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| **Value of Jurisprudence**: predict cases| ID part of law problematic + determine appropriate changes| intellectual framework for limits + authority of law| diff b/t law + other social controls| ID assumptions| what makes law valid/normative force?| Why are some sanctions more severe than others?| Why we obey the law| can you separate “’what is law’ from person asking? | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| **Natural Law** | | | | | **Key Qs** | | | | | | | **Key Features** | | | | | | | | | | | | | | **Criticisms** | | | | | | | | | **Thoughts** | | |
| *What is law?|* Valid law = conform universal morality| objective moral principles that depend on nature of universe, discovered by reason| connection b/t rules that govern behv + truths re human nature; higher law exists independently of positive law (man-made)| if law not consistent w/ higher law, might not be valid | | | | | Content of higher law? How know content? What if positive law conflict w/ NL? Define injustice? How far positive law depart from NL to be unjust? Who decides? Consequence if it is not law (**Aquinas**: ignore unjust law except if lead to civil disobedience, then must weigh injustice of law w/ consequence of disobedience) | | | | | | | NL unchanging, universal app| access to standards higher law via reason| only just law=law| places limit on authority of law| some moral values supersede positive law| provides external justification for challenging unjust laws/outcomes| **A**: 1.external (God) 2.natural (derived nature, discv by reason) 3.divine (scriptures) 4.positive (created society/govt in accord nl, nl can dictate pl but sometimes allows for human choice)| **A:** just law =1.consist w/ principles of nl, 2.lawmaker not exceed authority + 3.law imposed on citizens fairly-if law unjust, doesn’t carry same moral force/reason to follow it as if it was consist w/ higher law **Finnis**: b4 u know what law is, need to understand its purpose: ‘what constitutes worthwhile life’ = 1.life 2.knowledge 3.play 4.aesthetic experience 5. Sociability 6.practical reasonableness 7.reglion; all intrinsic value|1.struture pursuit goods 2.devl coherent life plan 3.avoid arb pref goods/4.ppl 5.open-mind +commit to project 6.rec’g effect consequences 7.respect act’s value 8.act common good/interest community 9.follow one’s conscious | | | | | | | | | | | | | | **Hume:** Derives ‘ought’ from ‘is’ (resp: if human behv natural then it ought to act morally this way| get relat b/t facts + norms if think humans have natural f(x) that’s discovered by app of reason| good rec’g by NL self-evident (eg slavery wrong)| universal goods based on universal human nature that is constant across time is hard to sustain b/c things ppl value + the way they view relationship b/t them change; institut + political constraints hard to give effect to them (**Greenwalt**)| reasoning trad NL= too abstract + categorical | | | | | | | | | NL comforting, but is it realistic?| **Cicero’s** NL has penalties if don’t comply, sounds like ‘backed by sanctions’| Maybe “what is law” changes w/ time| if good reasons obey unjust law, must assume sys is just or harm done by civil disobedience> unjust law harm| which basic good of **F** wins if they conflict?| Part of practical reasonableness = follow conscious-what if our conscious not accord w/ 7 basic goods? | | |
| **Classical Common Law Theory** | | | | | | | **Key Features** | | | | | | | | | | | | | | | | | | **Diff b/t artificial(legal)/natural reasoning** | | | | | | | **Criticisms** | | | | | |
| Rules of CL = product of social + political custom, role of judges to discover +articulate these customs| law comes from time immemorial (**Austin**: this doesn’t answer what is law Q)| CL=statue, CL, judges decisions | | | | | | | Make clear CL exist independently of Crown + thus bound by CL| authority CL derived partly from acceptable practice (authoritative b/c ppl rec’g it as such)| **Hale:** judges=’living oracles’ don’t make law, declare/ID it thru specialized reasoning b/c of training/position (exercise weak discretion=interpretation)| Law accessible if immersion in practice/artificial reason| Nature of reason, Aristotle: world can be understood if we apply reason. Artificial reason: paradox: law independent (natural), reason honed to see| **Hale**: (in defence CL) CL deals w/complexity, can’t reduce to what person thinks is fair; reasoning product of experience, not comprehensible to ordinary person | | | | | | | | | | | | | | | | | | If law can be divined by app of natural reason (everyone has) then no reason to have judges| tension b/t acknowledging law exists independently of judges (natural) + stressing that only those whose reasons honed correctly (judges) can see | | | | | | | **Hobbes** (sounds like PL) argue that authority of law derived from authority of sovereign (judges appointed by king, derive authority to render decisions from king)| **Davies**: our ideas about the role of judges has roots in early CL theory, + declaratory theory. If law is identified, declared by judges, where does it come from? | | | | | |
| **Legal Positivism (LP)** | | | | | | | | **Key Features** | | | | | | | | | | | | | | | | | | | | | | **Criticisms** | | | | | | | **Thoughts** |
| Law = social phenomenon (social thesis); existence + content of law depend on social facts, not on its merits (goodness ≠ existence)| ppl create law sys, define law w/ own criteria. Widely accepted: **Hart**: 1.law=command of humans 2.no necessary connection b/t law/morals 3.analysis of legal concepts worth pursuing + distinct from socio + historic enquires/ evaluation 4.legal sys ‘closed logical sys’, decisions deduced from predetermined legal rules by logical means 5.moral judgments cant be established by rational argument | | | | | | | | **Bentham**: reject natural rights, no clear way to ID them; belief in NL + nr =dangerous 🡪civil disobedience/non-obey, revolution. Law + right estab by govt have meaning. Utilitarian. Law= assemblage of signs, declaratory of volition, conceived by sovereign, concerns conduct to be observed by subjects, volition relies on fear of sanction- prospect of it motivates ppl. Sovereignty from habit of obedience| **Ben + Austin**: law= subset of sovereign’s commands, backed up by threat of force or sanction (no need ask if sovereign moral or has merit to commands). Separate “is”/”ought”. Limit scope of jurispr enquiry| **A**: science of law. Series of general commands of recog’d sovereign backed by threats. If not a command, not law. Sovereign commands = “positive” laws| **H**: rules (has justification/reason for action) are diff from habit (descrp of behv). Obliged (b/c of consequences) + obligation (b/c we ought to). Adherence to rules comes from fear of sanction, critically reflexive internal attitude. Laws differ from other rules b/c of internal aspect: we’re invested in them, we believe we ought to (eg. law validly made). Not every legal sys has sovereign, thus laws divided: primary (regulate/govern behv) + secondary (govern operation of rule sys itself) rules. 2ndry rule has RoR= criteria that officials use to determine which rules are/aren’t part of legal sys, RoR ascertained by ref to attitudes of legal officials, their assumptions + actions; source legal norms; law valid only if ppl rec’g as law. Min content of NL (legal sys that don’t offer certain min protection wont last long| **Bix**:RoR allows us to say what law is w/o having say what it should be| app strict legal reason = solution legal prob | | | | | | | | | | | | | | | | | | | | | | (of **A**) assume can ID sovereign who create law; many rules enabling/ empowering in nature (eg K), struggles to explain some laws (Cust law)|(of **A** by **H**) hard to ID sovereign that is obeyed/doesn’t obey others. Continuity of law when sovereign change. Much cant be explained re modern law by idea that law is command of sovereign backed by threats. (of **H**) RoR is circular; is it duty imposing or power conferring? Can be +1 RoR in legal sys? | | | | | | | Whether society legal sys depends on if there exist certain social structures, how does Westernized view affect this? **H** says there is a basis of all legal sys a set of same/similar key norms/ values, is this higher law? |
| **Legal Reasoning + Theories of Adjudication** | | | | **Lamond: Precedent***– how determine what precedent for* + *When willing to overrule prior decision*? | | | | | | | | | | | | | | | | | | **Lamond: Analogies** – *case treated certain way b/c that way similar case been treated* | | | | | | | | | **Dickson: Interpretation** ***–*** *how lawyers undertake?* **Coherence** – *of what?* | | | | | | |
| Can ID assumptions, change them, tackle legal issue differently. Key Q: To what extent is it right to say *judges make law?*  Legal reasoning diff from everyday reasoning b/c uses args ppl don’t typically employ (don’t feel bound by past decisions) | | | | Precedent has special legal sig b/c has practical (must follow, partly constituting law, provides basis for *stare decisis*) rather than theoretical (good reasons to follow) authority over law| 3 ways to understand precedent:1.ratio-court bound; distinguishing=precedent not followed even though facts fall w/in scope of ratio, form of rule mod by making rule narrower; CL don’t see it as rule mod, regard past decision as subject to distinctions not ID’d/mentioned by court so when CL distinguish, ratio isn’t exhaustive, other law derived from ratio; ratio not exhaustive= Q stability + consistency of law, answer= restrict to making mod earlier court would have made if had current facts 2.app of underlying principles**-**precedent binding b/c give justification for decision [explains judge’s reasoning, why courts don’t do precise ratios, natural explanation for practice of distinguishing-justification doesn’t apply to diff facts of case, even if falls w/in ratio] 3.decison on balance of reason-courts must treat case as correctly decided, should balance reasons in similar way when dealing w/ similar facts| justifications use precedent= 1.consistency 2.expectations 3.replicability 4. need for lawmaking | | | | | | | | | | | | | | | | | | Not binding| If rejected in 1 case ≠ rejected in others| complements precedent 1.don’t fall w/in ratio but want to 2.do fall w/in ratio but don’t want to| Justification=1.we’re in effect ref to underlying principles that were basis of past decision 2. We’re in effect ref same/similar reasons that were basis of past decision| Analogies encourage replicability + certainty; more predictability by giving weight to existing legal decisions/ doctrine | | | | | | | | | Unavoidable b/c linguistic indeterminacy| Key: balance conservative (backward looking) aspect of interpretation w/ creative (forward looking) aspect| coherence: 1.unity of principle-set of legal norms that realize common value(s)/fulfilling common principle(s) 2.(**Raz**)more unified the set of principles underlying decisions/legislative acts that make law, more coherent law is| *what part of legal reasoning needs to be coherent? Coherence justify decisions?|* coherence broadly or narrowly conceived; related to interpretation (b/c when interp, need to know how much coherence matters to us); some argue coherence not just value but necessary condition for legal decision to be legally justified/ binding. | | | | | | |
| **Legal Formalism (Lform)** | | | | | | | | | | | | | | | | **Features** | | | | | | | | | | | | | | | | | | | | | |
| 19thC-emulate science (law as interrelated principles; ID legal ‘facts’ for inductive reasoning)| Judge ID relevant legal principles (from legal authority incl statute, constitutions, regulations, case law), applies to facts of case, logically deduces rule that govern outcome (LR arg only 50% correct prediction) | | | | | | | | | | | | | | | | Direct extension of CCLT| Judges don’t make law, they declare it (it already exists), thus cant adapt rules to changing circumstances| solution to legal prob found by strict app of relevant legal rules| judging is replicable, consistent, scientific exercise| LP has roots in Lform| law I a closed sys, if apply rules correctly, answers to probs will be consistent| commitment to continuity, objectivity: promotes confidence in the law (but must be willing to accept outcomes) | | | | | | | | | | | | | | | | | | | | | |
| **Legal Realism (LR)** | | | | | | **Features** | | | | | | | | | | | | | **Key arguments** | | | | | | | | | | **Criticisms** | | | | | | | | |
| ***Holmes*** *Life of law has not been logic but experience* | largely reject Lform| law is NOT scientific| law =inherently subjective sys, determined by political, social + moral considerations| what is relevant is predetermined by attitudes of decision-maker| judicial decision not replicable/consistent| judges decide by feeling, ‘hunching’ + justify it thru finding legal rules that fit | | | | | | Focus on study of **empirical**/historical basis of law| Strong emp on prediction (‘what the court will do in fact’)| principles for legal reasons only valuable if help describe past decisions| cases decided not on formal app of law but by what would be fair/just in case| judge base decisions on reaction to case rather than law itself (reacting to underlying facts even if not legally sig)| don’t completely reject idea that legal rules/reasons influence outcome of judicial decisions, but have weak effect esp in hard cases| consistent w/ LP, accepting: law=product of social facts; authority of law comes from some accepted norm/rule that allows us to rec’g validly constituted laws; no necessary connection b/t law + morals| background judge= important | | | | | | | | | | | | | Law=rationally indeterminate-available class of legal reasons doesn’t justify a unique decision (CL founded on set of interpretive principles that conflict yet are equally valid; can adopt diff interp of cases); law= causally indeterminate- legal reasons cant wholly explain why judges come to decision| courts should decide cases: 1.Proto-Poserians**-**judges should openly adopt legislative role, acknowledge b/c law inherently indeter, judges must draw on moral/political sources 2.Normative quietism- pointless to give normative advice to judges (b/c will always do, (sub)consciously what they feel bound to do| SWR + IWR | | | | | | | | | | Re rationally indeter- 1.assume any app of precedent by judge= valid= wrong b/c not every precedent legally proper in every case, some interp of statute/case law are more valid than others based on facts of case 2.assumue statute/ precedent (esp CA) are only legitimate source of law-if you take broader view, you broaden class of legal reasons that can justify decision (**Dworkin**)[resp: moral principles can’t be ID’d w/ certainty, too malleable to be predictive| **Hart**: LR flawed b/c almost exclusively focus on judicial decisions as basis for foundation of law, this is too narrow; need to rec’g courts guided by the law, legal rules found in const, statute, regulations, past decisions (**H** willing to accept ‘law indeterminate at margins’ but not in its core) | | | | | | | | |
| **Critical Legal Studies (CLS)** *What is law for?* | | | | | | **Reject/Challenge Assumptions/belief re law** | | | | | | | | **Key Features** | | | | **Changes/Diff approach** | | | | | | **CLS critique of liberalism** | | | | **Criticisms (Morrison)** | | | | | | | | | |
| *Paved way for devlp of new critical appr to study of law*| emerged as leftwing reaction to prevailing ideas of law in 70s| successor to LR but moved past it| all law (incl statute, case law etc) is inherently political +not enough to confine critique to some limited rec’g that policy affects law| Law is not so much a rational exercise| why do those sysically disadvantaged by law accept the legitimacy of institutions + values that perpetuate subordination? (b/c adopted w/o critique) | | | | | | 1.Lform idea that law complete/logically consistent sys of rules 2.law(yers) objective/independent 3. tendency law school to ignore human dimension of legal problems +sanitize discussion of real world probs, distil them down to matters of doctrine/app of legal logic 4.failure of mod liberalism to live up to promise of equality, social justice, indiv freedom| **Unger’s** rejection of the formalism of **Hart** (formal rules applied uncontroversial + determinatively) + objectivism (judges can act as objective medium b/t rules + principles) | | | | | | | | 1.law is inescapably political + legal reasoning way of rationalizing/ disguising political decisions 2.b/c law is political, legal doctrines not determinative (can justify any # of outcomes)| law reform/ change= political| Who is the law for? Who does it serve? | | | | 1.person placed at center, rec’g illusion of objectivity= misleading 2.greater focus on political dimension 3.great focus on substantive equality + real world effects of law| start w/ realization no objective/ natural way to look at law, any approach is inherently rooted in one’s own political perspective| reject idea that laws/legal principles static but are rather product of political positions, args+ conflicts | | | | | | Liberty=strong commitment to individual rights (means to protect against state/ majoritarianism| formal right don’t in + of themselves lead to substantive justice, oft mask/ perpetuate inequality, don’t have same means| law isn’t neutral or separate from politics| law is product of the state +relies on it for enforcement/ authority | | | | CLS’s account of LP is old/ crude b/c few modern LP suggest judicial decision making/ law reform is entirely driven by fixed set of rules| Liberalism is flawed but does have moral center + commitment to integrity, underplays complexity of lib| overstmt that law is indeter b/c although influenced by politics, bound by rules| CLS assumes drop pretense of objectivity = good but **Davies** says it neglects fact that marginalized groups rely on power of law while be oppressed by it| **Hunt**: CLS focus on lib as theory rather than lib in practice, going from premises a/b lib philosophy to conclusions a/b lib philosophy; move from ideological claim re nature of law based on analysis of legal doctrine + discourse to empirical claim a/b how that doctrine + discourse shapes general beliefs, conceptions of law + justice in society; CLS talk a/b lawyer’s consciousness + from that draw general conclusions a/b how everyone thinks of law| underplay role of rights play in helping minorities achieve even formal equality | | | | | | | | | |
| **Feminist Legal Studies (FLS)** | | | | | | | | | | **Probs FLS seek to address/Commonalities** | | | | | | | | | | | | | **Address issues** | | | | | | | | | | **Rule of Law** - *integrity/coherence in law* | | | | |
| Feminist philosophy of law IDs pervasive influence if patriarchy on legal structures, demo effects on material condition of females + develops reform to correct gender injustice, exploitation; understand how legal institutions enforce dominant masculinist norms| it’s not enough for legal sys to espies commitment to equality, equality must be meaningful + more than simply procedural| substantive vs formal equality| some-gender=culture not nature | | | | | | | | | | 1.how law legitimates +exacerbates oppression of women 2.how patriarchy influences law/legal institutions + how equality to be understood against male authority 3.belief that women are diff from men in capacity for abstract/impartial reasoning that law demands| assumptions: all humans of equal moral worth, entitled to equal treatment under law| critique of ‘trad’ legal theory: CLT + LP are inextricably male in outlook, in part b/c theories mostly developed by men; jurisprudence + legal theory reflect values typically associated w/ the liberal male | | | | | | | | | | | | | 1.highlight area where law legitimates oppression or operation of law treat men/women diff 2.provide critique of trad jurispr + thinking a/b law =basis for law reform that isn’t inherently patriarchal/ discriminatory 3.challenge common ideas of normality which are based on masculine/patriarchal conceptions 4.highlight wrongs done to women that are typically ignored by trad perspectives | | | | | | | | | | Conceptualizing RoL in terms of coherence tends to reinforce + legitimate status quo + existing power relationships; law promotes stability + order by reinforcing adherence to predominate norms, presenting them as universal, natural + inevitable (which are male); law makes systematic bias which are accepted by actors w/in legal sys like judges, victims | | | | |
| **Liberal Feminism (LF)** | | | | | | | | | | | **Criticism** | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Equality of treatment for men/women| women are autonomous, should have same rights/freedoms, privileges as men| law reform | | | | | | | | | | | 1.lib starting point which is male construct (must examine assumptions + value sys) 2.insufficently lib b/c recomm at odds w/ lib commitment to autonomy 3.elevate 1 idea of good life over others 4.call for equality undermine existing beneficial social + cultural institutions 5.dont pay enough attn underlying causes oppression (eroticization of dom + sub = basis of gender discrim, RF) | | | | | | | | | | | | | | | | | | | | | | | | | | |
| **Radical Feminism (RF)** | | | | | | | | | | | | | | | | | **Consequence of male dom** | | | | | | | | | | | | | | | | | | | **Criticisms** | |
| Existing cultural, social, economic + legal diffs b/t men/women are result of male domination| **Mackinnon**: source of dom lies w/ male sexuality + idea that hetero sex enacts male dom over women| LF ignores reality of male power + dom + perpetuates belief that lib values are neutral | | | | | | | | | | | | | | | | | 1.women cant trust state (RoL blinds to structural inequalities that are heart of legal sys; promotes male values, legitimates existing power structures/rules that serve man’s interest) 2.violence toward women not confined to physical or psych harm (perpetuation of images of oppression + sub = injury/harm) | | | | | | | | | | | | | | | | | | | Single lens| denies w’s agencies, treats as helpless | |
| **Critical Race Theory (CRT)** | | | **Aleinikoff** law never achieve neutrality b/c our culture + experience lead us to organize + process info in a race-conscious way + b/c white culture will cont’ seen as superior; urges race-conscious measures to reach racial justice by allowing minorities to define themselves + membership in society, by generating material improvements in the lives of black Americans and by placing minorities in positions of power, authority and responsibility | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| **Key Qs** | | | | | | **Key Features** | | | | | | | | | | | **Defs** | | **Q of race** | | | | | **Cautions** | | | | | | | **Indigenous** | | | |
| Experience of racial minorities = diff from other oppressed groups| partly b/c colonialism, subjugated position of minorities is oft enshrined in law | | | 1.how structure of law entrench, mask, perpetuate racial discrim 2. Challenges facing legal theorists who want to develop juris that engages w/ indigenous legal trad as law | | | | | | 1.critique of lib (formal equality not enough, need affirmative action + equality in outcomes) 2.interps of civil rights + progress that are race conscious + rec’g diffs in culture + lived experiences 3.emp on role of storytelling as means of raising consciousness a/b experience of racism + its role in law 4.focus on role of social sciences + insights they bring when looking at race/racism from legal perspective | | | | | | | | | | | Race-human group b/c perceived common physical characteristics| ethnicity-common ancestry (can exercise choice to belong) | | 1.focus on failure of law to treat ppl equally or eliminate discrim in public/private spheres 2.focus on extent western idea of law is predicated on values that favour one culture over all others + its consequence | | | | | Lib focus on rights/ equality has conflated racism w/ other oppression; does little to shed light on how law is systemically racists (b/c western idea of law predicated on one set of values); does formal equality ever = substantive equality? | | | | | | | Need to rec’g that Indig legal sys are sophisticated + diverse| sources of law: 1.scared (spiritual/higher law/ creator) 2.natural (observe phys world) 3.deliberative (persuasion, council, discussion) 4.positivistic (rules, regs, authority figures) 5.custom(social practices via interaction) | | | |
| **Law+Morality** | | **Mill’s Harm Principle (HP)** | | | | | | | | | | | | | **Feinberg** | | | | | | **Hart-Devlin Debate** (Hart + Mills see more eye to eye’ H=not place law state what is/nt moral) | | | | | | | | | | | | | | | | |
| *Where to draw line b/t moral standards the law should/nt enforce?* | | Only purpose for which power can rightfully be exercised over any member of civilized community against his will is to prevent harm to others| importance of individual liberty + autonomy| ethical confrontation (moral progress more likely to occur when societies allow diff views a/b morality, politics, culture to co-exist | | | | | | | | | | | | | Distinguish b/t harmfulness + wrongfulness; crim law only justified in prohibiting conduct if both harmful + wrongful| app of HP hurts liberty | | | | | | Critical morality-attempt to state what is morally true; conventional morality-attempt to capture what most ppl believe morally true| **D**: law legit what majority think b/c society held together by shared commitment to certain moral positions+ values, undermining them =instability of society or its dissolution| **H**: D’s position infringe autonomy = ‘legal moralism’ + relied on assumption that society is entitled to enforce morality via law to prevent own dissolution (**H**: no empirical way to test these claims) + persevere particular set of communal values (**H**: implies society entitled to enforce set of morals simply b/c they are widely held, clear violation of HP; would prevent social change/moral development) | | | | | | | | | | | | | | | | |
| **JDM** | **Austin + Hart (LP)** | | | | | | | | | | | | **Dworkin** | | | | | | | | | | | | | | | | | | | | | | | | |
| *How judges decide cases* | Start by apply existing rules, exercising weak discretion b/c open texture of language. When ‘gap in law’, exercise strong discretion, act as lawmakers +fill gap | | | | | | | | | | | | Starts from idea there is never a situation in which there is no relevant rule/law. Law is characterized by rules + key principles/ standards that can be called on when deciding case, ‘finding the law’ (b/c separation of power –not proper for judges to make law; retrospectively + the RoL-if judges make law, apply retro + party punished for a new duty created)| rules binding/not binding, principles carry weight| ‘right answer thesis’ always right answer in given case b/c fits into web + consistent w/ aims of legal sys + underpinning principles| if conflict b/t rule/policy + rights, rights must prevail | | | | | | | | | | | | | | | | | | | | | | | | |

Ppl = problem in race; doesn’t matter if there is a law against racism, the society is systematically flawed and perpetuates the inequality