**JURISPRUDENCE AND THE NATURE OF LAW** (Jurisprudence= study of law)

* **Marmour:** *General jurisprudence, as this philosophical inquiry about the nature of law is called, is meant to be universal. Assumes law possesses certain features, and it possesses them by the very nature/essence as law, whenever and wherever it is.*

**What’s the point of Jurisprudence?**

* **(1)** You get an understanding of juris – purely knowing it **(2)** Provides an intellectual framework for thinking about limits of law + authority. **(3)** Helps us know the boundaries, helps to clarify day-day questions of the law **(4)** Helps to identify assumptions that others are using – deconstruct an argument better **(5)** Courts pay attention to legal theory, can influence decisions **(6)**Analogy as a car and theory is how it works.
* **Marmour**: questions of legal validity and legal normativity (most legal debates tend to focus on these two questions): **(1)** what makes a norm valid? A law a law? **(2)** Where does normative force of the law come from? Why do we obey the law?
* 2 competing theories about the nature of law: legal positivism and natural law theory
* According to **Marmour**, positivists like **Austin** and **Hart** start with a basic thesis – the social thesis – and claim that laws are inherently social phenomena; more specifically, the law for a given society is just whatever has been enacted by the lawmaking agency of that society.Laws are social facts. **Marmour**: “The Social Thesis asserts that law is, profoundly, a social phenomenon, and that the conditions of legal validity consist of social – that is, non-normative – facts. Form of reduction: the legal domain is reducible to facts of a non-normative type, facts about peoples conduct, beliefs and attitudes.
* For natural lawyers, law must also conform to some notion of universal morality in order for it to be valid (denies Social Thesis). **Marmour**: NL deny this insight, insisting that a putative cannot become legally valid unless it passes a certain threshold of morality. Positive law must conform in its content to some basic precepts of NL, that is, universal morality, in order to become law in the first place. The moral concept of norms, and not just their social origins, also form part of the conditions of legal validity. Law cannot be separated from the question of that principle’s law/morality

**Framing Jurisprudence**

* **Gustov Radbruch** – legal positivist from Germany (*Five Minutes of Legal Philosophy*), repudiates position on legal positivism; left you defenseless vs Nazis:

**(1)** Positive Law (a law is a law) “leaves the people defenseless” **(2)** ‘law for the benefit of the people’ transformed Rechstaat to outlaw state **(3)** Law is THE WILL TO JUSTICE. Only. Jurists should deny ‘legal character’ to unjust laws **(4)** Virtues of Law: public benefit + legal certainty + justice. Extreme violation of any of these denies legal character of a ‘law’ **(5)** Principles of natural law/ law of reason trump positive law.

* Good starting point, drove 20th century jurisprudence, we are heirs of 20th century jurisprudence
* **Radbruch** attributed German subservience to Nazi law to LP (Law is law). Raises the second question over which LP and NL differ (what is the source of law’s normativity?) NL answer: the obligation to obey the law is moral obligation (since principles are laws only if they are moral). LP answers: the obligation to obey the law is something other than moral obligation. **Radbruch’s** point might be put as follows: answering the question in this way leaves room for someone to say that she has a reason (or an obligation, or a duty) to obey a law, even if that law is morally awful.
* **Hart** defends LP against this criticism. On an accurate understanding of LP, law is law, even if it is morally terrible, and it’s being morally terrible does not undermine its status as law. But this does not mean that one is obligated to obey it, no matter what. In other words, legal obligation is always prima facie and never absolute. A principle can count as a valid law, and yet be morally horrible; and if it’s morally horrible, then one has no obligation, moral or non-moral, to obey it.
* Regarding Positivism; **Hart** on **Radbruch** – Emotional appeal, not intellectual argument. Extraordinary naiveté in linking Nazi evils to notion ‘law is law’, didn’t properly understand liberalism

**Overview of approaches**

* **Lon Fuller** “*The Case of the Speluncean Explorers*” (Based on *Regina vs Dudley & Stephens* 1884 ship sank, ate one of the survivors)
* Case to illustrate a number of different theories about the nature of law and legal reasoning. The various opinions are written by fictional judges who represent different theories; shows how different theories about the nature of law and the role of the judiciary might lead to different conclusions even when faced with same facts.
* Chief Justice Truepenny – affirms convictions but recommends clemency; statute is unambiguous and must be applied by judiciary notwithstanding personal views (positive law, blackletter approach)
* J. Foster – sets aside convictions; Defendants were in a “statue of nature” so Newgarth’s normal laws did not apply to them; the laws of nature would allow them to agree to sacrifice one’s life to save the other four (Natural Law)
* J. Tatting – withdraws from case and makes no decision; indeterminacy of rules
* J. Keen – affirms convictions; law is not the same as morality. Enforce faithfully the written code (textual literalism; positivist)
* J. Handy – sets aside convictions; public opinion instrumental, approach in law, do what is right (radical legal realism/instrumentalism)

**NATURAL LAW** ( **St. Augustine**: lex iniusta non est lex – unjust law is not a law)

* Normative =ideal standard or model, describes what ought to be done, how it ought to be according to a value position.
* Idea of NL has changed over time but there is a common threat of principles:
* Essence of NL lies in the assertion that there are objective moral principles that depend on the nature of universe which are discovered by reason.
* These principles constitute the natural law. NL is based on the idea that there should be a connection between the rules that govern human behavior (such as laws) and certain truths about human nature
* HIGHER LAW that exists independently of positive law (law made by societies/human law
* Key Features: (**1)** NL is unchanging over time, no different in other societies (**2)** Every person has access to standards of higher law by use of reason. **(3)** Only just laws deserve to be called laws.
* Asks 3 questions: **(1**) What is the content of the Higher law **(2)** How can we know what the content of higher law is? **(3)** What should individuals do when a conflict with NL and positive law?
* Key Criticisms of NL: **(1)** NL Derives an ought from an is – NL starts with a description of the natural word (the “is”) and uses them as the basis for making statements about how the world should be (the ‘ought’)
* NL Response to this**: (1)** If it is natural for humans to act in a certain way by observing, then they ought to act morally in this way.  **(2)** Can see relationship between facts and norms better if we think humans have a natural function/ proper function that can be discovered by application of reason or thought. **(3)** The goods recognized by NL are self-evident (no need to prove killing is bad)

**Major Approaches to Natural Law**

* **(1) H.L.A. Hart, Minimum Content of Natural Law** (neat tidy package. **Hart** maintains as a legal positivist that if this is natural law; ok)
* Objective: survival of people and of possibility of association with one another and society. Why? Not only do almost all men wish to continue living, but the very structures of our thought and language embody this desire and while specifically discussing law, we are discussing how best to govern the conduct of people who are living together, and to achieve that, they must be living in the first place.
* Thus, given that survival is an undisputed end, law must contain certain content to make sure that end is realized.
* Can be defined by: **(1)** Given that law is a mechanism for regulating the behavior of individuals in a social association, it must have certain basic minimal content in order that the association be viable **(2)** In turn, for the association to be viable, the survival and continued existence of at least some of its members must be ensured **(3)** The content which ensures such survival is called the minimum content of NL
* Content of such law is based on certain facts grounded in human nature and the state of human existence. **Hart** lists five such fasts:
  + Human vulnerability, which entails a restriction on the free use of violence;
  + Approximate equality, which restricts the use of aggression;
  + Limited altruism, which requires systems of mutual forbearance;
  + Limited resources, which require some system of property;
  + Limited understanding and strength of will, requires some form of sanctions
* This strongly resembles **Fuller**’s idea of a “morality of duty” and the “eight desiderata” of law that make a legal system possible
* **(2) Lon Fuller – The Morality of Law – 8 ways to make law fail**
* Objective: to create a legal system (no more) **Fuller** attempts to identify what he calls the internal morality of a system of legal rules. This morality is constituted by universal procedural norms
* Unlike **Hart**, **Fuller** does not treat this as trivial – he believes a larger structure of ‘natural law’ flows logically from these procedural starting points.
* **Fuller**’s modern approach to NL is procedural, in that it addresses the procedures embodied in a legal system. **Fuller** proposes that a system of positive law must pass a moral test if it is to be a system of law in the fullest sense, i.e. if it is to be genuine law.
* Myth of King Rex – tries to identify the internal morality of a system of legal rules. This morality is constituted by universal procedural norms.
* Rex’s mistakes - Fuller’s Principles of Legality
  + **(1)** He did not set forth a system of rules at all, but simply made ad hoc decisions on a case by case basis. (ad hoc (Lat. “for this”): for a specific occasion or case, without regard for more general applications. PoL - “laws should be general,” i.e. such as to apply to many individual cases; cases cannot be decided ad hoc, one by one.
  + **(2)** He came up with a system of rules, but he didn’t make them public. PoL - “they should be promulgated, that citizens might know the standards to which they are being held”
  + **(3)** He would make some actions illegal after the fact: actions that were legal when they were performed later became illegal and the people who performed them earlier were punished. PoL - There should be no “retroactive rule-making and application,” or at least as little as possible
  + **(4)** The laws were incomprehensible, so that no one could understand them. PoL - “law should be understandable”
  + **(5)** The laws contradicted themselves, so that it was impossible for anyone to obey all of them. PoL - “they should not be contradictory”
  + **(6)** He enacted laws that were impossible to follow e.g., laws making illegal to sneeze and to fall down, and that demanded that subjects respond to a summons from the king within ten seconds. PoL - “they should remain relatively constant through time”
  + **(7)** He changed laws so rapidly that it was impossible for people to adjust their behavior to them. PoL - “they should remain relatively constant through time”
  + **(8)** The laws were not administered in a way consistent with the way they were announced. E.g., the declared punishments for certain crimes were different than those actually given out. PoL - “there should be a congruence between the laws as announced and their actual administration”
* Objections to **Fuller**: (1) It is possible for a regime to meet all eight of Fuller’s legal requirements, yet still be wicked, by meticulously following a system of laws the contents of which are morally terrible. Ie. A system of law in which slavery and torturing is legal could still follow the eight principles – Fuller retorts by saying that his view it that the procedures embodied in a legal system are morally important and determine whether a set of rules really count as a legal system. Abiding by the 8 principles is a necessary condition of a system’s morality, but it is not a sufficient condition. (2) Fuller’s principles of legality are not really moral considerations. A positivist could agree but maintain that these principles are not moral principles and thus do not count as a moral standard, thus no moral-legal connection. Fuller retorts that there is a moral aspect to this, not merely procedural.

**(3) Classical/Standard Natural Law**

* Version of natural law before **Finnis**. Powerfully influenced by Church tradition.
* Objective: universality. Related to God although it does have that stream of reason independent of faith. The purpose of the law is to aid all of us in becoming that idealized human being who we are supposed to come in the course of our human lives. According to **Radbruch**, this notion of NL is dead.
* 2000-2400 year old tradition
* Strong Christian/Roman Catholic resonances in Western Europe and its colonies
* Founded on Requirements of Reason (or God) (or latter discovered by former)
* 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

**(4)Finnis’ Secular Iteration of Natural Law**

* **Finnis** does not include god in his natural law argument. Rooted on the idea of self-evident goods and practical reasonableness.
* Central to **Finnis**’ version of NL is the idea that we cannot begin to answer the “what is law” question until we have a clear idea of the purpose of law. According to **Finnis** “the rationale of NL theory is to establish what is really good for human persons”
* If you take these fundamental aspects of human flourishing and combine it with practical reasonableness, you will be led to conclusions that are true. He makes religion important but offers a non-religion rationale. How can he be making religion central to his argument but then also makes it secular? He says religion is all those beliefs that can be called matters of ultimate concern. Questions about the point of human existence. For **Finnis** it is important to speculate as to the purpose of Human religion. Then he identifies the aspects of practical reasonableness that allow you to take things and reason from them concrete conclusions.
* **Marmour**: **Finnis** views NL (in its Thomist version) not as a constraint on the legal validity of positive laws, but mainly as an elucidation of an ideal of law in its fullest, sense, concentrating on the ways in which law necessarily promotes common good.
* Different approach to ought/is problem. Says NL is not derived from anything. It is self-evident and understood by everyone.
* Can’t answer what is law until we know the purpose of law. Asks what is good for humans? A worthwhile and valuable life?
* 7 basic goods essential to pursuit a meaningful life: **(1)** Life. **(2)** Knowledge. **(3)** Play. **(4)** Aesthetic experience **(5)** Sociability **(6)** Practical reasonableness. **(7)** Religion.
* These are Intrinsic and Universal. Apply to all people.
* 9 Characteristics of the Practically Reasonable Person(i.e. whose views count?) **(1)** Must have a rational plan of life (don’t live in the moment with no concern for future) **(2)** No arbitrary preferences amongst values **(3)** No arbitrary preferences amongst persons **(4)** Detachment **(5)** Commitments not to be abandoned lightly **(6)** Efficiency within reason **(7)** Respect for all the above **(8)** “…favoring and fostering the common good of one’s communities **(9)** Following one’s conscience
* “Reason” is understood in a broad sense to include the light of experience
* NEVER act directly against a basic value – they are incommensurable.
* Sexuality – only expressed in intercourse b/w wife/husband not using contraception.
* “The attempt to express affection by orgasmic non-marital sex is an illusion”.
* Abortion, suicide, assisted suicide are never acceptable.
* Critiques of **Finnis**:
  + Illusory character of rational life plan; illusory given life’s contingencies, illusory to lessor degree for those with comfortable material circumstances
  + Seemingly arbitrary declarations of preferences; **Finnis** illustrates this with seemingly arbitrary declarations of preferences, institutional danger of top-down declarations about what people should prefer, **Finnis** fails to explain a strategy for inclusive consideration or preferences and values; no strategy for developing inclusive discussions within widely drawn ‘dialogical communities’
  + Limited dialogical community; failure to deal with value divergence/ dissensus
  + ‘detachment’ = ‘imagined people’, false objectivity
  + Nutso concrete conclusions: Never act contrary to basic value (kill mayor, save 5,000), Limited utility of ‘rules’ to decision-making (eg. People not used as means), Sex stuff – people suffer illusions about the quality of their sexual experience, Abortion/ assisted suicide stuff, Privileging abstract categorical statements over experience/ context

**LEGAL POSITIVISM**

* LP: the thesis that the existence and content of law depends on social facts and not on its merits (**Leslie Green**). Involves the separation of law and morals, not concerned with the question of whether there is a higher basis for law. Does not mean, however, that morals become completely irrelevant. According to positivism, you can believe in absolute morality and still accept that moral law is law. A positivist accepts the connections between law and morality, but rejects any dependence between the two.
* Law depends on the social standards that its officials recognize as authoritative -legislation, judicial decisions, social customs
* **Green** – a fundamental claim of LP is the assertion that whether a law or a legal system is good or not does not determine whether that law or legal system exists.
* **Hart** identified five principal views associated with legal positivism: **(1)** That laws are the commands of human beings; **(2)** That there is no necessary connection between laws and morals; **(3)** That the analysis of legal concepts is (i) worth pursuing, and (ii) distinct from (although not hostile to) sociological and historical enquires and critical evaluation; **(4)** That a legal system is a “closed logical system” in which correct decisions may be deduced from predetermined legal rules by logical means alone; **(5)** That moral judgments cannot be established, as statements of fact can, by rational argument, evidence or proof (known as “non-cognitivism in ethics”)
* An inclusive positivist takes morality a step further by weaving it into posited law, such as constitutions. For instance, our Constitution authorizes for breach of Charter rights “such remedy as the court considers appropriate and just in the circumstances”. In determining which remedies might be legally valid, judges are expressly told to take morality into account.
* To an ‘exclusive positivist’, the most common view, law is simply a matter of what has been ordered or decided. It suggests that law is largely a social construction. Unlike the American realists, positivists believe that in many instances the law provides reasonably determinate guidance to its subjects and judges. The fact that a law might be unjust, unwise, or immoral is never sufficient reason for doubting its legality. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. In other words, the laws that are in force in that system depends on what social standards its officials recognize as authoritative.
* Sovereign - is a determinate person or group who have supreme and absolute power – obeyed by others and do not obey anyone else.
* Both **Bentham** and **Austin** – societies laws are a subset of the sovereigns commands
* Both proponents of utilitarianism (theory in normative ethics holding that the moral action is the one that maximizes utility. Utility is defined in various ways, including as pleasure, economic well-being and the lack of suffering)
* **Bentham** explicitly rejects NL and natural rights. He states that natural rights are “simple nonsense”. His rejection was based on the fact that it was increasingly difficult to identify such rights. He goes further in stating that a belief in natural law and natural rights is actually dangers. It can lead to civil disobedience (the anarchist; ‘law and its authority may be dissolved in man’s conceptions of what law ought to be…’ “Hart”), a failure to obey the law, and even revolution. (the reactionary)
* Political Rights: Only the laws and rights established by government (which he called ‘political rights’) have any determinate and intelligible meaning. To Bentham, law is an assemblage of signs, “declatory of volition, conceived or adopted by the sovereign, concerning conduct to be observed by persons subject to his power”.
* **John Austin** was influenced by **Bentham**, agreed that laws are commands issued by the “uncommanded commander” (the sovereign). The commands given by the sovereign are enforced by sanctions or threat of force and are obeyed by the majority. As a consequence, anything that is not a command is not law. To both of them, law is a phenomenon of large societies with a sovereign. Austin, though, places more emphasis on commands. Only general commands count as law, and only commands emanating from the sovereign are positive laws.
* **Austin** differed slightly from **Hart**, however, in that he was a proponent of the Divine Law being a source of law. He argued that no human law which conflicts with Divine Law is obligatory or binding or is a law. Believed in separating what he called ‘true morality’ (laws coming from God) with ‘positive morality’, by using utility as the index. The best indicator of God’s morality is its utility. Ex, if something is good then it is probably a moral thing. Can have an absolute distinction of law and morality.
* **Austin** defined law in a purely descriptive way. His particular descriptive definition has become known as his Command Theory of Law: law is a series of commands issued by a sovereign and backed by sanctions.
* Criticisms of Austin: **HLA Hart** reacts to **Austin’s** approach. The problems were **(1)** it is hard to identify a sovereign. There might not be a modern body, or figure, to which is habitually obeyed but dos not habitually obey anyone else (separation of powers, checks and balances). This assumption is difficult to reconcile with the reality and complexity of modern legal systems, which are not necessarily characterized by vertical relationships of legal authority. He also struggled with the definition of ‘sovereign’ itself **(2)** the concept of a sovereign creates a problem when it comes to thinking about the continuity of law. What happens when one sovereign dies and another takes over? The new sovereign has no history of being habitually obeyed, so how does the habit emerge? **(3)** There is much about modern law that cannot be explained by the idea that law is the command of a sovereign backed by threats. Many rules are not prohibitions, but are empowering in nature (for instance, contract law). There are also many laws of horizontal nature, such as customary and public international law. He doesn’t like the idea that law has no higher claim of authority and is only identified with compulsion.
* **Hart** also finds fault with **Austin’s** view that legal obligation is essentially coercive. According to **Hart**, there is no difference between the Austinian sovereign who governs by coercing behavior and the gunman who orders someone to hand over her money. In both cases, the subject can plausibly be characterized as being “obliged” to comply with the commands, but not as being “duty’ bound” or “obligated” to do so. “Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion”
* For **Hart**, the authority of law is social. The ultimate criterion of validity in a legal system is neither a legal norm nor a presupposed norm, but a social rule that exists only because it is actually practiced.
* Primary and Secondary Rules: **Hart** rejects the idea that every legal system has to be backed by a sovereign, and instead argued that it was better to think of laws as divided into two basic groups: primary and secondary rules.
* Primary rules are the rules that we would most commonly recognized as substantive law (wear your seatbelt, promissory estoppel etc.). They regulate behavior.
* Secondary rules are rules which, according to **Hart**, “specify the ways in which the primary rules can be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined”. These include rules of adjudication (i.e. rules in court) and change (how leg. Is enacted and amended).
* Rule of Recognition: Another secondary rule is the rule of recognition. The rule of recognition is the set of criteria that officials use to determine which rules are – and which rules are not –part of the legal system. An example would be a written constitution, which sets out overarching principles for the system. Because the rule of recognition involves conventional criteria, agreed upon by officials, to determine whether rules are legal or not, it expresses a basic tenet of legal positivism. We are able to identify laws without having to consider their content or moral standing.
  + Problems with rule: There are a number of problems with this rule. It can be seen as a circular argument (i.e. the officials recognize the rule of recognition which recognizes them as officials). There is a question of whether it is best understood as a duty-imposing or a power conferring rule. It is also unsure whether there can be more than one rule of recognition within a given legal system.
* Rules vs Habits: **Hart’s** approach in *The Concept of Law* focuses on the particular characteristics of rules. He is concerned with the difference between rules and habits. For **Hart**, the difference lies not in the behavior that results from following a rule of a habit, but rather the attitude of the individual. With rules, there is a normative content and a justification behind enforcing action or non-action. On the other hand, habits are only a description of behaviour (i.e. I go to the movies).
* Obligation vs obliged: He also differentiated feeling obliged to do something and having an obligation. Feeling obliged is when we act in a particular way because there are consequences if we don’t. As soon as those consequences are removed, then there is no reason to act. An obligation, however, is acting in a particular way because we feel we ought to do so, as we do with validly constituted law.
* The distinction between primary and secondary rules helps **Hart** avoid a problem faced by **Austin’s** view. If **Austin** were correct, then the sovereign would be completely above the law. But on **Hart’s** legal positivism, there need be no sovereign who is the source of law and therefore must stand outside the law. Whether a given principle counts as a primary rule does not depend on the say-so of any sovereign; rather, it depends on whether it meets the criteria set forth in the rules of recognition
* Hart is not completely rejecting natural law. He endorses the ‘minimum’ content of it.

**Fuller Criticism**

* On **Fuller’s** view, no system of rules that fails minimally to satisfy the principles of legality can achieve law’s essential purpose of achieving social order through the use of rules that guide behavior. These internal principles constitute a morality, according to **Fuller**, because law necessarily has positive moral value in two respects: **(1)** law conduces to a state of social order and **(2)** does so by respecting human autonomy because rules guide behavior. Since no system of rules can achieve these morally valuable objectives without minimally complying with the principles of legality, it follows, on **Fuller’s** view, that they constitute a morality. Since these moral principles are built into the existence conditions of law, they are internal and hence represent a conceptual connection between law and morality that is inconsistent with the seperability thesis.
* **Hart** feels that **Fuller** confuses the notions of morality and efficacy

**LEGAL REASONING AND THEORIES OF ADJUDICATION**

* LR differs from sort of reasoning employed by individuals. It revolves largely around precedent. Precedent is the decision by the courts that has special significance, b/c relays both practical and theoretical authority over law. The commitment to precedents having practical authority is a key feature of the CL and provides basis for stare decisis – rule that courts must follow an earlier decision, even if judges believe case was wrongly decided. Without it no consistency in the law.
* How do we determine what a precedent is authority for? When should a court be willing to overrule its own decisions? Three ways to understand precedent **(1)** Precedents as laying down rules (precedents operate by laying down rules which later courts are bound to, can only distinguish on a difference of fact- cannot overrule) most accepted view. Central to its operation is the distinction between the ratio decidendi (the holding or ruling) and obiter dicta (other statements and views expressed in the judgment which are not binding on later courts). **(2)** Precedents as the application of underlying principles – binding force of precedents comes from the fact that they represent the justification for the earlier decision. Also explains why courts go into detail with reasons, and don’t lay down a precise formulation of the rule. **(3)** As a decision on balance of reasons – when we see a case being decided on the balance of reasons, its role as precedent is to require future courts to treat it as correctly decided. If a case is correctly decided, then future courts should balance reasons in a similar way when dealing with similar facts
* Why we justify the practice of Precedent: 1) Consistency: the idea that two cases which are the same (in relevant aspects) should be treated the same way. Concerns of consistency provide some justification for treating earlier decisions as sources of law, rather than approaching each question anew when it arises again. Doesn’t mean that mistakes should be repeated. 2) Expectations: give a sense of reliability and comfort. This could be a good reason for a court to follow a mistaken decision. Whether a past decision creates legitimate expectations, therefore, depends upon their being good independent reasons to follow on, or where there is a practice in doing so. Courts may say that merits are to decide the case. 3) Replicability: it may make institutional decisions replicable. Similar to expectations, where decisions are more predictable than they would be if they were conducted *de novo*. 3) Law making: a final justification for the doctrine of precedent is that it is desirable to give the courts power to make law. It is valuable for the courts to have the power to improve and supplement the law. While this also means that the court might overrule previous decisions, it provides scope for incorrect decisions to be reversed.
* Analogy: Analogies differ from precedents in that they do not bind. They are considered along with other reasons in order to reach a result. Can have strong or weak analogies. We use analogies because we are referring to underlying principles that were the basis of some previous decision, and we are in effect referring the same or similar reasons that were the basis of some previous decision. The main reason is they also encourage replicability and certainty.
* Role of Interpretation: in LR interpretation is unavoidable because of linguistic indeterminacy. Law relies heavily on language, and the semantics of words, and needs interpretation. Interpretation is by nature a divisive and contested process. **Dickson** argues that establishing a logically consistent means of interpretation leads to consistency and coherence with legal decisions as well. Coherence has been argued to be a necessary condition for a legal decision to be justified or binding.
* Lord Gardiner Practice Statement 1966 3 AII ER 77 - Statement made in the HL on behalf of himself and the Lords Appeal in ordinary, that they would depart from precedent in the Lords in order to achieve justice.
* **Sir John Salmond**: “A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the RD. The concrete decision is binding between the parties to it, but it is the abstract RD which alone has the force of law as regards the world at large.
* **John Chipman Gray**: It must be observed that at the CL not every opinion expressed by a judge forms a judicial precedent. In order that an opinion may have the weight of a precedent, two things must concur: it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be obiter
* **Arthur L Goodhart**- seeks to help us understand how to tell RD from obiter dictum.
* Problems with precedent: **(1)** ratio' is often very bad reason (eg common employment rule) but it is still law **(2)** A case can be a precedent even if: there is no rule of law set out in the opinion, multiple opinions of appellate courts with various rules set out, a rule is stated too widely or narrowly, a court gives judgment without writing an opinion, the judgment consists only of statement of facts and a stated outcome, its statement of principle is inaccurate or too wide (eg wrongful act, death, manslaughter) (eg. Riggs v Palmer) or too narrow (Barwick v English Joint Stock Bank - wrong for the masters benefit)
* Add all this up and what happened to the doctrine of precedent. Well established rules are overruled 50 years later. What happened to all those good benefits that the HL was talking about? If the binding principle is found neither in reason nor in the proposition of law set forth, where do we go?
* **Herman Oliphant** - American legal realist answer to these problems **-** First we should ignore the opinion, and instead look at the facts, look at the judgment resulting.Should also discern the driving principle from this objective evidence
* Critique of **Oliphant’s** answer: **(1)** Approaches nihilism; values gone; it is all sociological **(2)** What do judges think they are doing then with all those written opinions? **(3)** Naiveté: treats facts as pre-given, not constructed (by the judge)
* Resolution:
  + Ratio decidendi = material facts as seen by the judge + conclusion based on them
  + All based on facts: “it’s by his choice of material facts that the judge creates law”
  + There is the aspect of adversarial presentation to find the facts (no civil law-type factual investigator)
* **Goodhart** - Throws a hand grenade into theory of precedent. Demolishes the comfortable understandings that people before would have. Has two principle claims: **(1)** ‘true facts’ are irrelevant and legally misleading – only the judge’s findings of material facts count in discerning the principle of a judgment. He claims that the American practice of making whole records available is a dangerous practice because it encourages a practice which is inconvenient in operation and disastrous in theory. **(2)** Judges often don’t tell you what they considered the material facts to be, leaving it to future generations to determine whether or not these facts constitute part of RD.
* There is a moral hazard in **Goodhart’s** Formulation - sneaky judges avoiding precedent years later by declaring that an additional fact was material all along. Or scandalous judges making up facts in order to expand their authority. **Goodhart** recognizes this and says just to not assume the worst. Our 'theory' is that judges do not make mistakes of fact or law. Shouldn’t assume courts are arbitrary
* Guidelines for determining material and immaterial facts:
  + Presumed immaterial: facts relating to person, time, place, kind, amount
  + Immaterial: facts the court explicitly says are immaterial, and Facts impliedly treated as immaterial (Rylands and Fletcher ignoring liability of contractor)
  + Material: **(1)** An unspoken material fact may be identified by judges in subsequent cases **(2)** Facts specifically stated to be material **(3)** Presumption against wide principles of the law: THUS - all facts set forth in opinion are presumptively material **(4)** Common denominator between multiple opinions
* **Julius Stone** – central concern: “what magic lies at the heart of the system of stare decisis can transform a symbol of immobility into a vehicle of change?”
* Invokes the rule of law by saying that it is the right of citizens to be governed by law, not by persons. This right rests on the stability of the legal system and in common law systems in the principle of stare decisis.
* “If we could wholly accept idea that present and future decisions are determinable and determined on the basis of stare decisis then indeed we would have finally attained the dream of being under a government of laws and not of persons.”
* Separates descriptive ratio decidendi from prescriptive (binding) ratio decidendi
  + Descriptive: describes process of reasoning by which a decision was reached. It is a sociological, historical, or psychological explanation of the court’s reasoning and conclusions. Looks to whether the decision was true or untrue as a matter of fact.
  + Prescriptive (binding): Identifies and delimits the reasoning which a later court is bound to follow. It is a normative judgment requiring us to accept a particular ratio as necessarily drawn from a previous case and binding
* **Goodhart** splits these through the mechanism of material facts
* **Stone** critiques **Goodhart** by using facts from *Donaghue v Stevenson*
  + There is the profound problem of what level of generality a material fact is to be taken at. Courts can never be fully explicit on this matter. Each “material fact” of a case would have to be recognized as capable of statement in an often numerous range of more or less generalized versions – the range of the ratio varying with each version. A court would never be able to decide on a single ratio from an earlier case, and they would only become apparent in subsequent decisions.
  + Poor description of how case law works, his methods provide no single ratio decidendi, he is forced to admit that competing rationes lurk within a single decision, If, as **Goodhart** admits, ratios become apparent only in subsequent decisions: his single ratio thesis dies; this a fatal difficulty, not an incidental one.
* Is **Stone** a legal nihilist? No. He covers his bases by saying that the ‘legislative’ choice of judges is less than that of legislatures. Change can arise as social, economic and technological change wash over the law and the law responds, so that ‘no generation looks out on the world quite from the same vantage point as its predecessor’. Judges have the constant duty of choice and use the power of analogy to keep consistency.
* How can the CL provide stability and also change? Judicial choice. These choices arise from the nature of terms used in substantive rules, or from the interrelations of rules.
* They also arise from competing methods of seeking the “ratio decidendi of a case”. Additional choices arise when there are competing ratio from a single case, and the material fact method can be used to interpret such a decision.

**FEMINIST LEGAL STUDIES**

* Despite the formal equality the law theoretically prescribes, there are differences. Men can’t get pregnant. Gender diff such as height, weight, strength, and life expectancy. Also the undeniable historical/cultural backgrounds of women in caregiving roles, and earning disparity.
* Primary Goal: The primary goal of is legal feminism (LF) is to advance freedom and equality for women before the law (core commitment).
* Feminist philosophy of law identifies the pervasive influence of patriarchy on legal structures, demonstrates its effects on the material condition of women and girls, and develops reforms to correct gender injustice, exploitation or restriction.
* Other issues that most FLS aim to address: **(1)** how law legitimates and exacerbates oppression of women, **(2)** the ways in which patriarchy influences the law and legal institutions, and how equality is to be understood against this background of male authority, **(3)** The belief that women are somehow different from men in terms of their capacity for the abstract and impartial reasoning that law traditionally demands
* Patriarchy: When used in FLS, it means a social order characterized by male domination. A large majority of CL and legal theories were developed by men. Considering that law promotes order by reinforcing adherence to predominant norms on a universal scale, the implications of that fact are enormous.
* Basic tenet of patriarchy in this realm: everyone in leadership role is always male, or that at least functionality and social ideals of everything we do are driven by males.
* In practice, several legal standards that embed patriarchy. Open standards, such as ‘reasonableness’ in criminal, tort, and contract law might have male ideals in the background. Another example is “best interests of the child”, which ping pongs back and forth. Ex: is paid pregnancy leave a 'special benefit' outside of bounds of formal equality? It is only termed ‘special benefit’ because male norms are unnoticed. It does not, however, lead to conclusion that every male enjoys a patriarchal privilege.
* Binary thought: People like thinking in binaries (easier to classify things). Society has done this with women. Our thoughts are divided into categories based on what we think men/women are. Men: rational, aggressive, competitive, political, dominating, leaders. Women: emotional, passive, nurturing, domestic, subordinate, followers.
* **Thomas Paine**, 1791 wrote *Rights of Man*. Radical political thought. After the revolution the French had a discussion about education, and thought that educating women would be helpful. **Mary Wollstonecraft** also wrote *A Vindication of the Rights of Women* (1792) argues that women are not naturally inferior to men, but appear to be only because they lack education.
* 1st Wave of LF in Canadian history; *Persons* case. A group of maternal feminists took on the BNA Act, 1867. They assumed that the role for women was to be maternal, but they wished to strongly protect this role. It had been understood that persons of an age and status could be involved in government, and this group of women challenged whether "persons" meant men or women. The women won. First wave was focused on political inclusion, getting the vote, independent property rights.
* 2nd Wave: 1960s to the 1980s. Issues around women in professions. Women could be lawyers but there were almost none. It was based around reproduction because someone thought reproduction mattered to women. They were concerned about violence and rape, the intimate and private places where things happen. It is said to have started in the USA (but England and France also did it). The biggest influence was the destruction of the apartheid in the USA. The legislation that had enforced the apartheid and this was removed. It was also a sexual revolution with the birth control pill, and gave women more power. It was also a period of great prosperity and peace, which brought along an explosion in post-secondary education.
* Equal Rights Amendment was introduced in 1923, and passed by congress in 1972. It failed ratification by States in 1979. Amendment included clause that claimed "equality of rights under the law shall not be denied or abridged by the US or by any State on account of sex. The notion that women and men should have equal rights is essential to democracy. In Canada, adopted in form of the Charter. S. 15: "Every individual is equal before and under the law without discrimination based on sex"
* ERA objections: Said that ERA means abortion funding, means homosexual privileges. It means that women could be recruited into military service. People didn't want their daughters to be drafted. It also means that mothers wouldn't get alimony or child support, and that women may not be protected as well as they were in 1978 from sexual assault. Some women didn't want to give men custody on divorce. People also thought that men and women's washrooms would have to become one. Many of these messages were brought forward by **Phyllis Schlafly**, who swayed many states into avoiding ratification. It is also argued that Liberal Fem is insufficiently liberal. Measures recommended by Liberal fem – such as quotas for women in elected bodies and bans on violent porn are at odds with liberal commitment to personal autonomy.
* Critical of Rule of Law: Legal equality and LF posits the idea that in court you should be treated as a woman the same way that anyone else would be. It is associated with the idea that the RoL is an unqualified human good. Feminists take a critical view of the RoL; If we do the same thing today as in the past, it’s entrenching patriarchal practices we had before. We are shielding systemic bias. Any device that perpetuates that is open to criticism. Conceptualizing RoL in terms of coherence and consistency tends to reinforce and legitimate the status quo and existing power relationships

**Public/Private Divide** – pervasive theme in feminist works

* **Trudeau**, 1967 – “There’s no place for the state in the bedrooms of the nation”
* Speaking to defense of a private realm (your neighbors should have no business)
* LF find it hard sorting out a single/coherent position on pub/private distinction
* Valuing the private led to a sexual revelation. There was decriminalization of many previously criminal consensual sexual experiences. Intimate relationships across race lines or in same sex relationship. Decriminalization of fornication in some USA states (when not married). What do you do about prostitution? What is the right thing to do to protect the women who are prostitutes? Also includes freedom of conscience/freedom of religion.
* On the other hand: shield for domestic violence, lack of value for women’s work in the home, lack of recognition of women’s contributions to family businesses, some feminists view prostitution as never fully voluntary, religious practices can embed unacceptable discrimination against women, racial minorities, etc.
* Liberal feminists wish to preserve a private realm where individual choice governs. Radical feminists point out that the idea of free choice is itself a questionable one. Patriarchy pervades everything, and law shouldn’t shield that.
* Traditional Marriage and Feminism – Liberal Feminists; assuming decisions are not coerced, fine for woman to opt for: traditional marriage including economic dependence, choice about how many children, lives in uncompensated domestic labour, prostitution (controversial). Other feminists view this as manifestation of false consciousness. Even apparently free choices are exercised against a backdrop of: economic inequality and patriarchal dominance. Economic dependence and norms of dominance call into question possibility of generally free choice.
* Reaction to suggestion of false consciousness in relation to marriage – “What I am defending is the real rights of women. A woman should have the right to be in the home as a wife and mother” – **Phyllis Schiafly**
* Liberal feminists: Equality of treatment for both men and women. Both are autonomous and should have the same rights and freedoms. They argue that men are viewed as individuals but women are viewed as part of a group. They wish to preserve a private realm where individual choice governs, and seek formal equality.
* Critique of LF: **(1)** Shouldn’t use an inherently male system to start analysis and base equality **(2)** System speaks more to men since women equality are trying to match it **(3)** It will only benefit women who can conform to that male standard **(4)** Objectives (quotas for w in elected bodies) are at odds with liberal commitment to personal autonomy **(5)** Might undermine existing social and cultural institutions **(6)** RF: they do not pay enough attention to underlying causes of the oppression for women
* Radical feminists: Belief that the existing cultural, social, economic differences of men and women are the result of male domination. The idea of free choice is itself a questionable one, because choices are not exercised in a vacuum called freedom, they are exercised in a realm that is socially constructed. Cannot trust this state. It binds society to the structural inequalities that are at the heart of the entire legal system.
* RF argue that Liberal feminism ignores the reality (and pervasiveness) of male power and domination, and perpetuates the belief that liberal values are somehow neutral.
* Pornography Example: LF would argue that pornography must be understood with liberal values like freedom of expression and personal autonomy. RF would argue that porn must be understood in its broader context. It dehumanizes women and sets a standard for the mistreatment of women (leads to violence and rape).
* **Nicola Lacey** argued that feminist Legal theory does not generally operate as an encompassing legal theory. She critiques seven, somewhat interconnected areas of traditional jurisprudence **(1)** The neutral framework of legal reasoning (masculine adoptive rights is used vs. women care perspective) Looked at **Carol Gilligan**, who assessed moral reasoning by males and females. She would never say men think one way and women think another, but found that there was general alignment of moral reasoning with gender. Men are more R xF = D. Women take a holistic approach that is contextual, what is going on now and what are the circumstances. **(2)** Law’s autonomy and discreteness “Feminist theory seeks to reveal the ways in which law reflects, reproduces, expresses, constructs and reinforces power relations along sexually patterned lines: in doing so, it questions law's claims to autonomy and represents it as a practice which is continuous with deeper social, political and economic forces which constantly seep through its supposed boundaries” **(3)** Law’s neutrality and “objectivity” (objectivity is actually male POV, i.e. ‘reasonable person’’) **(4)** Law’s centrality (how law ought to be used as a tool for feminist action – strategic attempts might just reconfirm law’s power) **(5)** Law as a system of enacted norms or rules **(6)** Law’s unity and coherence **(7)** Law’s rationality (law not grounded in reason – values and techniques not acknowledged on the surface are in fact crucial to the way in which cases are decided. **Carol Smart** focused on family, and hence, public-private divide+ wider controlling fields than just the courts and their law. Says that the legal form of family does harm to the family. Follows Foucault in identifying law in relation to non-law

**Are we all better now? Legal Feminism 50 years on**

* Formal law revised significantly. huge gains for some women in public sphere (paid employment, leadership roles, politics)
* Continuing challenges: enforcement failure (engrained patriarchial assumptions of cops, judges, officials), persistent economic inequality compromises substantive equality for women, glass ceilings; feminization of poverty, workplace practices (private sphere) that take no account of women/childcare etc.

**LAW AND MORALITY**

* Law’s limits on harm: Harm could be self-harm, or physical, economic, or just offensive. Law is not the only institution that prevents harm. Churches, schools, clubs, usually promote the prevention of harm to some degree. Just because the law does not enforce a moral standard does not mean that no one will follow it. It could also be the case that laws seeking to enforce morality simply make matters worse. For example a ban on alcohol might create a black market, failing its purpose, and increasing societal harms. Law has practical limits, and can only seek to do the best possible with the tools available (**Fuller**).
* Key question: where to draw dividing line between moral standards law should enforce and those it should not. The dividing line between law and morals begins with Mill’s Harm Principle “Only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.” (principle based on utility). How we interpret this principle will depend on our view of both government and the individual.
* What is the role of individuals in society, and what makes their lives valuable? **Mill** thought the answer was bound up with his views on the importance of individual liberty and autonomy. Assumes that everyone has a right to individual liberty.
* **Joel Feinberg**: we need to distinguish between harmfulness and wrongfulness. Crim law is only justified prohibiting certain conduct if it is both harmful and wrong.
* Also says it is important to recognize that the application of harm principle requires us to think about the harm on both sides of the equation, in that if we restrict an individuals freedom because they are causing harm to another, then we are in effect harming that individual’s right to liberty/autonomy.

**Hart Devlin Debate**

* Not really a debate about the law generally, but about the law in criminal. It is only CrimL that uses coercive power of the state to stop you from doing things. CrimL authorizes police to stop you, authorizes state to lock you up, take away your liberty.
  + In some ways Crim law is quite special. If you go down that path, might actually give some support to Hart and Mill in saying that because of that we have to think carefully about limiting the Crim law.
  + But you could also say that the Crim law has a particular function that goes beyond redressing individual wrongs to one another.
  + While Crim Law does have a particular quality with its ability to interfere with individual liberty, there are also other legal impacts that can impact the individual ie tax, property, fines etc.
  + It may be that Crim law is not that special, and it may be that if Crim law is special it really doesn’t help us pick a side between law and morality because perhaps it supports both of those purposes.
* Critical Morality = an attempt to state what is morally true
* Conventional Morality = attempt to capture what most people believe to be morally true. (Brian Bix)
* Central to **Devlin’s** position in the debate is a claim that the law should enforce conventional morality; Society is held together by a shared commitment to certain moral positions and values. As a consequence, action that go against or undermine that shared/conventional morality have the potential to undermine the stability of society, and in the extreme bring about dissolution. Further 🡪 b/c the society is justified in protecting itself, it follows that it can use the law to enforce society’s conventional morality against attack.
* A society needs its morality as it needs a government and it is therefore, for the sake of self protection, entitled to ‘use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence’
* One is to consider the views of the ordinary person living in that society to determine the content of the morality.
* Majority Idea/Legal Moralism: **Devlin** also wants to go with the majority idea, where the majority decides what is or isn't harmful (it is more about what the majority perceives as harm, than what harm actually is).
* This argument is based on the idea that society is kept together by “invisible bonds of common thought”, and common morality is a part of this bondage. “The law must protect… the institutions and the community of ideas, political and moral, without which people cannot live together”.
* To carry **Devlin’s** argument one step further, a violation of a society’s shared morality will undermine society, even where the violations have no direct personal victims. It is in this way that **Devlin’s** view is more utilitarian. He is on the side of a collective, democratic, well-being instead of valuing individual liberty as **Hart** does.
* **Hart** + **Mill**: punishment is legitimate only when act punished causes harm to others.
* **Hart’**: **Devin’s** position amount to “legal moralism” and relies on 2 arguments: **(1)** moderate thesis - argues a society is entitled to enforce morality through law to prevent its own dissolution and **(2)** extreme thesis - argues a society is entitled to enforce morality through law to preserve a particular set of communal values.
* **Hart** says moderate thesis is problematic b/c there is no empirical way of testing its claims, and therefore is effectively a repetition. “it is effectively a tautology”
  + How can you prove that society will fall apart if law don’t enforce conventional morality – give me the proof this will occur is what **Hart** says
* Extreme thesis implies a society is entitled to enforce a set of moral values simply because they are widely held -> this is a clear violation of Mill’s Harm Principle. Can violate an individual’s values.
* Also argued extreme thesis would prevent social change or moral development.
* Because widely held moral values are not necessarily true or reasonable, it means that they might be inconsistent among various regions or cultures, and empirically controversial. **Devlin** accepts this as a consequence, but it leads to the uneasy conclusion that morality is a conventional notion, and that a corrupt and immoral society could perpetuate itself as a decent one.
* Liberalist theory: **Hart** was a proponent of the “liberalist” theory of criminalization. Liberalism is the view that “the prevention of harm or offense to non-consenting parties other than the actor is the only morally legitimate reason for a criminal prohibition” (**Feinberg**). Its primary claim, therefore, is the harm principle – that legal coercion is justified only to prevent one citizen from violating the rights of another. Any other basis for state coercion, particularly immoral acts, would violate **Dworkin’s** right of “moral independence”. Morality is removed from the liberalist theory. Two other tenets of liberalism include retributivism (that punishment be inflicted, at least in part, on the basis of desert or blameworthiness) and fundamental rights constitutionalism (the idea that democratic rule is important, but must be limited if it is to compromise vital liberties).
* Critique of Liberalist theory: It is easy to find harm for something you are against. You still need to go about the business of ranking harms. There is always some element of judgment that comes from ranking harms. Communitarianism opposes the classic liberal theory of rights that is more individually oriented, one that gives autonomous choice to the individual (i.e. not employing women in a workforce).
* Also to consider: what is meant by harm? Is self-harm included? Physical and/or economic harm? Other kinds of harm like dignity and reputation. Offensiveness.
* Fair to say that in Canadian law, in recent years that the harm side of debate is on the ascendency. More cases, particularly as s. 7 becomes more robust and effective tool, in which harm-based view is very prominent.
  + R v Labaye 2005 SCC, R v Kouro 2005 SCC – decision upheld consensual group sex and swinging activities in a club and alleged bawdy-house as being consistent with personal automy and liberty.
* One way to justify these laws under a harm principle; there is law, it may not be harm to other individuals but it is a collective financial harm. Considerable costs that we take on in terms of medical care. One way to fit those kinds of laws under the harm principle – there are some harms or costs that are shared by all of us, presumably you exist in some kind of network or web of relationships where other people are harmed
* Communitarianism - A counter to the idea that liberal rights and the harm model – we need to think about communities and responsibilities. More going on here than just individuals exercising their rights. When we choose to live in a community, we have a network of relationships, may impose on the individual to do certain things
* Where do individuals get their sense of what is moral and immoral?
  + We often get a sense of right and wrong from religion, family, what our parents are telling us, the norms of the community.
  + It is necessary for social order – you cant live together if we all have individual preferences. We need some shared norms, shared principles, shared sense of disgust. It is necessary for social interaction, for society.

May this CAN provide you with quick fingers and ultimate stamina, as it did to those before you. Good luck.

Bobyn and GB