them

Dixon:

- Legal reasoning differs from the reasoning used by everyday people
  - People don't really see themselves bound by previous decisions- though they may think they are, it's more likely that
    - 'notions of precedent' sometimes used as a justification for inaction
  - *Consider stare decisis*- what does it mean to follow a particular decision? What does it mean to follow a decision that most people think are wrong
- Language/communication is inherently vague with room for interpretation- no matter how clear rules may be designed
- Is legal interpretation a conservative process- aimed at preserving the intent/purpose of the original writers? Or is it creative- interpret rules and modify/adapt/change them in line with social changes
  - Raises issues WRT judicial interpretation- how conservative should judges be in their decisio ns as opposed to being creative
  - In US SC jurisprudence, considerable number believe the constitution should be interpreted in line with how the original writers intended
- What exactly is open to legal interpretation?
  - Should different interpretive tools or models be used to interpret statutes vs interpreting judicial decisions?
    - Dworkin vs Raz
- How far should a conservative as opposed to creative approach be taken
- Coherence- what exactly is supposed to be made coherent- legal system as a whole? judicial decisions?
  - accessible
  - may promote consistency
  - Unity of principle- different legal norms chosen b/c of their relation to each other
  - (1)NL seems to be quite concerned with coherence- wants everything to cohere with NL, whereas positivists might be more concerned with allowing discretion
  - (2) Coherence is closely connected to interpretation- reason about whether you take a creative or conservative approach to interpretation- incoherent if you vary wildly
  - Is coherence merely a value to be pursued? Or is it actually a condition of legal validity

Lamond:

- *Precedent*- decision of a court that has special legal significance- that it's binding
  - Then splits it into a precedent's theoretical and practical authority
    - Theoretical- we assume the court came to a decision for good reasons-
    - Practical- obliged to follow the rule because the rule a rule- they have practical authority because they're regarded as constituting the law
- 2 basic questions re precedent
  - (1) How do you determine what a precedent is authority for?
    - How do we characterize the ruling in any given case? When there is no simple majority outcome, or when there are 2 reasons given for the outcome?
  - (2) When should courts be willing to overrule the precedent of their own decisions?
- 3 basic ways to think about precedent-
  - (A) laying down rules- precedent is basically searching for the ratio/rule of a case (operates like a statutory provision) and once held, these rules are binding-
    - requires obiter, ratio, and that courts are then bound to the ratio

        - Distinguishing facts- 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
            - basically you avoid applying the rule by making a rule than the one that was made in the precedent case
                - In this model distinguishing is about modifying the rule, overruling= rejecting the rule
            - CL lawyers say that when they are distinguishing they basically suggest that the previous precedent was not exhaustive- they're not changing the rule of a previously binding case- they just look to find another rule that also applies
                - *"part of the skill of a good common lawyer is grasping the law as not stated by the earlier court: learning that cases are 'distinguishable' is a staple part of common law education, and no common lawyer would be competent who did not appreciate that the law was not to be identified simply with the ratio of an earlier decision. Common lawyers do not, then, conceptualise distinguishing along lines analogous to overruling.*
            - Problematic element of distinguishing?
    - (B) Applying underlying principles: Precedent isn't binding just because it sets out a rule but because there are good reasons for why it was made a rule in the first place
        - Not just about following rules because it's good to follow rules, but because there were good justifications to create those rules in the first place
        - One of the reasons that judges justify their decisions- these justifications are stare decisis- they provide justifications for following particular cases in particular ways
        - Courts don't always provide precise ratios for their cases in ways that are useful- they just provide reasons and a rule, without a clear ratio
    - (C) Decisions based on a balance of reasons
        - decision is basically a statement of the factors that a court provides as a reasons- the balance between them is the decision
    - Different accounts are ways to think about precedent-
        - courts act like it's obvious how to follow stare decisis, meaning of precedent,
    - 4 justifications- (a) why treat court decisions as partly constituting the law, and (b) why require later courts to follow erroneous decisions of earlier courts? Most responses to this consider…
        - consistency- Dworkin thinks there is never unconstrained discretion
        - expectations
        - replicability
        - the need for law-making
- *Stare decisis*- factually similar cases are only binding on future cases with similar factual decisions
    - At what point are factual cases similar enough that one can be binding on the other
        - Dixon argues that this is arguably a matter of interpretation- important to consider the different ways that a ratio of a case can be interpreted
- Analogical argument in legal reasoning- we should treat a particular case in a particular way because we have treated similar cases in that way
    - Analogical arguments complement precedent in 2 ways: (1) used when the facts of a case do not fall within the ratio of any precedent- to assimilate the result to that in the analogical case; and (ii) they are used when the facts of a case do fall within the ratio of a precedent, as a basis for distinguishing the case at hand from the precedent.
    - in contrast to precedent, analogy doesn't bind- but can be persuasive- but be aware of mixing analogy with precedent- frequent argument is to invoke analogy in order to argue that it should be treated like precedent, if the analogy is sufficiently
        -

- 5 elements of a case:
    - Facts
    - Issues- disputed question of law
    - Reason for decision
    - Ruling- application of reason to the facts
    - Result-

Dworkin: went against Hart's LP 'Concept of Law'
→ part of American liberalism
→ Focussed on how judge's deal with gaps in the law
→ Hart- when judges deal with gaps in the law, they apply rules if they are clearly applicable; however for 'hard cases' where there's no obvious rule to apply to the situation, Hart suggests here, judges can make strong use of discretion to fill the gaps in the law-
→ Dworkin argues that there is no such things as gaps in the law

- judges are *never* lawmakers with strong discretion- the law is a seamless web, characterized by rules but *also* by principles and standards that judges can call upon to reach decision
    - this is visible in type of language judges use- they speak as though they're drawing on common threads that go throughout the law
    - donut hole analogy-
- when judges fill gaps in the law they act like legislators yet without the democratic authority to do so
    - If judges make law the way Hart explains, it violates rule of law by retroactively applying the newly created law to a given situation
        - means that discretion cannot be exercised in the way Hart describes it
- judges are always trying to state an ideal that always exists

Lamond- Precedent and Analogy in Legal Reasoning:
→ Precedent- earlier decision is followed in a later case b/c the 2 cases are the same
→ Analogy- earlier decision followed in later case b/c the 2 cases are *similar*.

- When are 2 cases the same (for precedent) or similar? (for analogy?) And why should the earlier decision affect a later one

→ Individuals don't normally feel bound to make the same decision based on their past ones- usually open to reconsider them; law and other institutions are somewhat unique in this regard- put weight on their past decisions

- when individuals do do this, usually just as a shortcut to doing the right thing- if worried about its correctness they may reopen the decision
- in contrast, inst. often use past decisions as limits/constraints now, regardless of views on past choices
    - Even if past decisions are different from those at hand, may be relied on as analogous
        - individuals usually just look at merits of decision at hand- even if inconsistent w/ past ones they may disregard this, seeing both as correct even if hard to reconcile

Lamond- Text Notes:
Precedent and Analogy: legal world sees past decisions as significant in a way that individuals don't- generally don't see themselves as constrained by earlier decisions
Precedent: a decision that is considered to have special legal significance, with both practical and theoretical authority over the content of the law
→ Theoretical authority- when there are good reasons to believe a decision was correct at law

- If good reason to believe earlier case decided right, and similar facts in later case, good reason to think decision would also be right in later case- in some legal systems this is how cases work- only can be cited but they don't provide justification for a later decision

→ Practical authority- precedent is considered to have practical authority because it's considered part of the law- the law is what court says it is, because that's what the court stated

- because of this practical authority, and the fact that courts are required to apply the law, and earlier decisions have authority over law's content, later courts must follow these decisions

<u>CL and Precedent</u>**:** CL requires courts to follow earlier decisions even if twas wrongly decided according to earlier law

→ Overruling- gives courts limited power to remove the ability of an earlier decisions of its ability to bind- because they consider it wrongly decided

- lower courts "bound" by decisions of higher courts because no power to overrule their decisions
- appeal courts usually bound by their earlier decisions- tho can overrule them in limited circumstances
    - usually only when decision wrongly decided- and when clearly/plainly wrong
    - Not bound by lower court decisions

<u>Limits on precedent</u>: earlier decision only binding on later cases if the facts are the "same" in the latter case- obviously needn't be identical but the same "in all relevant aspects"

→ 2 main disputes: (A) When both parties agree that the law applies to dispute, but disagree on facts; (B) others where the 2 sides disagree about whether the law supports a decision in their favour

- Precedent are formed when courts decide disputes over law

<u>5 parts of a judgement:</u> (1) recitation of the facts; (2) Identification of the legal issues in dispute; (3) reasoning over the best resolution; (4) ruling to resolve the issues

→ In terms of precedent lawyers mostly focus on (1)- how do you determine what a precedent is authority for- how do you characterize a ruling? How do you deal with judgements where no single majority judgement- or give multiple reasons for same result; and (2) how to tell when court is willing to overrule its own decisions

Ways to understand precedent:

<u>(1) Laying down Rules</u>**:** precedents lay down rules which courts are obligated to apply to facts before them

→ When a case decides a dispute it create a rule to deal with that type of dispute- and applies to case

- Sees precedents as statutes- creates rules that will apply to later case with facts that satisfy the conditions to apply
- the ratio is the legal proposition that the case is authority for- the aspect of the case that binds later courts- obiter is just everything that's not binding

→ *Critiques?*

- Form of judgement- ratio is constructed from a precedent not just listed explicitly
    - thus often hard to identify it clearly- and even if court does IS it, the exact formulation isn't what's binding
    - though obviously clear than statutes in terms of providing a legal rule, it doesn't mean precedents don't create legal rules
- Practise of distinguishing- occurs when precedent isn't follow despite facts of later case falling within the ratio of an earlier decision- avoids this by pointing to the facts of the later case as being different from first
    - Distinguishing allows courts to avoid applying precedent by making a more narrow rule than in precedent case
    - Only constraints are that (A) the factors in ratio of earlier case must be present in ratio of later case; and (B) ruling in later case must be able to support result of precedent's case
        - A later decision can't be inconsistent with a precedent- but it can be narrower
    - might be seen as modifying the earlier law
    - *Rationale for distinguishing power?* rules are meant to create classes of cases that be treated as 'X' to improve predictability and transparency in decision-making- distinguishing seems to bypass this by allowing courts to avoid result mandated by earlier ratio, if they they can argue some fact different allows them to narrow ratio while supporting the result from earlier case

        - and all courts get this right- thus within the “rulemaking view of precedent” lower courts can narrow the rules of higher courts, provided new rule could get same result as reached in earlier decision
        - Might argue that distinguishing court can only modify in a way that earlier court would have when faced with the same facts- basically reinterprets original ratio; Alternatively argue there is a presumption against distinguishing
            - Both parallel reasoning statutory construction- interpreting statutes by looking at legislative intent- and creating exceptions to statutory rules
                - Yet these aren’t legal rules and the distinguishing power doesn’t fit well with ideas of ratio creating binding legal
    - Might be argued that rule for which decisions binds isn’t the court’s ruling, but the material facts needed for the case
        - Suggests that because decision does not provide a clear formulation of ratio, the ratio shouldn’t be identified with the court’s state ruling
            - Narrow what’s binding to the facts vital to outcome, instead of the rule applied to those facts
        - However general legal practise *does* identify the ratio with the ruling- and how do you decide material facts if you discard precedent court’s characterization of own ruling

<u>(2) Precedent as application of underlying rules:</u> places precedent’s power to bind in what justified the earlier decisions-

→ helps to explain why courts give detailed accounts of their reasoning- because that’s where decision is;

→ Also why they don’t provide precise ratios- the ratio isn’t a rule but a short-form for the overall power of the principles that justify a result

- also explains distinguishing- you can distinguish where the justifications for the precedent don’t fall in facts of the case

→ *Problems?* (A) Scope of distinguishing- if new facts raise more compelling justifications than in original case do they go beyond earlier decision?

- Perhaps look at precedent courts <u>best justification</u> for earlier decision and see if it applies to new facts- and what is binding is the set of principles that best fit and justify results of past decisions
- Distinguishing not just applying courts justifications for decision- but applying justifications for the doctrine which the decision was a part of;
- (B) Role of rationes- this view doesn’t explain their role- vital to control whether later court has duty to follow or distinguish- isn’t really explicable if you say it’s the justifications that bind
    - Determining a ratio requires understanding of what was decided by looking at judgement, earlier cases, and areas of law in general- a precedent court’s justification important to determine level of abstraction of factors in the ratio- and read these factors widely or narrowly
    - Ratio of precedent sets outer limit of what will be binding- while analogies are grounded in the underlying rationale for earlier decisions- but they don’t bind alter courts
        - Thus if justifications of precedent were binding, analogies would also be binding

<u>(3) Precedent as decisions on the balance of reasons</u>: Sees the ratio as a statement of factors that court saw as crucial in providing the reasons for the result it reached;

→ *Ratio*= facts that favoured the outcome and no other combination of factors could defeat them

→ This view helps to justify why a disposition in later cases, all other things being equal as it shows a weighing of the factors

→ Also helps to explain distinguishing- precedent= courts are bound by cases, to either follow or distinguish

- if the facts fall within ratio’s scope, they must consider precedent to see if differences in facts are enough to justify different decisions-

        - You can't distinguish based on factors present in earlier cases- that would suggest it was balanced wrongly, and you can't treat a case as wrongly decided unless it's a court with the power to overrule
    - This view of precedent also explains why courts often go extensively into circumstances and lack of clear ratios- it's the substance of the factors that are considered in reaching decisions- not the particulars of the language

→ What happens when alter courts bound to follow precedents it considers decided incorrectly?

- Can they avoid precedent by looking at any general difference in facts sufficient to distinguish case by narrowing ratio? If so, precedent has little binding power
- might ask how precedent court would assess facts of later case- but this isn't really legal practise
    - Better solution is the CL requirement for *stare decisis*- treat earlier decisions as correctly decided- it can be distinguished but ≠ it was wrong
        - No distinguishing if it implies earlier case decided wrongly- court can distinguish later case but to do so it must decide that factual difference provides a better justification against earlier case than that cases facts alone -

Justifications for precedent: Why do we consider courts to have law-making power? In civil system this isn't the case- judges considered to apply the law due to stronger separation of powers

→ CL systems unique due to central areas of law with no legislative formulation- some legislative intervention but mostly non-statutory

→ However even in civil jurisdictions, cases are often cited by courts to help them reach decisions- though judgements don't mention earlier cases

→ 2 issues related to justification around precedent: (1) Why are court decisions considered to constitute- in part- the law; (2) Why should courts be required to follow erroneous decisions?

→ 4 main considerations:

<u>(1) Consistency</u>: usually relates to formal justice- similar cases should be treated similarly

→ Could also be argued in terms of equality- wouldn't be be fair to threat parties before the courts differently

→ moral aspect- for law system to be morally legitimate needs to treat people in roughly the same legal situation, roughly the same

→ Legal decisions should be consistent across time- only change if law has changed (by leg. or overruling)

→ Consistency concerns don't explain following earlier wrong decisions however- in fact would go against equality to apply earlier wrong decisions- whether they favoured or harmed earlier litigants

→ Equality arguments might be stronger- if outcome in original case was indeterminate- different outcome possible/permissible at law, whether different incommensurable values- or because both equally supported at law-

- once courts comes to decision, equality says it would be proper to follow earlier decisions

<u>(2) Expectations: </u>if an institution deals with certain issues in a particular way, people plan around these expectations and control their actions in accordance with them

→ Argument favours following precedent- even if wrong- however somewhat circular- only legitimate expectations should be included in decision-making processes-

- expectation only legitimate if institution has said they will be bound by previous decisions

→ Whether prior decisions creates legitimate expectations depends on whether it's the institutions practices- or if good independent reasons to do so

<u>(C) Replicability</u>: both the consistency and expectations arguments assume that deciding cases on their merits is a relatively straight-forward process for decision-makers

- however decision-makers are fallible and produce uncertain outcomes- but precedent may still be a useful doctrine so that institutional decisions are made more replicable

        - Allows decision-makers to rely on a culture of decision-making; legal instruments, materials and canons of legal reasoning, so that their decisions are more predictable than if made fresh every time
            - allows people to be guided by the law and act in accordance with i
                - All else equal, better to be predictable than no
    - → raises some issues about the moral desirability of certain laws- if laws are less than morally desirable, this consideration may need to be weighed against desire for predictability

(D) Law-Making: valuable for courts to have ability to make the law and thereby improve and supplement it
- Whether due to law being incomplete or incorrect

→ This view treats the law akin to delegated legislation- limited power to make law, provided they stay within a limited framework- usually
- usually grounded in equality and replicability concerns
- if law has resolved some uncertainty, precedent ensures that future litigants are treated the same

→ If law is by nature indeterminate, just decisions that act as precedent will increase law's replicability
→ but if you believe courts law-making power to improve law, also favours the power to overrule precedent
- overruling power only needed if earlier decisions binding even when mistaken

→ "the argument from law-making, when distinct from arguments from replicability and equality, is an argument for the power to overrule, rather than an argument for stare decisis itself"
→ Equality and replicability concerns support treating judicial decisions as law-making
- replicability supports precedent doctrine even when earlier decisions incorrect- which then requires power to overrule law

Legal Analogical Reasoning: treat a case like 'X' because similar cases were treated as 'X'
→ Helpful when (A) facts don't fall within a ratio; and (2) when facts do fall within ratio of precedent, in order to distinguish from the precedent (if you can't distinguish it
→ While precedents must be followed, analogical arguments may vary in strength- if very close analogies, strong support for a result; more remote analogies provide weaker support
- obviously not binding- consider other reasons to support their case

→ Arguments by analogy may proceed with reference to another case or legal doctrine- relies on some common characterization of facts or legal doctrine in both cases
How do analogies justify? Consider if facts fall outside ratio of precedent
- court isn't bound- but if justification in earlier case can apply in later case, may be argument by analogy

→ When distinguishing, have to follow precedent unless good reason not to- but for analogies you must extend precedent unless good reasons to treat case at hand differently
- however whereas precedents can't be distinguished if it implies precedent wrongly decided, a precedent doesn't necessarily have to be extended if court finds its rationale unpersuasive
- for analogies courts can choose whether or not precedent should be extended given common factual or legal issues
    - but still may decide good reasons not to

4 bases for analogies justifying decisions:
(1) Principles- analogies are grounded in principles that underlie cases
→ Assess a body of cases for principle(s) that explain or justify them-
- if the identified principles apply in case at hand, good reason to favour result supported by principle
- however because principle must track the cases, if any of the case aren't correct, principle will be flawed
    - Could be better to just decide novel case on its merits

→ Alternatively principles make the "best sense of a series of cases or aspects of legal doctrine" which "can have some justificatory force even though the cases or doctrines" that it's based on aren't perfect, morally.
→ Further problem is that courts usually don't describe analogies by reference to a principle an in earlier case

- thus earlier cases are cited as examples where principles are applied- instead of as analogies to facts of case at hand

→ If case cited as good for an analogy, focusses on the closeness of the analogy- the specific of how closely the facts of the 2 cases can be characterized- and how this relates to the rationale for earlier decisions

- more specific analogues= stronger; more abstract characterization of facts= weaker analogical argument
  - Why? Because a more specific characterization of facts common to both cases means it's harder to distinguish the 2 cases
    - If more abstract there's a wider ground to say the cases should be seen as sign. different

→ However principles are rarely seen as enough to justify a decision

(2) Reasons- how much can a rationale for an earlier case apply to current case?

→ Means if earlier rationale relates only to a specific category used in ratio, no scope to extend by analogy

- the rationale needn't have 1 sole principle underlying it- permits other factors in favour of a conclusion
- Reasons-based theory of analogical reasoning helps to explain why individual cases and doctrines can ground analogies

Justifying Analogical Reasoning?: why not just decide cases based on merits?

→ In moral deliberation, argument by analogy used to show that uncertain situation is indistinguishable from another situation where the facts are basically clear:

- 3 options arise from this: (A) case is indistinguishable and rationale applies to both; (B) case is distinguishable; or (C) indistinguishable but turns out earlier case was wrongly decided
  - helps to deepen/sharpen understanding of a case on its merits

→ However in law analogies have weight above just the merits- imperfect and correct decisions have analogical force- perhaps support for adopting view in novel case

- exposes judges to a wider set of facts

→ Any deeper rationale for analogical reasoning? expectations don't really help

- Consistency may be a better argument- if earlier decision resolved some uncertainty- and this decision's rationale also applies to later facts, inconsistent to decide it differently
- Further argument for it is replicability- sometimes called coherence
- Coherence in law is often tied up with its instrumental use- and replicability of legal decision-making
  - 2 points: (1) legal materials tend to be quite fragment- at a high level only moderately coherent- if quite coherent at a localized level; (2) law has numerous decision-makers- many people that use the same materials to make decisions, but without a "uniform evaluative framework"
    - these factors create a wide scope for disagreement when dealing with novel cases
- Analogical reasoning improves predictability by buffering certain doctrines and decisions- and does so in a framework where diverse decision-makers agree, in a wide sense, about the "existence and importance of certain values"
- use of analogies helps to make up for the uncertainty inherent in law resulting from the "fragmented materials and plurality of decision-makers"
-

Interpretation and Coherence in Legal Decision-making:

What is legal reasoning?

→ for some accounts of law vs accounts of adjudication are different questions with different answers

- judges have wider scope than just trying to establish law as it applies to the issues hand

→ they suggest adjudication includes many "extra-legal considerations" and judges have discretion to fill gaps in the law and modify it

- thus legal reasoning may be (a) reasoning find what the content of current law is- as well as (b) reasoning from content of the law to the decision which the court should make
- yet even "how should judges decide" can be divided into how decisions should be made given the law that applies vs how it should be decided given all considerations

3 possible meaning of legal reasoning: (1) type mean to establish law's content on a particular issue; (2) reasoning from content to the decisions a court should reach, given applicable laws; (3) reasoning about what decision court should reach, all things considered

→ Dworkin thinks judges don't use/apply extra-legal considerations- they find content of law and apply it to facts- all considerations they may use are already part of the law

Role of Interpretation: solution to solve/respond to the inherent indeterminacy of the law

→ Because words and legal rules have little inherent meaning, interpretation must provide that meaning

→ *Basic view*: most agree that interpretation contains both a backwards facing (conservative) and forward facing (creative) aspect

- obviously interpretation assumes an original to be interpreted and to some extent interpretation must be "faithful" to distinguish it from pure invention- but it must also interpret the original, nor copy it

Locating interpretation in Legal reasoning: because of the dual nature of interpretation, when judges interpret the law they must balance faithfulness to the content of current law while modifying/adding to it as they shift from law's content to a decision

→ thus interpretation is present in legal reasoning both to establish current law and reasoning from content of the law to what decision should be reached on a particular issue

→ *Raz*: legal interpretation as straddling gap between identifying current law and modifying/developing it

- it helps both of these goals- so judges decisions don't come split into these 2 formal sides- their reasoning is interpretative and involves legal reasoning encompassing forward and backward looking
- however because interpretation blurs line b/w "law-finding and law"creating" role of judges, the idea that is incomplete- as does the ability of judges to solve most cases through interpretation

→ Persuasiveness of interpretation in legal reasoning and its dual nature may have led some theorists to argue that the distinction between identifyin and changing the law isn't tenable or coherent

- because interpretation seems to occur at every stage of legal reasoning process

Disagreements about framework of interpretive process:

(1) What is actually being interpreted-the object/original- in law? law in general? statutes? judicial decisions

→ *Raz*: decisions are main objects of interpretation- because law is an "institutional-normative system," where relevant institutions issue authoritative directives, intepretive process needs to look to the existence and meaning of the supposedly authoritative directives of the institution- and to do this you look to their decisions as the origin

→ *Dworkin* (OTOH): constructive interpretation- "impose purpose on object/practise to make it the best possible examples of form or genre to which" it's believed to belong

- for Dworkin the "argumentative social practise of law" is the 'original' to be interpreted
- broader view than Raz who interprets to find which legal directives are in force and are relevant, while Dworkin looks broadly at practise of law as a whole- which may include history of jurisdiction, etc

(2) Should creative- or conservative side of interpretation be more emphasized?

→ eg. Originalists- when interpreting US constitution, should be done according to how it was originally understood- some think it necessary to ensure proper separation of powers and gov. structure as founders intended

- others (at opposite end) reject originalism and instead focus on the role of creative innovation when interpreting- perhaps because of the radical/pervasive uncertainty in law
- How do you judge what standard to judge an interpretation as better/worse/wrong/right? Can't use conserving aspect of law as faithfulness is basically rejected out of hand by a complete rejection of originalism- perhaps correctness can be judged on reactions of interpretive community- interpretation = correct, if majority agrees

(3) How much are judges and legal interpreters constrained by conserving requirement that new interpretations be faithful to original- what other constraints are there?

→ Perhaps rules that discipline judges- these may constrain interpretation in addition language rules that constrain all interpretation of texts- thus for Fish judges may be constrained by need to be faithful to original and by supposedly interpretive norms unique to judicial role

→ Others suggest that any potential constraints on interpretation also subject to interpretation- meaning that texts/originals don't constrain judges as you might suppose

- so Fish doesn't think texts supply norms that constrain interpretation but process of training of interpretive communities do ensure that interpreters come to problems with pre-selected meanings- and the same norms/standards and critera for interpretation

(4) General theory of interpretation possible?

→ Raz rejects both operational/recipe theory of interpretation designed to have jduges make right decisions inc ase at hand; and general theories meant to provide critiera to judge interpretation as good/bad- to check efficacy of decisions-

- latter type of theories don't work because morality not susceptible to being explain through general operational theories
- theories that try to tell us how to identify good or bad interpretations are useless because of forward-looking aspect to interpretation, innovation

→ Dworkin: does provide general theory of legal interpretation to guide judges to right decisions

- legal interpretation must construe social practise of law by imposing purpose on it "make it the best possible example of form/genre which it's taken to belong"- specifically law as integrity- decision makers must identify legal rights and duties assuming they were created by single author- the community

→ Critiques of law as integrity?

- can't really be used to guide interpretation because they do it naturally and are committed to it as members of judicial interpretive community
- Sunstein instead suggests "incomplete theory of agreements" in JDM- can occur where there's agreement on questions of individual cases even of non about which general theory accounts for the outcomes- or agree on general principle, but not what it might require in specific cases
    - Sunstein thinks incompletely theorized arguments important to legal reasoning- allow a diverse judiciary to agree on actions even with institutional constraints, so they can make fair, respectful and largely error-free judgements
        - these agreements are vital in law- instituting them is a vital social function of law- because these rules allow for agreement when faced with disagreements
        - thus judges can agree about the outcome of a case required by a rule- even if they may disagree about the rule's justification

(5) Is interpretation always of something that has meaning? Or is the fundamental decider of the meaning of expressions- some argue latter point is false- the meaning of some legal rules can be found without interpretation

- others say it's a final/pervasive aspect, inescapable determinant of meaning

→ Why might they think this? Necessary because legal rules come in indeterminate language- can't self-determine their application- alone they lack "normative reach"

- thus interpretation needed to close disconnect between a rule and its application
- if this is the case, how to tell if the interpretation accords with the rule?

→ Perhaps solve this linguistic indeterminacy and the infinite regression of alternative rule interpretations by just sidestepping and pointing to "conditions and training standards of interpretive communities" for standards of correctness

(6) Values aimed at in judicial interpretation? HOw to balance them?

(7) Can interpretation in legal reasoning lead to a right answer?

→ Finnis says no right answer possible through this process because there are inescapable/irreconcilable differences in the criteria that we use to choose a preferable interpretation

- instead of seeking good answers and avoiding bad ones, don't pretend that there are "uniquely correct answers in issues of legal interpretation"- a false assumption that basic goods can all be critiqued by the same standard- and therefore the right state of affairs to achieve them can be known

Is interpretation desirable or necessary?

→ *Raz*: though legal interpretation has some saying conventions, it also has certain necessary features

- role of interpretation of legislation when interpreting- must be necessarily part of important legal interpretation- our legislative institutions and procedures we naturally think are designed to allow legislators to make law they intend
    - thus when judges interpret decisions of legislatures they must assume they reflect intent
    - We pay attention to law-maker's intent because we need to know what rules they have passed (their existence) and their meaning- owing to their authoritative nature
- authoritative nature of law is what makes legal reasoning interpretive- we need to find the existence and meanign of directives- to do this we interpret decisions of law-makers

→ *Dworkin*: rejects Raz's social-based idea of law- for Dowrkin, the idea that law can be identified by looking for authoritative social sources ignores the argumentative side to law and the amount of disagreement

- D sees law as intepretive practise- with interpretive attitude that (1) assumes practise has purpose- doesn't merely *exist*; and (2) rules of the practise are changeable in light of this purpose
    - the disagreements that members of legal practise have WRT to what's the best interpretation of the rules ensure that legal reasoning is interpretive
    - now that this interpretive attitude has taken hold amongst members of profession, to understand it you need to do as they do
    - anyone reasoning about the law must treat it as an interpretive social practise and consider different interpretations about what it needs given the point/purpose they think it has

What constitutes coherence? Role of coherence in legal reasoning?

→ Certain aspects of law make it particularly prone to arguments WRT coherence (eg. precedent, analogy)

→ What is coherence? (1) When coherence is discussed WRT adjudication, what's this coherence? How is coherence used to explain and justify judicial decisions?

- usually agreed that coherence is more than just logical consistency
- What then? coherence= unity of principle/ Legal norms must be interrelated due to common set of values? or fulfilling common principles?

→ *Raz*: the more that the principles underlying judicial decisions are unified, the more coherent the law

- "Degree of approximation to a perfect supportive structure show by reference to propositions
    - number of criteria to show degree of coherence: # of supportive relations, length/strength/ interconnectedness/reciprocal justifications/generality/# of cases
        - Weigh and balance these criteria

→ *Dworkin*: integrity in adjudication- judges should try to advance coherence by interpreting the law as having 1 voice- identify rights and duties as if the community personified created them

Coherence of what?: (1) What is supposed to be made coherent? (2) how is coherence used to justify/explain judicial decisions?

→ *Raz*: coherence requires some grounding- some original thing to be made coherent

- this base can't be relative to each person, must relate to the reality of the law in the jurisdiction
- Raz thinks law in a given jurisdiction doesn't vary much with the beliefs of the subjects
- because of this nature of law, coherence accounts must have some common base
- For Raz coherence accounts must use court decisions and legislative acts as a base; law= set of principles that make best sense of this base

→ Coherence accounts of law vs coherence accounts of adjudication?

- law= looks at what law is by applying coherence to court decisions/legislation of a given jurisdiction
- Adjudication- accepts the effects of political considerations on judicial/leg. decisions- meaning that settle law of a jurisdiction may not show much coherence, therefore if you apply coherence test to see how case "ought" to be decided by law; assume coherence-independence test to identify jurisdiction's settled law- then consider coherence at a later stage- hold that but to choose actions favoured by most coherent set of propositions "which were the setteld rules of the system justified, would justify them."

→ *MacCormick*- when deciding a case, 1st interpret law to find coherent views of a given area of law, and do this by showing how this given area is justified by some coherent set of judging principles- then use this view of the law to justify decision WRT new case

- SF= establish settled law, then interpret new case so that decision accords with most coherent account justifying that settled law

Coherence- Necessary? Sufficient? Desirable? How much should coherence be used to justify a judicial decision? Is coherence a necessary requirement of a justified judicial decision- necessary *and* sufficient?

→ If LR is reasoning from law's content to the best outcome for a case, and is entirely- or largely interpretive then adjust above Qs- to how much should we interpret the law in order to realize coherence

- is it the sole requirement to guide judicial interpretation- or a good feature of successful interpretation? Or necessary, or merely desirable feature that may be overruled by competing values

→ *Levenbook*: decision must be coherent w/ some part of law to be legally justified

- more than minimal amount of coherence required- otherwise to easy to dismiss coherence for other values
- for Levenbook, this would ignore important role of judge's responsibility to be faithful to prior law- makes judiciary different from legislature
    - mistake to choose a decision on moral grounds over 1 that better coheres with existing law- even if both within acceptable limits
    - How to balance coherence with morally preferable outcomes? If coherence considerations emphasized, also strengthens backward looking element of adjudication- judges may prioritize accordance with past decisions than what they ought to do, morally speaking

→ *Raz*:- basically reverses Levenbook's point- why should judge's prioritize coherence *ever* over taking the morally best solution

- Raz seems to think coherence grounds are too easily granted a strong position- perhaps because regularity of reasoning by analogy, which are easier to characterize in coherence terms
- also points out that reasoning by analogy isn't a requisite feature- adherent need to provide a rationale for it- and establish links between them and coherence accoutns to shift burden to thsoe arguing for coherence

Why should coherence be a part of legal reasoning? If legal DMs choose morally best option over coherent option, may result in conflicting rules representing social and economic purposes at odds with each other- and dissonance WRT legal doctrines

→ Whereas legislators can just overwrite such concerns, courts have less ability to radically reform the law

- With the effect that judicial reform will always be partial with potential to create conflict/disonace

→ *Dworkin*: in his view judges constructively interpret the law to make it the best example of form it's taken to belong - because Dworkin sees judges and theorists as engaging in constructive interpretation, jurisprudence/account of law must explain how law can justify coercive power of state

- such a justification can best be provided when the law is seen as the coherent/original creation of a "community of principles"- members must feel law by fact their rights and responsibilites are controlled by common principles
    - law must be interpreted as coherent (speaking with 1 voice) so we can see it as the "voice of a community of principle" and thus can justify state's use of coercive force

Coherence in Legal Reasoning-Global vs Local: Is coherence desired within a particular branch of law- or does coherence mean with the settled law of an entire legal system

→ *Levenbook:* suppots local coherence- decisions that promote coherence within a particular branc are best- may cohere but with the principles of a given branch of law, but not with principles of other parts of law

- for L a decision that accords with principles underlying 1 branch of law may not increase coherence of overall system

→ *Dworkin:* justified legal decisions should cohere with law as a whole

- integrity view of adjudication seems to require judges to be able to see the entire legal as coherent (Levenbook claims) though he does note that the "compartmentalization" of different legal areas is quite ncecessary
- "local priority in interpretation"- if a principle that might jsutify decision doesn't fit well iwth the legal area case fits in, counts significantly against deciding case in line with that principle
- strong push towards global coherence, in Dworkin's "law as integrity (communal voice thing does seem to undermine compartmentalization of the law)

→ Global coherence advocates might just say that decisions that increase overall coherence but decrease local coherence are more justified

- L just thinks any proper adjudicative account must provide for area-specific coherence

→ *Raz*- prefers local to global coherence as a

→ *Pezcerik*- suggests that the "doctrinal interpretations" that legal thoerists do is more global coherence while judicial interpretation tends to be much more localized

TOPIC 5- CRITICAL LEGAL STUDIES- Apparently I didn't do this section….

TOPIC 6: LEGAL REALISM:
Formalism: Post-enlight trend to explain int. disciplines in a scientific manner; (a) law principles, create framework-and (b) establish basic facts to promote emp. law;
→ law/education more systematic; learn law by looking at case law; scientists, Js ID legal principles, apply to facts, and logically deduce rule that governs dispute;
→ Legal rules + reasoning most important JDM- law= closed, complete + rational system- Js uncover pre-existing law- judicial thinking ≠ reacting to variable social/political facts but uncovering rules, in a logical, mech. manner, bound by legal rules alone; predictable, consistent and relatively logical (solutions similar); doesn't well to CL (ad hoc); **F + Mech. Juris:**if law= rational science, in complete system, no need to go to external rules- J only need rules of logic to decide- Js don't make law- legal system already complete
→ Critics call it mech. juris: pre-existing rules applied, no discretion, or policy or non-trad. sources
Early LRs (frank/Pound/Hutch~) early LRs Js: Js decide outcomes, then turn to L rules; can Js even decide based on general categories of rules; J's personality > L rules; rationality's role exaggerated- JDM relies on many imp. factors, even if rules imp. for post facto justification; *Extreme*: suggested LR and fact-finding R- Js might not accept facts that ran against their outcome; Pound- centrist - disliked F focus on mech. ruse of rules, logic, and science-like law- of certainty + reason; favoured. > use of policy + "techniques for deriving doctrines"
→ Llewelyn- rejected Jing as rule-bound process; rules used, but mostly non-F ones- like pub. policy (efficacy, competition), L knowledge + constraints, peer approval, and collaborative Jing; noted conflicting diff. interp. canons tho accepted J common doctrinal techniques, and inst. aspects like collegial approval helped limit inconsistency
→ US LRs devoted to emp. but focussed on judging, LR and "J-made law"; aimed to increase "certainty and predictability" of law by better understanding nature of judging
→ Not that legal rules/principles irrelevant- but that non-legal rules and other factors also quite important
→ Social- some LRs motivated by desire 4 social reform- recognized connections b/w legal rules + policy goals
LR: law? Q= loaded; law ≠ scient/auto. system logically applied in coherently/consistently; law= inherently subj., results b/c of pol./social factors morals ; Js aren't purely rational DMs
→ Holmes: law ≠ logic- its exp.; general props won't decide concrete cases; rejected F claim JDM is logical, coherent, consistent; J use LR/analytical reasons after fact to justify decisions- legal results from instinct, not rules

- changes in L practise don't often come from logic/prior law but J policy + preferences

→ Other LRs took psych. attitudes to JDM, J decisions= personal rxns; not a logical/rational app. of rules to facts
Req 4 scientific theory: scientific theory can be judged based on how well it (a) predicts and (b) explains
→ LR knew can't predict cases but F scient. theory of Jing either incomplete- or wrong, b/c couldn't predict
→ H/E more accurate predictions if policy princiles, personality of J, jud. ideologoy, emotion. cases, etc, considered
DM justif~: natural 4 Js to justify thru L rules; decision + legal rules may coincide, but jud. opinions ≠ judicial reasons
Demise: disappeared after a few decades but influential; Foundational for CLS and economic analysis of law
Conclusion: Realists make 2 claims: (1) F legal rules alone don't determine outcomes- perhaps they play some role but other factors are more important; and (2) judge will make a decision on a case before looking to legal rules.

<u>Leiter:</u> LR was rx to mech.F (JDM judges= strict application of legal rules that would always justify results)

→ Realists say emp. analysis of JDs show cases decided based primarily on the facts, not law- legal rules and reasoning are used to justify the result the judges want
→ positivistic culture influenced by natural science + empiricism- idea hypotheses must be tested- Realists argued current description of law didn't properly describe how it operates
→ Realism influenced by +ist psych. that avoided talk of beliefs, instead focussing on behaviour in terms of stimuli and response- assess law by seeing what fact situations created what responses
L indet. LRs saw law as (1) rat. indeterm- L reasons ≠ justify unique decisions; + (2) causally indet.- L reasons insuff. explained decisions- causal indeterminacy requires rationale, assuming judges respond to justified legal reasons
→ rational indeterminacy: note conflicting canons of interpretation 4 legal stuff- if J can chose either of 2 equally legitimate, but conflicting interpretations to make a decision, what's decision really based on?
→ *Llewellyn*- argued any precedent can be read strictly or loosely- and both interp.'s equally legitimate
→ Thus if precedent/statute can provide 2 equal, separate rules, can't provide reasons for unique outcome-
→ Realists assume if you argue (eg. particular canon of interp) it is legitimate in every case- but this isn't the case- Leiter says claim isn't that any strict/loose construction of precedent is always valid- but that this interp. discretion can create significant indeterminancy
→ realist view on indet. of law depends on seeing given scope of legal reasons- reasons that Js can use to justify

- b/c LRs focus on statutes/precedent as legitimate sources of law, and the conflciting but legitimate means of interpreting them, creates excessive indeterminacy- but others (Dworkin) argued indeterminacny disappears if broader moral/political principles considered legit. sources of law

→ Realists generally made clear that scope of indeterminacy mainly at appellate review - law is more likely to be indeterminate (cases w/ 'easy' answers resolved earlier)
Core Realist Claim: because they all agre ethat law and reasons are indeterminate, realists agree with the core claim that judges respond to facts of case, rather than legal rules and reasons
→ Oliphant- suggested courts respond to stimulus of facts rather than abstraction
→ Hutcheson- argued that the motive for decisions is an intuitive sense of right and wrong
→ Frank/Kent- saw where justice lies, then find principles that support
→ The general gist of these theorists was to advise lawyers to persuade the court that your case is sound based on facts- convince judges to decide in your favour, then provide precedents in favour of it
3 core claims:

(1) In JDM, Js respond to facts - even legally irrelevant ones
(2) L rules usually have little effect particularly at level of appellate review
    - realism acknowledges some links between accepted rule and judicial behaviour, but asks for greater inquiry into that link because the relation isn't always clear from logic or context of the rule- realism only denies that traditional rules "are the heavily operational factor" in jud. decisions
(3) Realists advanced core claim with aim to promote legal reform to make rules more fact-specific

- Oliphant wanted legal rules to be less abstract and separate from tehir factual content
    - Because these rules were abstractions, precedentual rules were useless for later judges, who then just responded to the facts of incase instead of the "over-general and out-worn abstractions in prior opinion
    - Oliphant argued that "meaningful stare decisis" could be created if rules were made more fact-specific

2 branches of Realism: Why do judges respond like 'X' to the facts of a case?
→ Sociological- believed that "judicial decisions fell into predictable patterns- on this basis suggested that social facts might be operating to do this-

→ Idosyncratic Wing: beleived that judicial responses to facts of cases depended on psychology/personality of a judge

- the conventional view was that rules + facts = decision

→ Frank on realism: stimuli on judges and personality of judges= decision; despite his preoccupation with Freudian psychoanalysis, still had a scientific view of behaviour

- because of his beliefs about the importantce of personality in DM, Frank believed it was impossible to predict judicial decisions because information about the personality of judges was mostly hidden from observers of judicial behaviour
- Frank's scepticism about inability to predict outcomes likely overstated- yet often taken (incorrectly) as a central claim of realism, making little sense given those realists who believed judicial decisions were based on knowable social forces and were thus predictable; or the realists who wanted reform to have system of legal rules to predict decisions by account for factual contexts.

→ Oliphant: argued that decisions track underlying facts of case- in some cases enforcing prevailing norms; other times chose differently because economically preferable to in the circumstances

- In other cases norms are enforced by a strict/harsh application of another unrelated rule- but that makes sense owing to some peculiar fact situation

→ Moore's "Institutional Method": identified normal institutional behaviour, then identified and marked deviations from thsi norm quantitatively, then try to show point at which a deviation will invoke a judicial decision that corrects it; this methods aims to predict what sort of behaviour causes courts to react

- Basically judges respond to how much facts show deviation from an institutional norm

→ Sociological realists, who says judges enforce norms to do best socio-economic purpose based on facts, doesn't mean deciding based on a view of the parties/or their lawyers

- More about the "general pattern of behaviour" shown by a dispute's facts and what would normal or desirable behaviour in a given context- not because of personal likes or dislikes

→ Why do judges enforce community norms w some degree of predictability/uniformity?

- realists usually point to psychological or social explanations- relying on tradition, experience as lawyers and judges; though some noted (cohen) about the lack of information about judges and their backgrounds

→ If the sociological wing of realists is correct, judicial decisions are causally determined (by psycho-social facts re judges) and fall into predictable patterns for the same reasons- they aren't idiosyncratic but are "characterisitc of significant portions of the judiciary"

→ Thus the sociological wing hoped to create legal rules that would guide decisions- or describe the course of court's decisions

- Didn't think that rules were without purpose, but that currently rules were to abstract, to separate from the fact-focussed ways that courts normally decided cases
    - However if impossible to create fact-specific rules, the sociologists supported using general norms reflecting those that judges were using anyways

Naturalized Jurisprudence: socio~ realists believed leagl theorists should identify and describe patterns of decisions, not merely justify them- SS could do this normative task

→ Thus a naturalized juris. avoids conceptual analysis "in favour of continuity with types of inquiry from empirical sciences"- basically a "descriptive theory of the causal connection" between situation types and actual jud. decisions

→ Realists apply a naturalistic method to natural thoery

→ Just as Quine says if you can't tell normative story about relation between evidence and theory, give up the normative project- what theories are jusitified on the evidence?

→ Realists can be said to advocate for empirical theory of adjudication because of the failure of the traditional jurisprudential goal of showing why and how legal reasons and rules justify decisions

- Because law is rationally indeterminate, the set of legitimate legal reasons that courts can use to justify decisions with, fails "to justifiy unique outcomes in many cases"
- "If law were determinate" rules/reasons would be a good way to predict outcomes

→ Indeterminacy means no "foundational sotry" to explain a particular decision- other legal reasons could justify a different result

- because legal rules/reasons can't rationalize decisions, they can't explain them- so other factors must be considered
- Realists look to see how a decision is really made- a "descriptive theory of adjudication" to epxlain why courts make certain decisions

How should judges decide cases? 2 main realist themes
(1) Judges should an almost legislative role- because law is indeterminate, courts will need to make socio-economic policy- and if they do so, they should do it openly, just as legislatures do.
(2) Further strand: no point in giving judges normative advice- how they judge cases is an inherent part of what they do
→ Frank in particular saw hunch-based reasoning as central fact about human thought processes- the personal element is impossible to avoid in adjudication

  - However no empirical evidence for this sort of assertion

→ Llewellyn: less radical type of quietism- just make explicit what judges should be doing anyways

- some jduges seem not to have recognized their duties- what judges are considering is a "concealed, half-conscious battle over legislativepolicy

→ Ultimately Holmes asked "for judges to do explicitly" what unconsciously occurs anyways
→ Frank suggested that WRT issues of social policy, the court should address it candidly

- preferable to do this then avoid it, while promoting same result indirectly-
- these realists weren't concerned about addressing the legitimacy of judges engaging in policy-driven analysis- the just though this was the fact of what judges do, so address it openly

→ Realist "quietism" was also about providing normative guidance for judges- believe judges should promote efficiecny norms when making rules (21)
Legacy of Legal Realism: focus on indeterminacy of law and legal reasoning and the importance of extra-legal factors in judicial decisions, increased willingness of judges/lawyers to considere political and economic factors (see obsession with policy implications)
→ To truly understand law requires knowledge of the economic/social/political factors of judicial problems, because these factor in judge's decisions.
→ ALso became important for law reform efforts- though realists feared their efforts would just "codify the over-general and out-worn abstractions" the restatements of law ended up restating legal doctrines in more fact specific manners- creating better descriptions for the actual reasons for the decisions
→ Ther ealist approach- critique court decisions against what they say, is such an accepted norm of legal scholarship that it's no longer called "realism"

- Though there is a continuing gap between "law in books" and "law in action" (24)

Legacy II- Legal theory: realists were critiqued for undermining the rule of law/supporting enemies of demo.
→ Legal process school argued that jduges had a distinctive institutional-competence for deciding through "reasoned elaboration"- the job of scholars was to ensure this was done correctly so that judicial opinions coudl guide future decisions- but didn't support realistm claims WRT indeterminacy
→ Hart's critique of realism was particularly powerful- rejected rule sceptics (both that talk of rules was a myth), conceptual rule scepticism and empirical rule scepticism (no point see jduges as subject to rules or require them to decide in certain ways)

- Conceptual rule sceptisms- denies view that prior enacted law by leg. or courts are law; sceptics see law as either a prediction of what court will do, or law as just what a court says law is
  - Simply view= prior official acts= law (including leg. enactments, judicial decisions, etc)

- Empirical rule scepticism- empirical claim about causal role of rules in JDM
    - Rules of law don't causaully change court decisions- however

→ Hart rejects conceptual rule sceptics- when you say a "rule is valid" this is in part an "internal statement" saying that rule meets test for identifying what courts as law- it's part of the reasons for a decision- not a "prophecy of it"

- However realists weren't particularly concenred with the "concept of law" but with adjudication and working of legal rules

→ What then of predicting? Realists seem to use law in a very practical/instrumental manner- the only law that matters is that which helps the client in terms of predicting outcomes and guiding themselves accordingly
→ Realists cannot be conceptual rule-sceptics because realists arguments for indeterminacy of law assume non-sceptic view of the "concept of law" (28)

- Leiter even thinks it's close to an account like that of the legal positivists
- Indeterminacy assumes "class of legal reasons" can't always (or ever) justify unique outcomes
    - Class of legal reasons- those that might legitimately justify legal conclusions- and compel it if legal actors respond to such reasons
    - thus valid precedent is part of the class of legitimate legal reasons
        - therefore indeterminancy arguments pre-suppose a boundary of legal reasons
    - Indeterminacy arguments assume that the reasons courts actually base decisions on aren't legal reasons
    - Equally when realists focus on conflicting but equally legitimate ways to interpret statutes and precedent to prove law is indeterminate, only works assuming statutes and precedents basically "exhaust authoritative sources of law"

→ What concept of law does this legal indeterminacy argument operate against? (where statutes and precedents are law; uncodified norms and policy= NOT law)

- Basically amounts to the legal positivist concept of law and rules of recognition, in which legal validity is determined by reference to pedagogy: rule= law, if sourced in legislation or court decisions
- Thus realists can't be conceptual rule-sceptics because indeterminacy argument assumes a "non-sceptical account of the critera of validity"

Hart critique of Empirical-Rule Sceptics:
(1) LEgal rules are indeterminate; therefore (2) legal rules don't determine or constrain decisions
→ Leiter thinks Hart's framing of ERS makes it depend on a philosophical claim WRT law
→ Hart concedes indeterminacny- but only in a limited way- pretends sceptics have excessive expectations of determinacy
→ Hart thinks rule are indeterminate because of linguistic constraints on guidnace

- Open-textured language- words have core meaning- facts/aspects that clearly fall within an extension of a word's meaning- and penumbra- where it's unclear if case can be fit w/i extension of word's meaning
    - When facts fall on penumbra, requires exercise of court's discretion

→ For Realists, indeterminacy doesn't come from language, but from the conflicting canons of interpretation that are applied to statutes and precdent, such that courts can create different rules from the same legal materials-

- indeterminacy doesn't come from eules, but the ways we characterize the rules w/i statutes/precedent
    - Further reason to expect indeterminacy in law, apart from Hart's explanation
- Thus legal rules are indeterminate in terms of their open-texture *and* manipulation of statute/precedent

→ Hart on loose/strict interpretation of precedent (which can mean 2 ruels from same decision)- just says that in vast majority of cases little doubt- even just get them from headnotes

- wrong rule can be described with "different degrees of specificity"

→ Hart and realists also disagree about the range of cases subject to indterminacy- and thus were rules don't determine decisions

- Hart sees indeterminacy only as an issue for rules at the margins
- Realists place it at the "core of appellate litigation"
- All hart does is just deny realists claim that rules aren't that powerful a factor at appellate level

→ Critical legal studies re-enervated realism- but their own version; Unlike traditional realists; CLS realists argued for indeterminacy in all cases- not just at the appellate level

- Though they also found indeterminacy in all language rather than just inr elation to interpreting legal sources

Class notes- re Leiter:

→ Leiter- don't make a mechanical decision by applying law to facts- rather consider what is a fair outcome given all the facts- and what law might justify this

→ Realists also aim to emulate empiricism of natural sciences- also mirror the assumptions/beliefs of legal positvists

→ Main claim= law is indeterminate:

(1) law is rationally and causally indterminate:

- Rationally= canons of interpretation offer conflicting but equally legitimate rules, such that they can be applied to same case and result in contradictory outcomes; because of this law is inherently indeterminate given that the same precedent/statute can be read to mean 2 different things
    - precedent can be read to have 2 different intepretations- either by reading it broadly or strictly
    - The scope of precedent can vary widely
    - Soem realists claim that each decisions can be read as correct b/c it's made by jduges- however Leiter notes its clear that we can judge a decisions as good or bad- some cases aren't "hard" (not rationally indeterminate)- there would be significant degree of agreement among jduges/legal theorists about how to interpret precedent/statutes
    - One criituqe of realism is that they're overly focussed on appellate level, whereas at trial level law looks more like formalism predicts, in terms of its consistency/predictability
    - Further critique: realists focus on too narrow a band as law- a broader view of law's scope ameliorates some concerns around indeterminacy
        - Eg. if you broaden class of reasons that can be considered to justify/explain a legal decision (like in Dworkin's "web" of law), such as moral/political considerations, judge's reliances on these reasons makes law seem much more determinate
- Causally indeterminate: one can't really predict judges decisions based on legal reasons- or explain them

→ Realists argue that judge respond to the entirety of the case- not just the legally relevant facts

- Nor do they simply reject the effect of rules on decisions as irrelevant- just that they're not particularly strong- "formalists exaggerate the influence of legal rules"

→ At the time, the claim/theory that legal rules aren't exhaustive as reasons for decision was important

What do realists assert?

→ That judges should openly acknowledge the indeterminacy of law and accept the importance of considering extra-legal considerations

→ Pro-Posnerian because it suggests judges should be open about their DM process- including their personal inputs- and acknowledge when courts are legislativing

→ Normative claim WRT legal realism- normative quitism

- no point in telling judges what to do because they're doing it anyways- best to leave it quiet

→ Realists also acknowledged that law could learn/be informed by other disciplines

Hart's Critique: describes realist position as claiming that "rules are a myth"

→ Because rules are found in all sorts of places, realists make a mistake in focussing on statute and precedent- inf ocussing on these as sources of indeterminacy they fail to acknowledge law's determinacny ohter areas

- Acknowledges indeterminacy, which Hart attributes to linguistic limitatios- but argues this is only a peripherial issue, in marginal cases

Realism and LP: Realism accepts many of the same claims of LP

→ Law is a product of social facts- not higher law

→ law's authority comes from a recognized rule/way to identify law/rule as authoritative

→ Doesn't require a connection between law and morality as a condition for LV

Legacy of Legal Realism: made clear that judges don't decide based on rules alone- and they won't say this; also unsettled notions about why judge's make decisions- are there other factors or are the written reasons exhaustive?

- and if not, what else is playing a role?

What is law- for realists?

→ the decisions made in courts- which are influenced by factors outside of coruts

→ Less concerned about the normative framework for law.

TOPIC 7- CRITICAL RACE THEORY:
(1) L entrench/enhance discrimination? (2) How we think re ILTs- how can WLT work w/ non-Euro. L systems/theories? **L systems meet?** 1 ignored/invalidated, or 1 recognized, but not as L, but as tradition/culture- w/o L claims→ LTs (Hart/Austin/Bentham): hier. idea of L- doesn't fit well w/ ILT- where society has quite diff. power distributions → Fund. assmptns of WLT untested; Eg. adversarial - assumes truth- so diff. sides w/ interest in outcome must argue their side; Core idea is that truth can be gleaned from uncertain situations thru conflict; eg. idea of world of indivds. w/ L rights/strong property ownerships- doesn't always fit well w/ ILTs- by contrast ILSs see truth as shared, negotiated, found thru consensus= diff. ind. mediation; diff. property conceptions→ Impact of colonialism on WLT- how did it treat non WLT? Don't privilege our LS just becase its ours!
History: Evolved from CRT in 70s (move race to centre of L discourse) **Critique of liberal. Trad.**: focus on formal E + rights- + view of basic equality- doesn't lead to E outcomes for all b/c of marginalization + systemic biases- CRTS argued F equality won't→ subst. equality- policies beyond equal treatment needed.
Char.(1) L racism covertly + embedded- SS to uncover how L perpetuates disadvantages systemically; (2) cultural differences play out in context of L system; (3) Confirmation biases in perpetuating racial discrimination; (4) Inst. +systemic DM leads to diff. treatment of certain racial groups (eg. what drugs cops focus?)(5) CRTs often critical of CLTs for failure to consider racial theories- how fair is this?; (6) emphasizes narratives, story-telling, role of individual in legal theory; aimed at consciousness-raising, allowing people to empathize w/ Vs of racism; Delgado (particularly) draw on SS- CRT open to incorp. these disciplines; promotes intersect~ b/w gender, sex.orient., + class into racial critiques of trad. legal doctrine; revisionist critique of Civil Rights
Burrows: correct myth ILSs are uniform + static; C isn't source of all Ls; treaties > just L docs WRT status/rights, they're intersocietal law; B fears perv. belief in Can. L establishment of ILTs as incomplete/2ry L/or even not law- and the IA hasn't helped this, removing wld encourage partic. in ILS and broader CLS→ B uses diff. levels of analysis- analytic, descriptive, historical and conversational- different framework of analysis- → ILTs has various sources, like other Ls, product of comm/ind/outside- don't assume ILT unsoph.- acknowledge its diversity + varied foundation- B responding to Hart, asking WLT to engage w/ ILTs as law- not custom, habit, etc; varied sources/perspective for IL give it unique binding force/vibrancy; RoL + state stronger if it incorporates diff. LTs- provided done fairly/orderly/nondiscrim.
→ **SL-** creator's L- creation stories; in some ILTs treaties =sacred w/ Creator and C- giving distinct power + significance-even given C's bad faith; (but not where colon~ w/o formal consent/treaties; creation stories help to create rules + norms, uni~ or regional, often less flexible; sits poorly w/ C's narrowly interpret treaties
→ **NL**- L principles from obs. natural env- "rules for reg. + conflict resolution," differs from W NL- less divide b/w man/nature, less focus on uni. reason/prohibitions/commands, discard W NL when used to justify disposs. Ind. rights/land; theories of how to interpret/understand world- less focus on state- look to family + kinship for authority/notions of legality; see Delg~ where crt heard elders spoke of Gixstsan hist. use of land in terms of I NL
→ **DL**- thru persuasion/discuss/delib. b/w indvls + groups in community; more explicitly human + thus more adaptable to contemp. changes; uses all accessible knowledge- ancient + modern principles; adjusts to formal/informal settings; DL powerful means of dealing w/ issues in Indig. communities (re. substance abuse/sexual abuse/econ. dislocation/poor communal support)- allows comnties. to improve socio- econ. health thru dialogues to promote better relationships/"healthy partic. L processes"; notes it may cause injustice to indvl rights- so ILT shld incorporate HR- wld increase persuas~/loyalty towards ILTs; Tradition needn't be static/discrete- strengthened by interaction + dialogue w/ other LTs; DL better at incorp. non-conform. views in orderly/respectful manner thru dialogue- circle settings powerful eg of this in CJ- limit hierarchy, promote order; attempts to incorp. ILTs into crim. combine WLT w/ trad. principles of ILT- thru comm. partic. in sentencing (eg); acknow. issues in ILT WRT disclosure/participation- but similar limits in WLT(class/race/$)- suggests drawing on the partic~ + egal. principles of DL to deal w/ these; B is critical of IA- thinks it limited opps. for

DLM- and band councils to eff. employ ILTs; B also fears PL often used by powerful indvls/groups to limit part. and take undeserved authority
→ **PL-** certain Ls w/ force b/c considered auth.- usually due to source; for B, PL is dangerous; dislikes CL reliance on it; fears it puts too much power in powerful indvls or majorities; absent checks may lead to dom. by these people; B suggests PL can be balanced w/ other types of L- decentralized, based in trad. heritage; in ILS, legit. of PL only b/c of its source reason/respons- not SL or DL; thus shld be easier to remove them if corrupt w/o fear - may lead to pol turmoil but no unsettling of natural/divine or DL consensu of community; can be problematic if PL source claims to be interp./promoter of NL or SL/or centre of Delib. process- tough to disentangle personality; tough in practise b/c laws tend to overlap; BUT makes clear- there are broad appeals to auth. in ILT(wider than people think)- but don't separate law from politics; DL/SL/NHL offer alt. authority if PL fails due to indvl. frailty
→ **CuL**: just as CL, ILT incorps. CuL= "rep. patterns of soc. interaction" considered binding by practicers- created by obs. comm. + discussions w/ members Re. opinions on actions/Os; strengthens comm; "comm. layered and indiv. intuit. form" of L, enforced thru informal social pressure encourage/discourage certain conduct
Concl: Bs notes that separating into discrete source of L is overly F- multiple sources involved in ILTs; Emphasize diversity + complexity of ILTs, and opportunities they offer; expand perspectives on ILTs, so they become widely applicable; Unsettle notions of L hierarchy- see them as "living systems...open to human choice and agency, w/i context of communities who use them.": OL can empower ILTs- gives unique "flexibility and relevance" to changing context- and communities; linking history and present; OL more accessible to non-elites + allows incorp. of non-indig.legal ideas; Incorp. OL + other sources= law that is more participatory+immediate, embedded in wider cultural framework.
SEP: Idea of/people on criteria of (1) bio. foundation, (2) separate racial groups w/ unique bio. characteristics, (3) foundation is inherited, (4) geneo~ can trace race, + (5) bio~ foundation demonstrated in phys~/behavioural traits; criticized on scien.+ logical grnds- reworked as socio~ construct, or at least less discrete/essentialist bio; confusion around IDing discrete race basically led to idea that race= social construct; tho debate endures WRT influence of social hierarchies; "moral status of racial identity and solidarity"; and around polices aimed at reducing racial inequalities
→ Concept of race fairly modern- classical era didn't create separate categories of bio~ difference;
→ Later thinkers (Kant/Hume) ran w/ idea of common ancestor which diverged into distinct peoples w/ diff. phys. traits b/c of enviro. factors; Even w/ Kant/Blomenthal's influential common ancestor theories, idea that different peoples had different ancestries persisted; Sex selection + evolution replaced polygenesis as a "scientific mechanism" for racial differentiation- Focus on sex. selection would evolve into eugenics movement, w/ Galton's call for selective breeding of certain traits as culture and government policy- and negative eug. was adopted in a # of countries; Later focus on SS as causing emergence of distinct races b/c geo/hist~ factors- inevitably tied to suggestions that certain aspects of European civilization emerged from specific races, and drawing on classical distinctions (misinterpreted) between Christians/Pagans, etc- popularized in US by Madison Grant who advocated for seg. on this basis→ But Bio. race faced criticism in early 20th, from anthrop., demonstrated huge impact of enviro. conditions on supposed racial traits and genetic effects
Contemp. Race Theories (1) Naturalism: old bio race, w/ diff. races w/ diff. "biophys." aspects + potentially genetic traits that are inheritable and biological, that all members of race have, and that explain much behaviour/culture/etc of indviduals/groups; (a) Scepticism- denies existence of races given disproving of discrete, essentialist basis for races in biology, modern genetics that sign. undermines ideas of racial traits that are distinct, apparent, and inherit~, (b) Constructivism- even if no bio~ basis, created + perpetuated by culture + human decisions; b/c society often racially categorizes- (led to inequalities of wealth, opportunities) important to preserve the concept to allow for race-oriented policies to ameliorate inequities; (c) Population- rejects assignation of traits to racial groups, but suggests may exist "genetically significant biological groupings could exist that would merit the term races".

Race vs Ethnicity: In race, a human group defined by “perceived common phys.traits” believed inherent, ethnicity= common ancestry b/c shared culture, linguistic past/present, religious beliefs, kinship, certain physical traits.
→ racial ID imposed by outsiders, race often involves power relations, racial IDs often based on hierarchies, perceived as inherent; more agency to self-ID ethnically (less physical diff. - cultural practise you can adopt), but racial ID often thought a given, strengthened by “role of informal perceptions + formal laws in imposing racial identity externally”; and race/ethnicity distinction less clear for some groups.
Race in MPL Philosophy: (a) moral status of ‘race’; (b) policies+institutions designed to correct racial inequality
(A) **Blum** sees R’ism in 2 forms- Inferiorization- denigrating group b/c think its bio~ inferior; and antipathy- bigotry/hatred to group defined by physical traits; these behaviours “violate moral norms of respect/quality/dignity” + are particularly blameworthy owing to hist. link to oppression- but b/c of this link, make racism serious charge, so suggests not to apply it to “lesser ills” done out of “mere ignorance, insensitivity, or discomfort” around other groups- doing so closes off moral dialogue; Suggests avoid “race,” instead “racialized groups” to show social sources for such IDs and various costs imposed based on their diffs. in form of “common physical traits”; separates from bio. views of race and allows for gradations of “race”; **Appiah**: dislikes talk of “races” favours “racial IDs”- given wide acceptance of ‘races’ people get categorized racially w/e their personal choices, so “racial mobilization” may be needed to oppose racism
(B) Policies to correct R inequality: **CJ:** Goldman (eg) argues jobs/ed. opps. should go to most-qualified, not thru affirmative action, unless someone has been specifically harmed by discrimination should race be used as factor in choosing to compensate someone; **DJ**: Fiscus suggests that w/o racism, jobs/entrance to schools would be evenly distributed, so advocates “proportional distribution of jobs and university seats”; **Critique of ‘merit’:** supplements theories that current criteria for assessing merit are biased against certain races, and not linked to job performance; **Diversity of perspective**: affirmative action is worthwhile for its promotion of diverse viewpoints; **Race-conscious electoral drawing**: allows minorities to be repped by minority leaders; should allow for improved legislative deliberation, effective advocating of minorities- perhaps PR to improve voting power of certain minorities