INTRO/GENERAL PRINCIPLES

Charge against army guy's wife (illegal deprivation of liberty) for reporting remarks about Hitler → death penalty but sent to front instead -- PRINCIPLE -- governed by law that is in place at time of your actions // Fuller = immoral (NL) // Hart = was legal (PL) // judge = because no duty to report just option she was guilty BUT judges ≠ guilty - duty

Radbruch **-- FIVE MINUTES OF LEGAL PHILOSOPHY** (reaction to Germany WWII)

First Minute → LP -- equates law with power + there is law only where there is power // "a law is valid because it is a law, and it is a law if, in the general run of cases, it has the power to prevail" // law = valid because it is a law // defencelessness

Second Minute → law is what benefits the people (w/e authorities deem to be of benefit to the people is law) // only what law is benefits the people // public benefit claimed as the justification for things that do great damage to people

Third Minute → law is the will to justice // justice = equality before law without regard to either politics or law // implies non-arbitrary withholding of HR okay // if laws deliberately betray the will to justice ≠ valid

Fourth Minute → three values of law = public benefit, legal certainty and justice // will be occasions where validity is withheld because of the laws so unjust and socially harmful that legal character must be denied // will put up with some but there is threshold that should not be passed where legal certainty is outweighed

Fifth Minute → NL -- law ≠ law if it violates certain standards // unclear where dividing line is

JURISPRUDENCE AND THE NATURE OF LAW

Two issues = (1) general conditions that make norm legally valid; (2) normative aspect of law

Austin → law is: (1) command of a sovereign, (2) who is habitually obeyed, and (3) command is backed by force // NO CONCEPTION OF MORALITY // objective easy to see what is and is not law

Law = CL + statutory law + constitution?

Execution of Charles I → "the King can do no wrong" // French Regicide, 1793 → King seen as semi-divine at time it was unthinkable King could be held accountable for action ∴ shakes foundation of society (French Revolution -- based on equality, liberty and fraternity ∴ become a citizen and not a subject)

Hart → celebration/critique of Austin // **law is union of primary and secondary rules** (primary rules = the command (declare the rule) + secondary rules = rules about the rules) **+ a rule of recognition and IPV** (rule of recognition = distinguishes legal rules from non-legal norms // IPV = internal point of view -- regarding bindingness)

CORE IDEA OF LP → facts ≠ values; is ≠ ought; existence of law = a fact, not a value; factual, not normative // conditions of validity are merely social facts

- Inclusive legal positivism = accepts sometimes legal validity rests on moral content of norms // exclusive legal positivism = morality never relevant to legal validity
- Social thesis = law is a profoundly social phenomenon ∴ legal validity consists of social, non-normative facts // separation thesis = conceptual separation b/w law and morality (what law is cannot depend on what it ought to be in the circumstances)

CORE IDEA OF NL → normative // moral content of norms bears on validity

Dworkin -- taking rights seriously // rules are not the only thing (PL) // PRINCIPLES drive law // facts/value distinction frayed -- source + content of law determines validity // law is profoundly interpretive (ruling = facts + law) // interpretation requires evaluation -- "propositions are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive, interoperation of the community's legal practice" // principles do not determine outcome -- must be WEIGHED, not absolute // will case where willed to person who murdered -- conflict b/w rule + principle

Marmor → according to some legal theory moral judgments are subjective, law rests on moral judgments, hence both morality and law are propounding subjective, "promo" legal theory

Fuller -- SPELUNCEAN EXPLORERS // R. v. Dudley & Stephens (cannibal boat -- British yacht ∴ British laws applied) // Truepenny (apply law, ask for pardon) -- blackletter approach, PL; Foster -- NL b/c out of state OR purposive interpretation [PL] situation more akin to s-d and deterrence wouldn't apply [intelligent and unintelligent fidelity to the statute]; Tattler -- indeterminacy of rules

NATURAL LAW

Greenawalt → the opposite of NL ≠ LP

- NL accept wide variation in human PL
- Both NL and LP may think it is okay to break an unjust law, to oppose an unjust legal system
- NL assert that there are fundamentals that are universally valid *even though not in face widely agreed upon*
- **Basic NL premises** → (1) human life is integrally related to all of existence; (2) human nature is universal; (3) defining characteristic of humans is reason/rationality; (4) we possess inherent purpose or self-evident goods; (5) these are discoverable by reason; (6) morality is objective, universal, and discoverable by reason; (7) moral obligations are consonant with their own true purposes/realization of self-evident goods; (8) at deepest levels no conflict arises b/w individual good and common good; (9) human laws appropriately reflect NL and human law determines the details left open by NL; (10) human laws not in accord with NL are not really law in some sense

MAJOR APPROACHES = HART // FULLER // FINNIS // Classical NL

Hart - Minimum Content of NL → law/moral venn diagram -- law intersecting with morality (law ≠ morality but they overlap where law prohibits things that are immoral)

- Objective = survival of people and of possibility of association with one another (society)
- 5 facts and the law that flows necessarily → human vulnerability (restrictions on violence) // humans approximately equal // limited altruism (restrictions on aggression) // limited resources (system of property and contract/exchange) // limited understanding of strength of will (punishment is needed)

Fuller - The Morality of Law → 8 ways to make law fail = (1) Failure to achieve rules at all, so that every issue must be decided ad hoc; (2) Failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) The abuse of retroactive legislation; (4) Failure to make the rules understandable; (5) Enactment of contradictory rules; (6) Enactment of rules that require conduct beyond the powers of the affected party; (7) Introducing such frequent changes in the rules that the subject cannot orient his action by them; (8) Failure of congruence between the rules as announced and their actual administration

Classical NL → requirements of reason/God // teleological view -- people should develop to the specific end of excellence of mind and character AND law *should be* or necessarily *is* directed toward that end

Finnis - NL and NR → self-evident goods (ex/ life, knowledge, play, aesthetic experience, friendship, etc.) + practical reasonableness (ex/ rational life plan, no arbitrary preferences amongst values/persons, detachment, following one's conscience, etc.) + particular conclusions -- never act against a basic value

- Critique (Duncanson) → rational plan of life = illusory given life's contingencies // following conscience but not if something unreasonable // weird stances on sex

How to save NL → reduce to INTRAcultural claim, BUT NL must logically be universal, not culture specific // ground claims in true religion, BUT Finnis makes secular reasoning claim, results in claims not being persuasive to those outside the faith, religious perspectives are themselves culture-dependent // drawing back NL claims to a minimum of basic moral premises that are in fact widely observed among diverse cultures BUT traditional NL produces highly specific moral norms for which it claims universal validity

LEGAL POSITIVISM

Distinguish law as it is from law as it ought to be

Austin → the existence of law is one thing, its merit or demerit is another // human law SHOULD conform with divine law // God will punish human legislators who make contrary law // BUT such law IS law // 'positive morality' (actual accepted morality of a group) might not be the same as God's true morality // the best indicator of God's morality is utility // true morality = God // utility = index (indicator) // positive morality ≠ true morality

Bentham → utility, yes BUT God, no // emphasized duty to obey law AND duty to criticize and call for reform (obey punctually; censure freely) // horrified by French Revolution // recognized that the need to refuse obedience to evil laws might arise // best protection? don't confuse law and morality -- otherwise two dangers: the anarchist (law and its authority may be dissolved in man's conceptions of what law ought to be) + the reactionary (the existing law may supplant morality as a final test of conduct and so escape criticism)

Summary of Bentham and Austin → law has been shaped by morality // law's rules often reflect/mirror moral principles or rules // morality might be explicitly incorporated into legal rules (ex/ court to decide what is just, best, etc.) // Bentham -- constitutional provisions might bind the legislatures to adhere to moral standards // Austin -- not so much this last (all about sovereign legislature)

Utilitarian perspectives on the law → (1) formalism: that a legal system is a closed logical system in which decisions emerge without reference to social policy, moral standards, etc.; (2) moral relativism: that moral judgments cannot be established or defended by rational argument; (3) separation of law and morals; (4) law could only be understood through combination of three types of study (historical, sociological, analytical study of legal concepts); (5) imperative theory (law is a command) -- 1&2 are falsely attributed to LP

Command Theory of Law → utilitarians believed a legal system was characterized by: COMMAND + HABIT OF OBEDIENCE // command = general directive (+ of a sovereign) + threat of sanction // sovereign = person or body who is habitually obeyed (uncommanded commanders)

- ***Hart*** not a fan → law surely is not the gunman situation and legal order is surely not to be thus simply identified with compulsion
- Problem of legislature as a sovereign habitually obeyed → changing membership // secondary rules -- legislatures don't make law unless they follow very specific procedures ∴ THOSE rules are not commands habitually obeyed (the root of the legal system lies in an analysis of what it is for a social group and its officials to accept such rules) // facilitative law -- command theory cannot explain law that creates facilities such as contracts

Hart → **core of certainty // penumbra of uncertainty // not law**

- Accepts that formalism is nonsense and that in the penumbra judges may do and do adopt a purposive approach (considering aims/purposes/policies/moral principles, etc.)
- This does NOT mean social policy or morality IS law RATHER: (1) laws are incurably incomplete; (2) to accept the extreme statement would be to abandon the idea of rules altogether (even in the core); (3) focus on the core disproves the necessity of a law/morality connection
- On ***Radbruch*** → didn't properly understand liberalism where morality can trump a bad law (too evil to be obeyed)

Residual claims for NL → (1) minimum content of NL (property, contract, restraint on violence); (2) procedural morality

How do we know what is moral? → (1) subjectivist/relativist/noncognitive theories [feelings/emotion/subjective preferences to which one is committed // no rational method of arguing for 'ends' which re 'fiats of the will' or 'emotional choices']; (2) "objective morality" [***Austin*** -- God as revealed through utility // ***Bentham*** -- utility // NL]

- You can believe in morality and still accept that immoral law is law

Fuller → true purpose produces oughtness of judicial outcomes (red herring -- in penumbra judicial decision is more a choice)

LEGAL REASONING AND THEORIES OF ADJUDICATION

Practice statement from HL allowing their own precedent → shows the normative value of the ROL // sometimes following precedent will do injustice AND b/c they are SC they have to assume responsibility of overturning bad precedents // must bear in mind the need for certainty // before this HL would just interpret things away

Goodhart → ratio problems: 'ratio' is often very bad reason but still law -- a case can be precedent even if -- no rule of law is set out in the opinion // multiple opinions with various rules set out // a rule is stated too widely/narrowly // judgment without opinion, etc.

- If binding principle is found **neither in reason nor in the proposition of law** set forth?
  - ALS answer → (1) ignore the opinion; (2) look at the facts; (3) look at the judgment resulting; (4) discern the driving principle from this objective evidence
  - CRITIQUE → (1) approaches nihilism; values gone; it's all sociological; (2) what do judges think they are doing with written opinion; (3) naiveté -- treats as if facts pre-given, not constructed by judge
- **RESOLUTION -- RATIO DECIDENDI = MATERIAL FACTS (AS SEEN BY JUDGE) + CONCLUSION BASED ON THEM**
  - By his choice of material facts judge creates law → adversarial presentation + judicial finding
  - True facts are irrelevant and legally misleading -- only the judge's findings of facts count in discerning principle of a judgment
  - Judges often don't tell you what they considered the material facts to be -- leaving to future generations to determine whether or not these facts constitute part of the RD
- **Guidelines for identifying immaterial facts** → presumed immaterial = facts relating to person, time. place, kind, amount // immaterial = facts the court explicitly says are immaterial or facts impliedly treated as immaterial
- **Guidelines for identifying material facts** → unspoken material fact may be identified by judges in subsequent cases // facts specifically stated to be material // presumption against wide principles of law THUS all facts set forth in opinion are presumptively immaterial // multiple opinions -- material facts are limited to the sum of all the facts held to be material by the various judges (narrowest possible RD) // any opinion expressed on the basis of hypothetical facts or a fact not determined by the court is OD
- **MORAL HAZARD** → judges finding facts later by declaring it was there all along // making up facts in order to expand authority
  - Response = shouldn't assume courts are disingenuous and arbitrary // our theory is that judges do not make mistakes of fact or law
- **RULE OF LAW** = (1) right of citizens to be governed by law, not persons; (2) rests on stability of law; (3) in CL that means stare decises
- **DESCRIPTIVE RD** → process of reasoning by which the decision was reached
- **PRESCRIPTIVE RD** → binding RD // identifies and delimits the reasoning which a later court is bound to follow // normative judgment -- REQUIRING us to accept a particular RD as necessarily drawn from a previous case and binding
- True believer in ROL being embedded in all this

Stone → problem for Goodhart is what level of generality a material fact should be taken at // each material fact would have to recognized as capable of a statement in an often numerous range of more or less generalized versions // range of RD with each version // if ratio becomes apparent only in subsequent cases then Goodhart's done

Judicial choice → how CL provides stability and change -- choices are NORMAL (ex/ competing versions of material facts)

Boyle → anatomy of torts case

LEGAL REALISM

US → (1) no general court of appeal in USA ∴ divergent doctrinal outcomes of state courts; (2) constitutional review of legislative action and hence directly political role
Summary of ALS: (1) American; (2) Constitutional role of SCOTUS; (3) no general court of appeal; (4) activist court acting on behalf of big business; (5) formalist style of reasoning used to enact judges' economic theories and policy preferences ∴ ALS is court focused; obsessed with formalist style; not a general theory of law
Formalist style (*Langdell*) → R x F = D
Realist views of law (all about judges) → (*Holmes*) bad man theory of law -- the bad man cares only about what the courts will do in fact // prophecies of what courts will do in fact and nothing more pretentious are what I mean by law // (*Frank*) this is what lawyers care about too -- dare not act on assumptions of legal formalism *Frank* → (1) rule skepticism = imprecise; multiple; not harmonized; (2) fact skepticism = facts are unknowable in any contested case until the court renders its decision; (3) HENCE law is unknowable until the judge renders decision
- **F** → (1) juries -- ignore the judges rules // produce composite decision from undifferentiated reaction to evidence; (2) judge alone → decide who should win then tool for facts to support outcome; (3) decision from hunch of judge -- stimuli + personality of judge = D
- 4 types of error to destroy formalism → wrong prediction of (1) fact finding; (2) rule selection; (3) of both; (4) of multiplication of FxR

***Hart* on realists** → (1) believed law needed capacity to change with times (formalize froze it); (2) forward-looking adjudication (rules as displaceable presumptions -- modified if context unsatisfactory); (3) judges should openly address their views of law's aims or justice or social policy and other elements in decision making
Hutchinson → law NEVER understood as clear rules wrapped in intelligible doctrine

CRITICAL LEGAL STUDIES

Legal realism + progressive political edge // indeterminacy of rules // all law is politics // law in inherently CONTRADICTORY // individual autonomy is a myth
Marxism → social evolution: feudalism, capitalism, communism // each stage characterized by necessary alignment of institutions and ideologies // contradictions inherent in each stage, leads to its eventual displacement by the next
- Critiques → mechanical notion of historical change not borne out by history // categories are too big (big variety in types of societies)

Liberal political theory → indivisible linkage of individual freedom, private property, free market/freedom of contract, democracy, equality of citizenship (*Hayek*) [BUNDLE = can't have one without the other]
- Critiques → insists upon logic of social types that is contradicted by history (*Unger*)

Unger → super liberal // wider 'institutional imagination' // 'transcend' and destabilize the 'formative context' // empowered democracy = help folks to free themselves from the formative contexts which limit their imaginations (dominant ideology) // destabilization rights
THREE METHODS OF CLS: (1) legal history [vertical analysis -- identify roots of a legal doctrine and misfit with current circumstances]; (2) imaginative doctrinal work [horizontal analysis -- deviationist swapping doctrines/principles among and between spheres of social life/law (state/market/family)]; (3) imaginative doctrinal digging [interpretivism -- vacuum up alternative principles already embedded in legal system so as to destabilize, displace mainstream formative contexts, leading to incremental progressive transformation of law and society]
Never really moved past the trashing stage

FEMINIST JURISPRUDENCE

CORE COMMITMENT = advancement of freedom and equality for women
Patriarchy = social order characterized by male domination; compatible with other principles of social ordering (ex/ class, status, race); does not connote that every male enjoys patriarchal privilege
Stereotypical binaries → men [rational, aggressive, competitive, political, dominating, leaders] // women [emotional, passive, nurturing, domestic, subordinate, followers]
First wave/maternal feminism → focused on political inclusion, voting rights, property rights (ex/ 'persons' case)
Second wave 1960-80 → sexuality, family, workplace, professions, reproductive rights, domestic violence, rape, etc.
Equal Rights Amendment (US - died) → stupid objections (ex/ mixed gender bathroom)
Feminism + law → critical stance // ROL entrenches existing (patriarchal) power relationships // ROL commitment to formal equality on an individual level makes 'systemic bias invisible'
Public/private divide → **LIBERAL FEMINISTS** want to preserve a private realm where individual choice governs (assuming not coerced it's fine for women to choose traditional marriage/economic dependence/prostitution, etc.) // **RADICAL FEMINISTS** say patriarchy pervades all relationship and law shouldn't shield patriarchy under the guise of respecting privacy // liberal view is false consciousness because even 'free' choices are made against backdrop of economic inequality and patriarchal dominance [ex/ freedom of religion → religious practices can discriminate against women]

FLT and traditional jurisprudence (*Lacey*) → neutrality (of application of legal standards); autonomy (from religion, politics, etc. -- law reflects these deeper forces); centrality (of law in constructing social relations); rules (law as a system of rules and norms); coherence (of law -- rubbish → migrations of the public/private divide); rationality (actual law reveal rhetoric and emotion as much as rationality)
Gilligan → general alignment of moral reasoning with gender // men: R X F = D // women: ethic of care/responsibility/contextual/holistic approach

CRITICAL RACE THEORY

INDIGENOUS LAW - Burrows

Cautions against looking for law in the way that you recognize it in western law b/c won't necessarily recognize indigenous law ∴ must be openness to diverse iterations of authority, institutions, etc.
Law can be contained in songs, stories, etc.
Ipelee → court talks about impact of colonialism and its relation to the failure of the CJS to deal fairly with aboriginal offenders
Law as tradition → but where are they in Canada's hierarchy? Not *terrain nullius*
Legal pluralism - simultaneous existence within a single legal order of different rules applying to identical situations
Van der peet → AR based on indigenous legal customs/traditions
Mitchell → European settlement did not distinguish aboriginal interests rather survived
Sacred law → stem from the Creator (ex/ creation stories) -- rules and norms that give guidance about how to live with the world and overcome conflict (ex/ treaties)
Natural law → law from observations of physical world (rules for regulation or conflict resolution) -- use of adaawk in Delgamuukw
Deliberative law → formed through process of persuasion, deliberation, council, and discussion -- subject to re-examination and revision through generations -- use of circles, feasts, ceremonies -- unanimity is often important for council decisions
Positivistic law → proclamations, rules, regulations, codes, teachings, axioms that are regarded as binding -- proclamations have weight because made by a person regarded as authoritative -- narrow basis of legitimacy protects from abuse
Customary law → practices developed through repetitive patterns of social interaction that are accepted as binding on those who participate in them -- often inductive ∴ observations of behaviour lead to general conclusions about how to act (ex/ Labrador Inuit customary law given paramountcy over laws passed by Nunasiavut gov't)

RACE - James

No good is served by maintaining the idea of race in any socio-legal context → eliminationists
Monogenesis vs. polygenesis (common ancestor vs. different species)
Racial naturalism → old biological concept: (1) heritable, biological features; (2) shared by all and only the members of a race; (3) explain behavioural, characterological, and cultural predispositions
THREE metaphysical camps (racial skepticism, racial constructivism, racial population naturalism) + TWO normative camps (eliminativism and conservatism)
Racial skepticism → racial naturalism is false; races do not exist -- cannot exist b/c one thing they could uniquely refer to has been proven not to exist
Racial constructivism → even if biological races are false, have come into existence through human culture and human decisions -- society labels ∴ keep to facilitate race-based policies like affirmative action [thin constructivism = grouping on superficial properties; interactive kind c = category causes common experiences; institutional c = race as a social institution]
Racial population naturalism → possible that genetically significant biological grouping could exist that would merit the term races -- groupings would not be essentialist or discrete
Race vs. ethnicity → race = defined by perceived common physical characteristics; ethnicity = sense of common ancestry based on cultural attachments, etc.
Kull → law should be colorblind

LAW AND MORALITY

Devlin → okay to use criminal law to punish acts that are considered immoral in society // morality is necessary for the social order // we need shared norms w/e they are // legal moralism
Hart/Mill → limit criminal law to only actions that cause harm to others
Morality = universal/fundamental (something outside the individual)
Harm = what is really meant by harm? (self-harm, to others, physical, economic)
Malmo-Levine → SCC rejects harm principle as a PFJ
Communitarianism → need to think about communities/responsibilities (more than just individuals exercising rights)
When is punishment legitimate? → only when the act punished causes harm to others (Mill) // only when the act punished causes harm or serious offence to others (Feinberg) // only when the act punished causes harm to others or harm to the actor (Hart) // only when the act punished caused harm or transgresses moral norms (Devlin) // only when the act punished causes harm or where punishment would advance a particular human good (Murphy -- hierarchy of good vs. neutrality as to choices)

Harm principle (*Mill*) → ultimately based on utility // interference with liberty by use of power or coercion only to prevent harm to others -- no other moral ground good enough // harm to other contrasted with *offence* to others and self-harm OR *bare* (harmless) *immorality* of conduct
Feinberg → harm is a good reason to coerce -- so is 'the offence principle' ∴ prevent serious offence to persons other than the actor // against hard paternalism where person is forced to act for their own good
Raz → no principled limits on pursuit of moral goals on part of state BUT limits to the means that can be legitimately adopted in promoting the well-being of people and in pursuit of moral ideals // states' primary duty is to promote/protect autonomy -- must ∴ create morally valuable opportunities // autonomy = adequate range of valuable options // to be autonomous must also be independent
Harm principle rooted in idea that people make choices because of their agency → presumption of capacity
Harm principle isn't without some consideration of moral blameworthiness (ex/ in sentencing)
Murphy → legal moralism = use criminal law to limit behaviour that is not harmful // liberalism can't completely escape morality -- sentencing, MR // liberals rank liberties on scale of importance -- draws in human good/virtues

THE ROLE OF RIGHTS

Negative = free from some interference // **positive** = right to something // remedial = after breach of a primary one // conditional rights (vested or not) // property rights
Moral rights // political rights (medicare) // legal rights (enforced and recognized through CJS + remedy)
Sources? -- NL = proven beyond just a majority OR CL = customary (communities) OR utilitarians (agree with PL) -- if rights are inalienable would be difficult to do things
Who? -- legal systems create legal persons
Hohfeld → logical structure of rights -- can have any or all elements (full right = all 4)
- **Claim** = if B has a claim, C has a duty to B (can be to refrain from doing something)
- **Privilege** = if B has a privilege (or liberty), C has a no-claim and B has a no-duty (privilege ≠ right)
- **Power** = if B has a power, C has a liability (power to waive or alter right, others liable to the change)
- **Immunity** = if B has an immunity, C has a disability (immunity from others altering your status)
- Example - computer: claim against others using it; immunity against others altering your claim; power to waive, annul, or transfer your claim; privilege to use the computer
- **Privilege + claim = first order rights**
- **Power + immunity = second order (rights over first order rights)**

Interest/benefit theory → right means that one's interests are protected by the duty which is owed by another person (*Bentham, Austin, Raz*) // persons possess rights to enjoy or not suffer (states of affairs or things) // rights provide protection of important interests or well-being // can be negative as well as positive // may rank importance
Will/choice theory → essence of a right is to have choice/control over how one is treated - further right-holder's interests (*Hart, Sumner*) // rights are closely connected to agency, autonomy, rationality, dignity // person is a small-scale sovereign // unwaivable rights do not exist // rights do not depend on duties but can correspond to other concepts like permissions, powers and immunities (expands the scope of right) // can be negative and positive // if the force of the right is not necessarily exhausted by the existing set of duties, then when circumstances change, new duties may be created -- implications for which institution (legislature/judiciary) can or should make this change -- constitutional legal rights permit this kind of change
***Dworkin*'s rights as trumps** → law concerns itself with matters of balance, relevance, justification and weight // rights possess different weight // in law, some rights can be defeated by considerations concerning general interest // legal actors ascribe to rights reasons or justifications why they should have categorical priority over other considerations such as public good (so they should have heaviest weight, so heavy, they can trump other competing considerations) // rights should be able to outweigh competing considerations, especially if they are constitutional // if not, the corresponding justification for limiting or defeating the right should be strong // specificationism - right define by elaborate qualifications ∴ no conflicts
Functions of rights: *Dworkin* → limits to the burdens the many ask individuals to bear in order to reach valuable social goals // limits = rights and they override utilitarian justification // rights are individualistic trumps over social welfare **** *Raz* → rights protect individuals (agreed) // BUT rights merit protection because they serve the goals of liberal democracies // require protection in order to serve the common/general good
Role of rights in Canada → Legal system -- distributes a variety of rights - claims, privileges, immunities - in different ways (rules about who is free to act in what ways, who has authority to create rules, etc.)
Justifications → status-based (NL) -- features humans have that make respect for rights appropriate // instrumental -- rights = instruments for achieving an optimal distribution of interests // contractual -- rights define principles that would be chosen by properly situated and motivated agents agreeing to the basic terms of their relations
Critique → *Marx* -- false conception of human individual as unrelated to others (liberty reinforces selfishness, etc.)