August 24, 2020

Types of Truth

1) **Objectively True** - Reality is independent of the **knowing** observer.
   a. Measurable through observation
   b. No bias – personal views of the observation are irrelevant.
   c. Doesn't change because of what people believe or agree.

2) **Conventionally Truth** - Reality exists by virtue of our agreement about it. It's true only because the knowing observers agree it's true.
   a. Requires more than one person – it's a group phenomenon.
   b. Can change based on what people believe/

3) **Inherently Contestable** – Things about which no truth exists. No rational basis to know the answer. The phenomena themselves have no rational register in our brains. They are totally irrational. So no way to share it.
   a. **Most delicious**
   b. **Prettiest**

Three questions about law:

1. **What is law – Legal Theory**
2. **What is our law – Constitutional Theory**
3. **Who cares what the law is…What is the force of law – political theory.**

Nature of Law – Possible Descriptions

1. Legitimate power
2. Body of moral principles that promotes social order.
3. Body of moral principles posited by an entity with the power to enforce them.
4. Rule by an entity with power to enforce its will.
5. Rule by an entity with power to enforce its rules.
6. Rule by an entity who posits its rules and has the power to enforce them.

August 31, 2020

1. **Dworkin: Justice For Hedgehogs;** How do we know morality? Dworkin begins by going through a history of how we have gained knowledge of the world

    a. Greeks- Live a happy life… do this by following ethical commands… you could know morality the same way we know logic and geometry.

    b. Christianity – felt we were hard wired to know moral goodness.

    c. Modern Era -- logical positivism – things are either true
        i. By definition – eg math or logic – you can know the truth 100%
        ii. By observation – empiricism or science. Science can only give you good reasons to believe something is true.
        iii. Because we can't observe morality.. it isn't there. There is no such thing as morality….. moral statements are nothing more than emotional expressions.

        iv. Logical positivism is skeptical about morality
            1. **External Skepticism -** global rejection of the idea of morality

            2. **Internal Skepticism -** doesn't reject morality as an idea but says that a particular version of it is mistaken.

        v. **Interpretive Truth:** things that are true in a social sense. Morality as a social concept. So the truth of a social practice is the interpretation of it from an insider perspective.

            1. To know how to interpret a practice you need to know the purpose of the practice.

2. The Dworkin goes on to develop his idea that morality is an interpretive interpretive phenomenon that can be objectively true.

1. The Unity of Value

- **Argument:** Dworkin challenges the prevalent view that different spheres of value—morality, ethics, aesthetics, and politics—are distinct and often conflicting. He contends that a deeper analysis reveals an underlying interconnectedness, a "unity of value."

- **Reasoning:** He observes that moral and ethical dilemmas often involve weighing competing values, suggesting an inherent relationship. Furthermore, aesthetic judgments often carry moral implications, and political decisions are frequently grounded in ethical considerations. These observations support his thesis of a unified value system.

2. Truth as Interpretive

- **Argument:** Dworkin rejects the simple correspondence theory of truth, where a statement is true if it mirrors reality. Instead, he advocates for an interpretive view, where truth emerges from a process of understanding and making sense of the world.
- **Reasoning:** He highlights the role of context and interpretation in understanding even seemingly straightforward statements. For example, the truth of "the cat is on the mat" depends on our understanding of 'cat,' 'mat,' and 'on.' This suggests that truth is not merely a matter of objective facts but also involves subjective interpretation.

3. Morality as Living Well

- **Argument:** Dworkin moves away from traditional rule-based morality and proposes that morality is about "living well." This involves making choices that align with one's authentic values and principles, leading to a fulfilling life.
- **Reasoning:** He emphasizes the importance of personal responsibility and integrity in ethical decision-making. Merely following rules, he argues, does not guarantee a moral life. A truly moral life involves actively reflecting on one's values and striving for a life of authenticity and purpose.

4. Interpretation and Creation

- **Argument:** Dworkin extends the idea of interpretation beyond its usual application in literature and art. He argues that interpretation is fundamental to understanding all aspects of human experience, including law, history, and even our own lives.
- **Reasoning:** He contends that interpretation is not merely about uncovering an author's or creator's original intent. It also involves a creative act of constructing meaning based on our own understanding and context. This view emphasizes the dynamic and evolving nature of understanding.

5. Human Dignity as the Foundation of Value

- **Argument:** Dworkin posits human dignity as the bedrock of all value. This dignity, inherent to all individuals, demands respect for autonomy and self-determination.
- **Reasoning:** He argues that all moral and ethical principles, as well as notions of justice and fairness, ultimately derive from the recognition of human dignity. It is this inherent worth of each individual that necessitates treating everyone with equal concern and respect.

6. Justice as Equal Concern and Respect

- **Argument:** Dworkin's theory of justice centers on the idea of "equal concern and respect." This means that society and its institutions must treat every individual with the same level of consideration and regard, regardless of their background or circumstances.
- **Reasoning:** This principle, rooted in human dignity, implies a commitment to equality and fairness. Dworkin argues that a just society is one that strives to create conditions where everyone has the opportunity to live a fulfilling life in accordance with their own values and aspirations.

3. **Ayer: Analysis of Moral Judgments:** What is the reality of morality? Ayer is a logical positivist who believes that the only knowledge we can have of things out there in the world, (ie things that really exist), is through our senses. That's it. If we can't sense it then it is meaningless to try to speak of it because we have nothing to say apart from our attitudes or emotions about it. Nothing we say about something we can't sense adds anything to our knowledge of the thing itself. It only reflects our feelings, or in other words, it only reflects ourselves.

    a. He speaks about whether murder is good or evil. We can describe elements of a killing such as motive and that would add to our understanding of the act itself. But if we talk of justification, that would depend on things outside the murder itself. If we thought that permitting murders of a certain sort would lead to negative consequences then what we are doing is not describing murder itself but other things that we do or don't like.

    b. So thinking of morality is just emotive of one's attitudes about something and therefore not about reality but just about emotions. So saying that one doesn't like genocide is akin to saying one doesn't like asparagus.

    c. Ethical statements as sui generis:
    Ayer argues that ethical statements are sui generis, meaning they are in a category of their own. He explains that ethical statements are not purely descriptive like scientific statements but are expressions of attitudes. Ayer emphasizes that ethical statements cannot be treated in the same way as factual statements due to their normative nature, which sets them apart from purely descriptive statements.

    d. Ethical statements as expressions of attitudes: Ayer discusses how ethical statements are not merely descriptive but are persuasive expressions of attitudes.
    He points out that ethical judgements are not considered true or false in the same sense as factual statements.

    Ayer highlights that ethical terms carry normative implications and are used to express attitudes rather than describe objective facts.

e. Distinction between ethical judgements and factual descriptions: Ayer delves into the distinction between ethical judgements and factual descriptions.
He argues that ethical terms are normative and not purely descriptive.
Ayer emphasizes that ethical terms are used to prescribe attitudes and behaviors, not just to describe the natural features of a situation.

f. Moral philosophy as analyzing moral judgements:
Ayer clarifies that moral philosophy, as he sees it, is about analyzing moral judgements and understanding the nature of ethical statements.

He asserts that moral theories, regardless of their type, are neutral concerning actual conduct and belong to the field of meta-ethics rather than prescribing specific moral standards.

g. Objectivity of values: Ayer dismisses the dispute about the objectivity of values as pointless and argues that moral philosophy is more about understanding attitudes and directives than establishing objective truths. He suggests that the focus should be on analyzing moral judgements and understanding the nature of ethical terms rather than debating the objectivity of values.

h. Meta-ethical theory and moral relativism: Ayer clarifies that his meta-ethical theory does not imply moral relativism or indifference towards moral values. He emphasizes that the theory aims to analyze moral judgements without prescribing specific moral standards, focusing on understanding the nature of ethical statements.

i. Impact of philosophical beliefs on behavior: Ayer refutes the idea that accepting a certain meta-ethical theory leads to moral laxity.
He suggests that empirical investigation is needed to determine the actual impact of philosophical beliefs on behavior, highlighting the importance of studying how people's conduct is affected by their acceptance of different meta-ethical views.

j. Focus on truth in philosophical analysis: Ayer concludes by asserting that the focus is on the truth of the theory presented, not its expediency.
He argues for the importance of truth in philosophical analysis and emphasizes the need to understand the nature of ethical statements and moral judgements without prescribing specific moral standards.

4. **Fay and Moon:** What would adequate social science look like? This article addresses the question of how we should study the social world. In the past two approaches have been at war with each other.

    a. **<u>Naturalism</u>** Treating society as a science eg objective reality. This view treats social phenomena like crime, authoritarianism, or inequality as natural phenomena akin to earthquakes or tsunamis. You don't ask the volcano why it erupts or the wave how it got so big and you shouldn't ask people what they think they're doing in order to understand what it is they're doing.

        i. This approach says that trying to interpret the mental states of the actors about what they believe they're doing or their understanding of the social practice is radically unscientific and must be expunged from any method designed to understand human phenomena.

        ii. But removing all reference to any interpretation of anything would be akin to trying to understand the meaning of a dance by understanding the biological process in the movement of limbs. It doesn't tell you anything about **social** activity.

        iii. A corollary to this is that any attempt to understand a dance without interpretation of anything is impossible because all language requires reference to social understanding.

    b. **<u>Humanism</u>** Treats social phenomena as an interpretive practice. Says that human social activity is rule-governed. In order to do something like voting, we must understand concepts like democracy, political equality, etc. A dog can't understand this and so even if a dog can mimic the behavior of voting he isn't actually voting. We can't understand social practices in this view without understanding the intentions of the actors when they are acting. The action is what the acting believes he or she is doing.

        i. While this approach is very good at explaining the meaning of something, it isn't very good at describing why it happened. Cause and effect or how something came into being is not part of this explanatory process. It seems like the best it can do is explain what is, not how it came to be that way or how or whether it could change. Whatever is, seems like how it ought to be under this approach.

    c. Critical Social Science - Integration of interpretation and social science. You can't just measure things or just interpret them. You've got to combine measurement with a sophisticated interpretation of the concepts (ie things) being measured.

September 14, 2021

5. Aquinas

a. Free Will This is the basic and most fundamental requirement for law in his view. Without this we could not form the intention to do good and without the intention to do good or evil it would make no sense to have rules about what we ought to follow. We cannot condemn anyone or praise anyone unless they have the ability to intend to do the right thing or wrong thing. This is the basic human requirement that makes law possible.

i. How universal is this capacity distributed amongst God's creatures.

ii. How is this capacity distributed amongst humans?

1. Does everyone everywhere have this capacity?

2. Does everyone have this capacity always?

6. -- **<u>Law as the Word of God</u>**

a. All laws emanate from God.
b. Law is God's right reason put into practice.
c. For the common good.
d. **God's will has to be posited (published) in order for it to be law.**

i. **<u>Eternal law</u>** -- God's right reason, things that are true now, were always true since before the creation and will always be true. What is actually in God's mind?

ii. **<u>Natural Law</u>** – God's will that we can access through our reason **put into practice.**

1. Why do we follow his/her will instead of doing what we want?

2. People's ***self-interest*** is definitely tied together with doing the right thing. Because you only get to go to heaven if you follow god's law. So you have a strong interest in aligning your own interest with God.

3. Not everyone can access god's will to the same degree and some not very well at all.
    a. Some people treat others well according to common law but they were born at the wrong time or place.
    b. Some people are wiser than others…

c. Self-interest is ok but only if it's the right sort.

i. **Internal interest**… things that are inaccessible or hidden to individuals…they aren't obviously deduced from reason.

ii. **External interest**… Material goods… eg food or water… things need to survive…. Here humans can follow our self-interest and use our reason to get things consistent with God's reason.

e. **Divine Law** – Comes to the rescue … The Bible and other sacred texts lay out the rules we need to follow that will tell us what our right reason and self-interest cannot do.

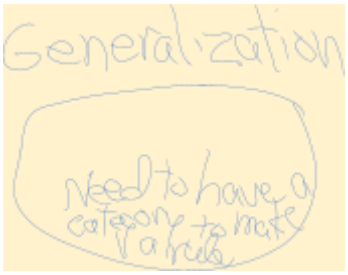
i. God gave us the bible to know his will but no one can read it except priests.

1. Only priests can read the bible.
2. Special powers/gifts of god's grace and strong faith that permit them to understand divine law and interpret it correctly.

f. **Human law** Peoples attempt to put into practice rules that will achieve some sort of social good and which are consistent with god's will. Implicitly, it's imperfect….

7. **Moral Paternalism** -- It treats citizens as childlike in that they don't have the capacity to rule in their own self-interest. The ruler knows best not merely what is best for himself but what is best for the people being governed and rules in their interest.

An unjust law is no law… it never existed…. So the church must be involved in human law-making in order to keep it consistent with god's will. Only the church has the faith and grace to know the portion of God's reason that isn't available through our normal reasoning.



8. Fuller – The Internal Morality of Law

a. **Failure to make a rule.**
A rule is a generalization that creates categories of behavior that's included and behavior that's excluded from the rule. To be a generalization there need to be boundaries. People can't tell whether a law applies to them and therefore how to conform their behavior.

b. **Failure to publish the rule.**
Can't follow a rule that you don't know about.

c. Retroactive legislation
Must be able to follow and decide not to follow if you're responsible for breaking a rule.

d. Failure to make rules comprehensible.
Can't follow a rule you don't understand.

e. Contradictory Rules

Rule can't be followed

f. Rules that are impossible to implement.
Rule can't be followed

g. Frequent changes in rules.
Can't follow the rule.

h. Failure of congruence between the rules as posited and the rules as enforced.

Don't know what the real rule is….

9. Internal Consistency to law – that's created by meeting these eight requirements. This definition of law creates a moral basis for it.

10. The law has to be knowable, comprehensible, and able to be followed. This creates a certain consistency to the law that produces a moral basis for it.

11. Fuller's claim law's morality is not all of the substance of a legal is moral..but that the feature which requires this sort of due process has a moral character.

Questions to think about for next week.
What is the morality of Fuller's definition of law?
Why does Raz not think that Fuller's requirements constitute a moral basis of law?
Was the proceeding in "The Response" a legal proceeding?

12. Raz – The Virtue of Law

a. All laws should be prospective, open and clear.

b. Laws should be stable and consistent

c. The making of rules should be guided by generality.

d. The crime-preventing agencies should not be able to pervert the law. You can't use national security as a reason to suspend the law.

e. Judicial Independence

f. Courts should be accessible to everyone.

g. Courts should have some reviewing power over the lawfulness of laws and other actions by different branches of government.

h. Natural Justice must be observed -- Open and fair hearing, lack of bias.

13. They go to the same general idea that Fuller spoke of… but Raz denies that this gives law any moral basis… Raz says that Fuller has merely described what it means law but not that it has moral content. Failure to follow the requirements just means there's no law, not that it's immoral.

14. Fuller's claim is one of limited morality… It's just that it precludes arbitrary power. You have to have due process and people can follow it if they want to…..

    a. <u>Internal Morality of Law</u> Fuller isn't saying that every law is morally what it ought to be. Rather, he contends that it imposes a sort of consistency that achieves a sort of minimal

natural law.

b. He's not saying that this consistency can't occur in an evil regime. But he does say that having consistency is itself a level of morality that is better than not having it.

c. What does Fuller's morality actually accomplish? Is he presenting something that is simply a necessary feature of having law as something moral? Is that permissible?

15. Raz agrees with Fuller that the virtue of law is that it prevents arbitrary power. That means it's good to have a legal system versus not having a legal system…. Even an evil legal system is better than arbitrary power… less chaos…

    a. Chaos means no ability to plan your life…..
        i. No ability to carry routines of daily life
        ii. Your ability to form a purpose in life is defeated

    b. <u>No free will in this situation</u>…. Free will is impossible because there's no basis to form a life plan for yourself let alone have the political freedom to carry it out.

    c. Should we accept Raz's distinction between something being "good" as a virtue as opposed to something being morally good? How do we decide what is virtuous versus what is evil? Aren't virtues just a species of morality?

    d. Has Raz unwittingly provided a moral aspect of law?

16. **THE RESPONSE:** Was the hearing in the response a legal proceeding.

    a. Court is saying it's not a legal proceeding.
    b. Court is not determining guilt or innocence.
    c. But we are determining whether or not we keep prison indefinitely.
    d. Their actions are inconsistent with a legal system.
        i. Defendant could not know the evidence against him.
        ii. Defendant could not follow the rules that he had violated.
        iii. Judges couldn't know all the facts..

17. Two conceptions of due process…
    a. Moral Conception as a matter of fairness, people shouldn't lose rights to property freedom, without a hearing to show that doing is consistent with the law.

b. Conceptual idea of Due Process as the basis for a legal system. – are you engaged in the activity we call law…. A process that permits a determination of whether a rule exists and whether a particular defendant violated the rule… or whether or not a rule applies to a particular plaintiff.

18. Legal Positivism – Law and morality are separate concepts and that you can have a legal system that's evil and it's still a legal system.

Logical Positivism… The only things that we can know

a. Things that we observe through our senses. (empiricism)
b. Things that are true by definition. They are tautologically true.

c. Bentham - Anarchical Fallicies

No such things as natural rights. –

i. As presented in the French Declaration, they're incoherent and contradictory. We could know their meaning if they were posited.
ii. Ordinary language definition of a concept. – When we apply that to the assertion of rights claim… when we make a rights claim, we actually believe we have it now, not that it's an aspiration.
iii. As a matter of fact, no one in France had any of the rights they claimed.

iv. Where do rights come from? Law is the power of the sovereign to impose his will. Rights come from the sovereign power who decides to give them to you.

v. Human rights can only come from someone with power…
1. **Can't come from God because no basis to know that god exists.**
2. **Because there's no international sovereign who can give you those rights … can enforce.**

d. Austin –

i. Legal System -- Requires a knowing superior (someone who is inferior to no one) who posits rules to knowing inferiors, who are in the habit of obeying that superior.

FOR NEXT WEEK –

What does Austin mean by KNOWING superior/inferior

What is meant the habit of obedience to a superior (sovereign)/

September 28, 2020

e. Legal Positivism – emanates from an idea of knowing called logical positivism.

i. The only things that we know are things

1. What we observe
2. What is tautologically true - true by definition
3. Law is just one of many ways of organizing power.

f. Austin's Concept of Law-

i. What is a sovereign? -- Someone who is superior to everyone and inferior to no one.

1. Power
2. Ability to enforce your will –
3. Command – is the power to enforce your will
4. Recognition of the inferiors on who the commander is.

ii. Law is the habit of obedience -- Command of a knowing superior to a knowing inferior that is backed by consequence.

1. Knowing means -- law is a rational process… it's <u>not</u> accidental or transcendental
2. The person you KNOW is the commander through rational observation gives you an order that you KNOW must be followed.
3. The habit of obeying the sovereign is the <u>legal obligation</u>

g. Law is a sociological phenomenon. You can tell whether law exists by observing a society and seeing whether it has the components of a legal system or not.

i. Important to distinguish positive law from positive morality and also non positive morality and law from positive morality and law.

1. **Positive versus non positive- positivism means those things that you can observe or make up - Non positivism are things that you say exist but that you can't observe.**

2. **Law versus Morality – positive morality are standards we follow from conventions we make up but that aren't backed by the commander.**
3. **Humans cannot know anything that isn't observable and because god's thoughts and desires with respect to specific rules aren't observable they can't be part of law.**
    a. **God's will being unknowable is gibberish… i.e. incomprehensible.**
    b. **If it's not comprehensible it can't be followed even in theory so it can't be part of a legal system.**
    c. **Austin thinks that transcendental morality cannot be part of any legal system…**
    d. **However, positive morality can be incorporated so long as the commander/ sovereign says so.**

19. **Hart – Law as a system of Rules: Primary and Secondary**

i. **He criticized Austin's idea of Law as a command or the habit of obedience as simply Gunman situation writ large.**
ii. **Do we have a legal obligation to muggers?**
    1. **Difference between being obliged and being obligated.**
        a. **Obliged means forced under the circumstances.**
        b. **Obligated requires some sort of internal understanding of a justification for following the rule.**
iii. **Hart says Austin is confusing obligation with being obliged and there's no obligation to a commander just because he is giving commands.**
iv. **<u>Internal Aspect of law:</u> We need a certain sort of feeling internally, an attitude about the sovereign… Both the citizens and the rulers must have this internal aspect. <u>Internal aspect is a psychological recognition</u> that a particular person or entity is the lawgiver.**
v. **<u>Sources or pedigree concept of law</u>…. That something is law if it comes from the correct source that we recognize as being the source of law. We know what law is by knowing that it comes from the right source.**

b. **Austin's idea of law acts as if there is only criminal law… Austin acts as if the law only restrains what we can do. Law solves coordination problems… Hart says that law is more than just criminal law. It enables activities that would otherwise be impossible.**
    i. **As examples- property and contract rights are very difficult to enforce without a sovereign to make it happen.**

1. **In particular something like giving money away after you've died would be impossible without a statute of wills that created a mechanism that enabled it.**

c. **Hart says law isn't just a command, it's a system of rules.**
   i. **Austin's system only provides for Primary Rules.**
      1. **<u>Primary Rules</u> are directed at citizens. Telling them substantively what things they can and cannot do…..**
      2. **<u>Secondary Rules</u>**
         a. **Legislation – how to make laws**
         b. **Adjudication – how to apply laws**
         c. **Recognition -- rule about knowing which rules are really rules… eg our constitution… how do you know that the rules are coming from the right source.**
            <u>i.</u> All legal systems must have an <u>Ultimate Rule of Recognition</u> -- In the US is our belief and understanding that the constitution is sovereign law.

<u>Questions for Next Week</u>

1) **Hart says that language is open textured and thus can contain ambiguities about the proper meaning… What does he mean by open texture and does this permit us to interpret the law precisely enough to say there is a single correct rule.**

2) **Dworkin criticizes Hart's idea of law as a system of rules. He argues that law requires more than just rules to make a legal system. He argues that every legal system also has principles which are different from rules and makes it possible to get a single correct answer about what the law is. What are principles in Dworkin's view and how do they permit us to find the single correct answer about what the law is. Can they perform this role?**

   i. **<u>Judges should be textualists.</u> Use the language that a normal speaker of the language would have used at the time and place it was written.**
      1. **Not intentionalists – look at the psychological state of mind of the author of legislation….**
      2. **Problem of hermeneutical circle..language is a game that consists of shared intersubjective meanings…**
   ii. **Open texture of language… implies ambiguity of language.**
      1. **Ambiguity… when there multiple correct meanings of language….But the ambiguity can be solved with more language.**

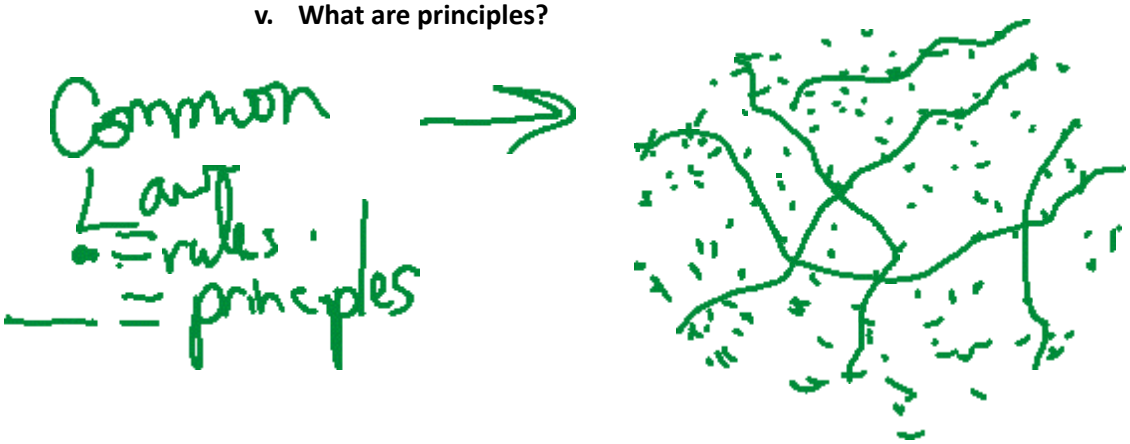
2. **Vagueness… there is no meaning because there are no boundaries on the category to create meaning.**
3. **When the judge confronts ambiguity he or she must act as a deputy legislator … look at the text and determine the meaning that the legislator intended.**
    a. **Acting as a deputy legislator makes no sense as a textualist because ambiguity is the problem in the first place.**
    b. **Looking at the context determine the parliamentary intent is intentionalism which he supposedly rejects.**
4. **Judges must act as deputy legislators because litigants have a right to a correct answer to their problem.**
5. **Part of the job of the judge is to fill in gaps in the law left by ambiguities.**

3) **Ronald Dworkin and Law as Integrity…. Morality is part of law….**
Embarrassing Questions… Legal positivism claims that every litigant is entitled to an answer to the problem being litigated and that there is a correct answer… but in fact it seems as if they are making it up.

i. **Rejects the idea of judicial discretion…. Because it means that we give the person the freedom to decide for themselves. To use their own judgment.**
ii. **We don't act as if judges had discretion because we criticize their interpretation all the time.**
iii. **We act as if we're engaged in a huge charade where we act as if the law is really there and clear when we also acknowledge that they're sort of making it up.**
iv. **We can't ignore this question…need to have an idea of what law is in order for the judges to know where to look to find what our (specific) law is.**

In fact, the law never runs out… so there's no need for legal discretion ever…
ALWAYS A RIGHT ANSWER TO EVERY SINGLE QUESTION OF WHAT THE LAW IS IN EVERY PIECE OF LITIGATION.
Law isn't a system of rules, it's a system of rules plus principles…

v. **What are principles?**



vi. You can understand what law is by watching what judges do…
vii. Judges act like political theorists…. (the basic question of political theory is why am I obligated to obey the law)… to find out the principles of law that form our obligations to each other in our community.
viii. Rules
    1. run out…
    2. conflict with each other (they shouldn't but they do under legal positivism)
ix. Principles –
    1. Never run out - so there never any gaps in the law. So no need for judges to ever exercise discretion
    2. Principles never conflict with each other.
x. There's a right answer to what the law is. Judges don't make up the law. Because there are no gaps and principles don't conflict.
xi. You can't have law without morality… law is about what obligations we have to each other. That is essentially a moral question.
xii. Law as integrity is the consistency of moral principles and rules within a society into one coherent whole.
xiii. Law is judges saying what justifies the sovereign's power…

Riggs v Palmer

xiv. Probate interpreting the statute of wills.
xv. Palmer killed his grandfather when he thought the grandfather might cut him out of the will….. he was convicted of murder and is in jail.
xvi. Minority – says that despite the injustice the grandfather's will is valid under New York State law. It follows all the rules and so can't be changed after death.
xvii. Majority… Nobody can profit from their own wrong… This moral principle is part of our law even though it doesn't appear explicitly in our law…. It refers to cases that go back a thousand years and might not even refer to the principle but when all the cases are taken together as a whole, you can see they all follow these principles.

When lawyers reason about legal rights and obligations, especially in hard cases, they make use of standards that do not function as rules, but **operate differently as principles, policies, and other sorts of standards.**

• **Policy** – a kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. (That auto accidents ought to be decreased)

• **Principle** – a standard that is to be observed not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality. (No one may profit by their own wrong)

• Dworkin makes his case with Riggs.

Riggs v. Palmer – whether an heir named in the will of his grandfather could inherit under that will, even though he had murdered his grandfather to do so.

> "It is quite true that statutes regulating the making, proof and effect of wills, and the devolution of property, if literally construed, and if their force and effect can in no way and under no circumstances be controlled or modified, give this property to the murderer." …
>
> but "all laws and all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."

Rules vs. Principles: they differ in the character of direction they give.

▪ Rules are applicable in an all-or-nothing fashion.

1. Compare rules of a game – baseball example.
2. If a batter has three strikes, then he's out.

Conditional character of rules.

3. If a will does not have three witnesses, then it is not valid.

Principles, however, do not set out legal consequences that follow automatically when the conditions provided are met.

4. They are not all or nothing.
5. People often profit from their own legal wrongs
    a. Adverse possession – squatters rights
    b. Breaking contract to take a better paying job

Principles are necessarily open-ended

6. Could not enumerate all of the conditions and turn them into rules.

7. Rather than set out conditions, a principle states a reason that argues in one direction, but does not necessitate a particular decision.

First Amendment: rule or principle?

Absolutism (rule) vs. Clear and present danger exception,among others (principle)

Rules often contain words like “reasonable”, “negligent”, “unjust”,“significant” – these point to further principles necessary to determine their meaning, but do not quite turn rules into principles,for they restrict the kind of principles that can be appealed to.

Principles and the Concept of Law – What does this mean for Hart?

Courts often cite principles in creating new rules in a judgment.

8. How can a theory of legal obligation account for the role of
9. principles in reaching particular decisions of law?
10. Ie, what makes principles legally valid?
11. Unlike rules, principles do not usually originate from some institution like a legislature or court. The rule of recognition can't be applied to principles…the test of pedigree just doesn't work. So are they not valid in legal decisions?

Principles originate "in a sense of appropriateness developed in the profession and the public over time."

Power depends on the maintenance of this sense of appropriateness.They may erode with time and cease to hold sway in legal reasoning.

But we do argue for principles on the grounds of past cases or their appearance in preambles to statutes, for example…when they are argued for at all. BUT we cannot devise a test for how much or what kind of institutional support is necessary to make a principle a legal principle….

NO RULE OF RECOGNITION FOR THEM.

• The arguments mustered don't stand on a different level from the principles they support.

No distinction between acceptance (of rule of recognition) and validity (of rules of obligation).

o We argue for acceptance and validity at the same time when we cite previous cases where the principle was relied on.

• Principles aren't logically structured like rules, either.

They don't support each other by derivation, rather they hang together.

• Perhaps, though, Principles can be grounded in CUSTOM

Hart makes room for this possibility for some rules.

> Some ancient legal rules in common law were never legislated, they appear first in legal opinions and texts as already accepted rules…already part of the law.

• Austin treated these as not being law until a court first recognized them in an opinion as an agent of the sovereign.

• Hart claimed the Master Rule might stipulate that some custom counts as law.

> But how to differentiate between moral and legal custom?
>
> Not all of a community's customary rules or longstanding moral obligations are enforced in law.
>
> So, the ones that are customarily enforced in law are the legal customs?
>
> But, then, the master rule…the primary rule of recognition…collapses: it just says that whatever the community accepts as binding is binding.

Hart wanted to claim that the master rule was binding because it was accepted, but that all other rules are binding or valid only because the master rule deems them as such.

But he can't maintain this…for some customary rules are valid only because they are accepted and the master rule cannot be amended to account for this without spiraling into triviality.

▪ If this is right, then Hart can't account for principles in this way either for it makes a mockery of the idea of the master rule.

There is, then, no master rule of recognition if principles play an important part in legal reasoning.

So, the first tenet of positivism – that the law of a community is distinguished from other social standards by some test in the form of a master rule – falls.

What about legal obligations?

4) Positivists hold that legal obligation exists when and only when an established rule of law imposes such an obligation. In hard cases, there is no obligation until the judge creates a new rule for the future.

But, once we accept principles as law, we are forced to recognize that legal obligation might be imposed by a constellation of principles as well as by an established rule of law.

International Law

5) Justice vs Political Morality

The pattern of past decisions is what Dworkin calls the political morality of the state. This is the type of morality that legitimates the power of the state to obligate us.

Many communities have horrible precedents that are evil. Would their political morality simply be evil? If so, what purpose does the term morality serve?

If morality is meant to serve as a judge of our actions then how can an account of our actions constitute morality?

Dworkin admits that there can be a justice fritz in addition to Hercules. One rules in the third Reich and one in America…. Each interpreting the moral principles of their communities.

Walzer – Sphere's of Justice -- Distributive justice… question of how resources ought to be allocated…

6) **Complex Equality: Most theories of justice are based on a single principle of allocation. Walzer rejects this notion and argues that each principle of justice rests with the nature of the resource being distributed. Justice in society not just one idea or formula. Rather it is actually a complex balance of different ideas of justice based on different justifications for different goods. Understand the resource, you understand the proper principle of distributive justice that rules over its allocation.**

Injustice is where principle rules outside of its sphere.

Primary Resources -- Rights
Secondary Resources – material objects like food, healthcare

You can tell how a resources ought to be legitimately distributed by looking at how it has been distributed in a community.

How to distribute marital spouse?

How to distribute public office ?

These are all resources that we have social practices to define the legitimate they should be distributed

This doesn't seem dramatically different from Dworkin's idea of political morality. But Dworkin rejects it.

7) International Law It's status and desirability

Thuycidides : Melian Dialogue -- Nations are in a community where the strong do what they can and the weak suffer what they must. IE International Relations equal law of the jungle.

- **i. Law only operates within a community not across communities**
- **ii. – Power determines relationships, not law in the international sphere.**

8) Westphalian Sovereignty… whatever goes on inside your borders is no one elses' business

9) Morganthau – Opposes the idea of law or morality in the international sphere.

Logical positivist…. He doesn't believe in morality. He presents morality as moralism.. people telling other people what to do without any particular justification for it.

- **i. Treats morality as local social practices that are no one elses' business.**
- **ii. Obligation of the Sovereign is to look out for the interests of his own nation and is obligated not to consider the welfare of other nations at his own country's expense.**

10) Hart On International Law:

Possible that you could have individual international laws: could make treaties that would characteristics of a contract for example….

But you can't have an international legal system.

- **i. No secondary rules… only primary rules like treaties.**
  - **1. No rules of recognition**
  - **2. No judiciary**
  - **3. No legislature**

Citizens of International Law land are the states..

- **ii. International law is public law - states are the citizens of this legal framework.**
- **iii. States are sovereign… so they can't subject to anyone… they're inferior to no one.**
  - **1. States can follow treaties but only because they're obliged to do so.**
    - **a. Eg UK will only abide by its Withdrawal Agreement from the EU if it must do so in order to get something else it wants.**

11) Dworkin : International law is more than a system of rules, either primary or secondary…

If there are state actors who believe they have obligations and do follow through then there are legal obligations… no individual legal system has any stronger foundation.

Sovereign leaders appeal to international human rights observance as part of their legitimate rule within their states.
Most states dealing with each other appeal to international law and human rights as the basis for their legitimacy as a state.
We have the beginning of the development of an international understanding that you get to be a part of the community by subjecting yourself to law.

12) Melian Dialogue – Athenians who believed very much in the idea of law being part of society and part of the idea of justice nevertheless felt that this did not extend outside of their society. Societies are ruled by law within but in their relation with other states, no law applies. The strong do what they can and the weak endure what they must.
The Athenians didn't just think this was the way the world was but thought it was the way the world ought to be.
They didn't think there could be questions of justice between states because the idea of justice was tied up completely by the practices within a state. So justice could not apply across borders.

Questions For Next Week

1) How must states conceive of themselves in order to be part of a legal community. What is it that the states must feel or believe as a precondition to the existence of a legal order.

2) What is the primary thing standing in the way of this recognition or attitude necessary for an international legal order in Rawls' view? What role does Westphalian Sovereignty play in this?

October 19, 2020

13) Morgenthau is a logical positivist who doesn't believe that anything is real that can't be observed through the senses. Morality can't be seen so it doesn't exist. So if morality doesn't exist then it can't be part of the law.
Leaders have a duty only to look out for the interests of their own society.
But duties are a moral phenomenon and if they don't exist then they can't exist within communities.
There can be a legal obligation for leaders to exploit others but there can't be moral ones if there's no morality.

14) Kant – Morality comes from the fact that we act for reasons and we can criticize people's actions based on the reasons they chose to act.
If morality is true, it must be true for everyone.
How to find the universal basis for actions.

i. You must be able to ***will*** that your reason can be legislated universally to apply to everyone.
ii. Cannot treat anyone as an object of your own ends. Each person is sovereign of their own ends. If I have a duty to be moral, that means choosing the right reasons for acting then so does everyone else and so I can't interfere with anyone else's necessity of choosing the right reasons for their actions.

States must be organized like people if there's going to be international law… so they have to be constitutional republics that respect the free will of other states, they can't use force to overbear other states reasons, they can't own other states … all these things overcome the free will of other states.

15) Rawls – The law of the Peoples

International law is possible if nations relate to each other differently

i. Treaty of Westphalia and Westphalian Sovereignty (1648)
ii. It was signed by Kings and Princes… who owned the country and could do whatever they wanted inside the country.
    1. Leaders won't persecute minority populations
    2. Whatever goes on in other countries is a black box…ie no one's business.
    3. UN does not provide for intervention if it doesn't affect third party states.
iii. The only people protected by Westphalian Sovereignty are high government officials for what they do to their own people.

By taking away Westphalian Sovereignty you're making it possible to have a sovereign above the states.

iv. Leadership of a country is no longer immune from legal process for what they do to their own people.
v. The International Criminal Court is the first example of an institution that applies this idea.
vi. By eliminating Westphalian Sovereignty from international law you make possible a sovereign that stands above states which is what the legal positivists have said is a requirement of having a legal system.
vii. It also makes human rights possible because leaders of states would no longer have immunity for what they did to their own peoples.

Who can be a member of a society of the law of the peoples?

Rawls' idea of justice is that it is a voluntary community that people join in order to get something that isn't possible outside of the community

viii. It's set on the basis of a shared common good
ix. Whatever principles are chosen apply to everyone.

Members of an international society of justice must themselves be societies of justice or else they won't commit themselves to operating along the lines of justice.
Types of societies of justice

x. Liberal democratic Societies
xi. Hierarchical societies

Non justice based societies

xii. Burdened states – where they exist in states of disarray and the state can't be counted on to do anything including keeping order or preventing famines etc
xiii. Criminal states – they're organized around the idea of exploiting their own people and everyone around them internationally.

Rawls says that those states outside of any society of justice are not protected by the actions of the law of the peoples although they're presumably covered by human rights protections for individuals within those states.
He says however, that even though hierarchical states might be odious and may treat people unequally, liberal states cannot try to change them to be like themselves because that would not be showing respect to the more abstract idea of justice that underlies the law of the people globally.

xiv. How much should we respect those societies of justice that are different?
xv. Can societies that don't share the same idea of justice be of a larger idea of justice?
xvi. Does the EU reflect Kant's idea of Federation of States or Rawls' idea of law of the peoples?

Questions for Next Week – Formalism and Legal Realism

Can the laws contain judges' so that an actual rule can be applied without the judge's viewpoints being inserted into the meaning of the law?

Can the language of the law actually constrict the outcome of a legal decision or can judges essentially come out with any decision they wish?

October 26, 2020

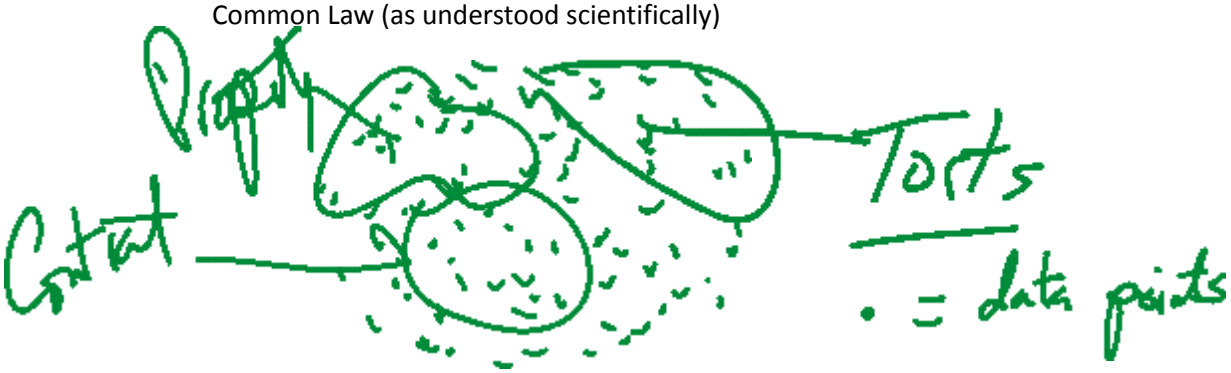
16) Legal Formalism – Judges must be constrained to apply the law and not make it up as they go along. Impetus for this came from political history if the US as well as the rise of science as a way of knowing the world.

Dredd Scott – one catalyst for this. People were outraged.
Rise of Empiricism and the scientific method.
Logical positivism… only two types of knowledge

i. Facts that can be observed through our senses and confirmed with others.
    1. Are true because of verification…
    2. Scientific method is the process by which we verify the truth of the observation.
    3. Science provides a good reason to believe it's true.
ii. Tautologies.. definitions, things that we make up. – those you can know 100%. They are always totally knowable.. no need for verification because the truth is in the definition.

Legal Formalism was motivated by the scientific principle that we can know the law through observation and the scientific method.

Common Law (as understood scientifically)



Each dot is a case that is a data point reflecting a observable phenomenon out there in the world. Law students and then lawyers look at precedent as an empirical example of something. Law turned into Legal Science…

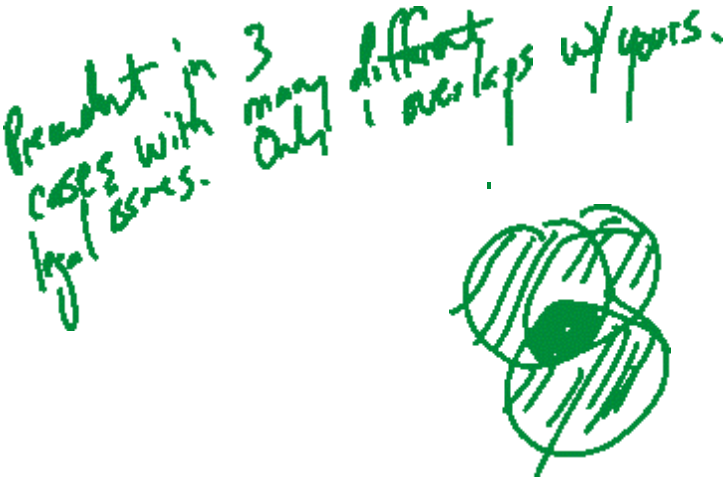
Find the law empirically…and therefore you understand it empirically and therefore judges apply it empirically. This scientific method puts a constraint on judges. If they're applying a rule it's verifiable based on the facts of the case.

If this works you've taken out the uncertainty of judges going rogue just applying whatever rule they feel like.

Schaeur thinks we can know a fairly strict meaning of language if we understand the purpose of the speakers and are in their interpretive community….BUT are we in the same interpretive communities?

17) Perfectionist Theories of law --- Legal Realism
Perfectionist theories of law argue that the law is there to perfect society. The law should be rooted in some theory of justice and should be understood to serve that end of justice.
Legal Realists argue that we can't know what the law is by looking at common law precedent or written legislation.

i. One problem is the open the texture of language. It is inherently ambiguous.
ii. Secondly, common law cases are decided on the basis of many different rulings. There's rarely just one issue of law to be decided. This means when you cite cases in briefs you've got to figure out if the case you are using was decided for the same legal reason that is relevant to your case. This isn't always clear. So we can't assume that the rules from precedent actually mean what we think it means if the case was decided for different reasons than we assume.



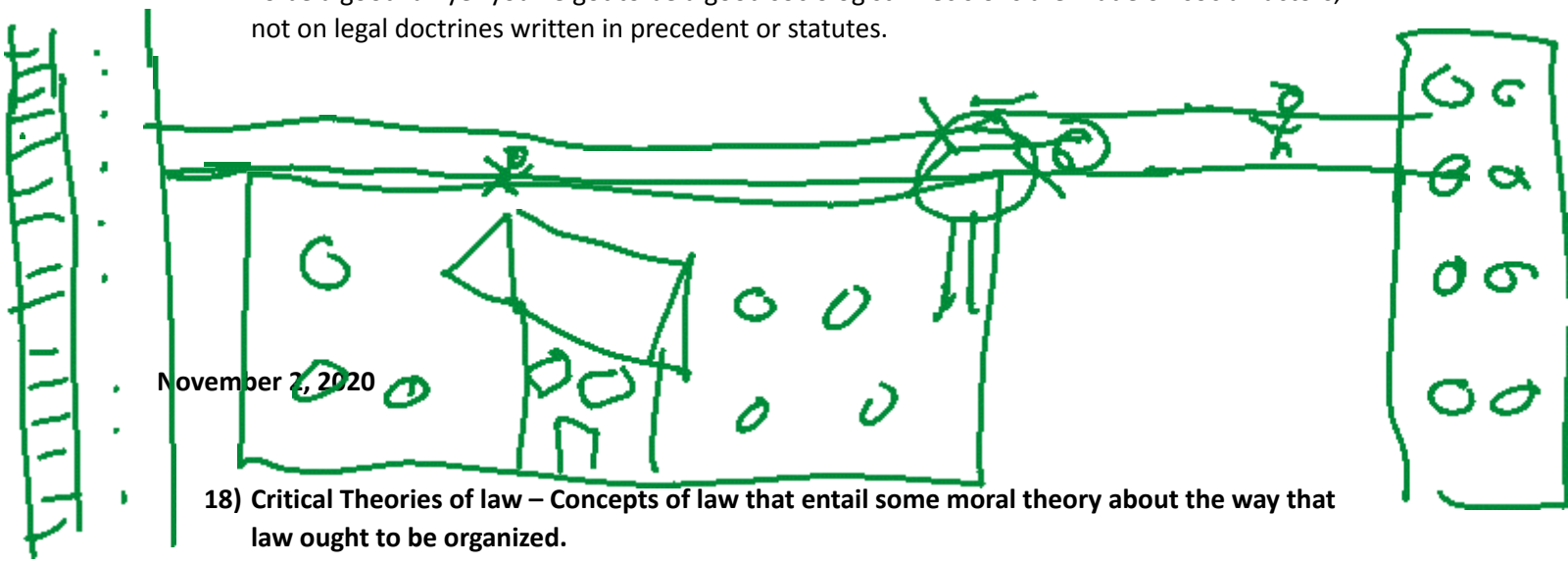
iii. Realists believe that the common Law cannot constrain judges to follow rules. Judges do not follow the law when they make legal decisions….

If you want to know what the law is….where do you look?
Legal realists say the law is not in law books or common law cases but in what people actually do.

iv. How do you discover how people act? That is what they actually do? You look at the reality of how decisions are made. **Socio economic factors**. If you want to know how a judge will decide a case…. Look up their backgrounds.
v. are they rich/poor
i. Do they own a home?

ii. What political party do they belong to?
iii. What religion
iv. What gender?
v. What race…
vi. Are they immigrants?
vii. Do they belong to a country club
viii. What is their education level?

To be a good lawyer you've got to be a good sociologist. Decisions are made on social factors, not on legal doctrines written in precedent or statutes.



November 2, 2020

18) Critical Theories of law – Concepts of law that entail some moral theory about the way that law ought to be organized.
It includes two aspects.
i. Conceptual objection to the way that we see law
ii. Moral claim about the proper goals that law ought to serve.

19) Legal Realism
Conceptual Claim – Law is not found in legal doctrine (ie statutes and common law)
You find the law in what people are actually doing.
It's not found in law because it can't be.
i. Common decisions as precedent are just too ambiguous and sometimes even vague. You can't judges by language because it's too unclear what the language means
ii. People in practice behave in their own idiosyncratic ways that isn't always the way the law says.
The primary reason for a case to be decided is on social factors of the judge, jury, and litigants… not the law.
Moral basis of legal realism is welfare state liberalism…
iii. To preserve the market economy you have to even out the power of people in markets to negotiate.

iv. **Can't have concentrations of power in one side of the exchange so there must be more equality in power between consumers (individuals) and corporations (banks, industry etc.)**

20) **Law and Economics – Law ought to mimic the market. And actually if you look at judges the law does mimic the market.**
No legal rights or claims should be given to anyone *ex ante* by virtue of the law such as in legislation or precedent.
Rather all legal rights should be given to those who value them most. In other words these rights should be distributed in the market.

i. **Because the allocation of a right to someone is the distribution of an obligation to someone else.**
ii. **This means that a right for you is a cost for someone else.**
iii. **When you give a right you're taking money out of someone else's pocket and giving it to the rights holder.**

For example: Zoning Law

21) **If you allocate rights to the neighbors you're involuntarily taking money away from Farmer Jones.**

22) **What is the fundamental goal of the market? Efficiency in the allocation of resources…. The goal of the market is to give everyone what they want.**

For Law and Economics—people have all the rights they want and none of the obligations they don't want.

Pareto Optimality

i. **Pareto Superior Situations – at least one person is made better off in a trade and no one is made worse.**
ii. **Pareto Optimal Situations - no trade is possible without making at least one person worse off. No further trading will take place because everyone has exactly what they want.**

Questions for next week.

Is pareto optimality a measure of absolute perfection or is it just relative to some other factors? If it's relative then to what is it relative?

How difficult is it for Farmer Jones' 10 neighbors to get together to negotiate the sale of the property? How can the market incorporate the costs of negotiating such a deal?

Lets assume that there are no zoning restrictions and all of Farmer Jones' neighbors want to stop the casino construction. Do you think all of Farmer Jones' neighbors would agree to pay their share.

November 9, 2020

Law and Economics is both

Descriptive – This is how the law actually works

Prescriptive - This is how the law ought to work.

L& E has libertarian overtones…. The state has no right to allocate resources to one person involuntarily taken from another person… Giving a right to one person, is taking away property from another person.

L&E also has utilitarian overtones…. We allocate resources according to utility maximization. What markets attempt to do is maximize efficiency….

The thing that L&E wants to maximize is individual freedom.

Pareto Optimality – depends completely on the initial distribution of resources. It's a completely relative term that depends on who has how much…

iii. Not optimal
    a. In a psychological sense – internal perspective of what people actually want.
    b. Not optimal in an absolute sense that the outcome is REALLY the best of all possible distributive worlds.
    c. So it IS efficient even if unequal… but we're talking about the distribution of rights….

iv. Trading for rights has several impediments that cause market transactions to fail or not take place.
    1. **Transaction Costs** the costs of doing a trade.
    2. **Externalities** positive or negative consequences that are external to the trade. So they have effects, costs or benefits that go to people who aren't part of the trade. These costs and benefits are not incorporated in the price of the good because it's not part of the sale of the goods contracts. Those costs will be paid by someone if they're not paid for in a trade… they don't go away.
        a. **Eg** pollution and global warming and the effects of that on other property owners and health costs are externalities to the trade in fossil fuels.
        b. **Public Goods-** a good that is indivisible and inexhaustible… you can't limit access to it.

The rational thing to do with public goods is to wait for someone else to purchase it because you'll get the benefit anyway… So public goods will not be bought on a free market.. they cause market failure because of the nature of the good, they're non excludable, people will wait for others to purchase and then enjoy the benefits anyway.

RIGHTS often are the purchase of public goods…. The rule of law is a public good. So in these circumstances there will be free riders. The government has to create collective action and require the purchase of the goods.

US v Caroll Towing

Kelo v City of New London

Critical Legal Studies This is rooted in critical theory which is itself rooted in hermeneutics.

- **v. Scientific Revolution** was based on the idea of empiricism. Meaning that nothing was real that couldn't be experienced through our senses.
  - **1.** We're born as blank slates and we get information through observations and memories and associations.
- **vi. Hermeneutics** Society precedes rationality and information about the world. The reality of the world comes from the social practices that exist which give certain meanings to things. Even personal identity is a function of social forms.

vii. **Critical Theory – Form of Hermeneutics –** They accept that personal identity and rationality are a function of the interpretation of social practices all around us but they believe that we have misunderstood all these social practices and misinterpreted them.

1. So for example, Marx was a critical theorist who argued that our interpretation of society was all wrong. We don't have freedom because of God, but in fact we created God because we don't have political freedom and we don't have that because we have bad economic institutions that alienate us from our true selves.

viii. **Critical legal studies** (critical race theories, critical legal studies, feminist jurisprudence. These theories of law apply critical theory to our understanding of law. In order to understand how our legal system works, we have to understand how it relies on misinterpretations of individual identity, ideas of freedom, and equality. We also must understand that there can be no single interpretation of reality in society given our differences.

Questions for Next Week

Critical legal theorists argue that there is no single interpretation of reality that is possible given the many different communities that society is comprised of. If that is true, what are the implications for the rule of law.

If people cannot understand or identify with each other why should they care about equality or other moral values being brought into the legal system?

November 16, 2020

23) **Critical Legal Studies** Makes a prescriptive and descriptive critique of law.

Descriptive Critique is that it's impossible for everyone in a multicultural society to understand the same interpretive (hermeneutic) circle. For many people, the law will be incomprehensible.

Prescriptive Critique- The interpretation of law is not randomly distributed among different communities. The meaning of law is controlled by dominant groups in society.

i. Legal liberalism reflects the idea of capitalism on the rest of society and interprets everything within that meaning.

ii. The pretension of liberal neutrality is that the substance of law does not force anyone to live a certain type of life they don't choose. It preserves their autonomy to choose their own idea of the good life.
iii. This political theory requires neutrality between different ideas of the good life.
iv. Liberal law is incoherent because law has to mean one thing but liberalism says that morality is plural... that there are different ways of living your life that are all equally valid.
v. Law must be incoherent for a liberal perspective
vi. Law must be coercive.
    1. Because people don't understand the law it is all **arbitrary power.**
    2. It's the arbitrary power of the elite group that is being imposed.

Liberal law acts as if the law is transcendent above us. We have no control over it.

Crits people do have control over the law. The content of law isn't inevitable. It's a part of the political and moral sentiment of elite groups.

24) Challenges epistemology of self implicit in liberal law

Behaviorism

i. What counts as knowledge is what you can observe.
ii. What people think about what they do is irrelevant.
iii. What counts is what you can test

Hermeneutics

iv. Humans are rule-governed and the rules are determined by the constitutive meanings of their society.
v. People's ideas about what they are doing are key
vi. Their preferences are a function of their identity
vii. Their identity is a function of the community in which they live and its intersubjective meanings.
viii. Challenges Political foundation and organization of law.

Says that law is based on the identity that people have and that the present organization of law excludes the identity of many different members of society who are marginalized

Power/ Dominance theory of law vs equality/sameness theory.

25) Methodology For Bridging the Understanding and eliminating the arbitrary basis of law.

Trashing: This method tries to ***undermine assertions about the necessity*** of the organization of things by showing how other conclusions can be drawn from any given set of assumptions. This method accepts assumptions and questions conclusions.

Deconstruction: This approach seeks to articulate the ***assumptions that are implicit in discourses***. By doing so, critics destabilize oppressive hierarchies. For example, what are the assumptions that underlie the assertion that individuals are the basic actors in society? This method starts with conclusions to uncover the (often disagreeable) assumptions that support them.

Genealogy: This method ***traces the family trees of ideas*** and categories to show how classifications that are seen as natural are actually the product of accidents and historical events. By doing so, genealogy helps to explain the forces that support accepted definitions. Discipline and Punish by Michel Foucault provides an excellent example of this approach

Questions for next week.

If different critical theories of law are correct, people who belong to different communities cannot communicate because they don't share common meanings. If they are correct, how is the rule of law possible?

While some people argue that communities of interpretation can merge if they are exposed to each other some feminist scholars, suggest that the differences in these communities are biological and cannot be overcome. If this is true what does this mean for the possibility of men and women living under a single system of law?

Critical studies of law look to expose the hidden assumptions in existing laws to show how they reflect meanings that are not neutral in their application. While these critical theories have been very successful in exposing these hidden meanings they have been less successful in getting the law to reflect their communitarian solutions. Why were critical theories successful in changing the marital rape exclusion in People v Liberta but unsuccessful in prohibiting hate speech in R.A.V, v Minneapolis.

November 23, 2020

26) Critical Theories of law have been successful through the use of genealogy and other tools in showing how modern laws are based on social understandings that are anachronistic. These outdated beliefs are often repudiated as offensive.

When the goal of a particular legal challenge is to overturn this meaning for the purpose of giving the oppressed group equal rights to individual autonomy, the cases have been successful. eg *People v Liberta*

Where the litigant has asked to overturn the accepted

27) **Constitutional Theory** - Theories of how we find out what **<u>our</u>** law is and what the proper methodology is for finding it.

28) Originalism- That we must understand the actual correct meaning of the law when applying it.

Common Methods of Discovering the meaning of the law.

i. **Literalism** - there is a natural and single objective meaning for every word.
ii. **Textualism --** look at the meaning of the text as it would be to a normal speaker of the language in the time and place it was written.
iii. **Intentionalism** -- Look at the actual psychological intentions of the authors of the document. But whose intentions do you look at at which intentions do you look at?
    1. <u>Determining the Framer</u> Laws are written by multiple people. Is there any such thing as group intent? What about the people who enact the legislation? They often have as much impact on the outcome of the document. Are they the framers too?

    2. <u>Different types of intention.</u>

        a. <u>Concrete Intentionalism</u>: Look at the concrete meaning of a term. This means the concrete meaning at the time the law was

written. So for example the requirement that the president be 35 years old when elected means concretely 35 earth years. Not the equivalent maturity.

b. Abstract Intentions -- Look at the abstract intentions of the authors and follow them. BUT the specific circumstances required to meet those intentions may change over time. So for example the 8th Amendment prohibits cruel and unusual punishment. But what does "cruelty" mean? The concrete intentionalist would say do what was normal at the time written but the abstract intentionalist says there is nothing special about that approach that makes it more original than anything else. The term being used is abstract so the abstract intention should be implemented. In this case determine what cruelty means. But the concrete applications necessary to implement the original abstract meaning might change over time even if the abstract commandment not to be cruel does not change.

November 30, 2020

29) Problems with Originalism

Hermeneutic Barriers to understanding.

30) Neutrality and Constitutional Interpretation

Bork _ Neutral Interpretation - His idea is premised on thing he supposed to be interpreting. He presumes we're a majoritarian democracy and then goes ahead an interprets everything to show that we are a majoritarian democracy.

i. rights were substantive exceptions to the majority.

Ely- No such thing as substantive rights, only procedural rights. The purpose of rights was to reinforce democratic institutions. Perpetual motion machine.

Dworkin's - Purpose of the judge is to act as a political theorist. To look at the abstract intentions of the framers and do what's necessary in today's society to implement those original intentions.

Brown v Board of Education -- What is the original meaning of this document? The Senate Floor manager said when asked whether this amendment required school integration. He answered no. Is there any way to support the result in Brown while remaining consistent with the original meaning?

b. Bork - No
c. Dworkin - Yes.

31) HOW DO WE KNOW WHAT SORT OF DEMOCRACY WE HAVE IN THE US?

A. Three different types of justice:

1. Perfect Procedural

2. Imperfect Procedural

3. Pure Procedural

B. Two Conceptions of Democracy And its value:

1. **Majoritarianism as inherently valuable**: -based on idea of UTILITARIANISM: maximization of average happiness

2) **Majoritarianism as instrumentally valuable.**Democratic process is subservient to other goals thought to be more important.

C. Why would democracy be valuable in one way or the other?

A. Bork, (Monaghan, Rhenquist) Neutral Principles

1. Democracy is majoritarianism: the tabulation of the majority will. But why should what the majority will be supreme?

2. Legal Positivist- Separation of law and morals -- Law is what is written- not abstract moral principles.

3. Moral Skeptic- No basis to choose between different moral preferences. Morality is essential irrational preferences so no principled basis to choose between them.

4. Neutral Derivation: Princples derived neutrally as well as implemented neutrally as Weschler said. Only legitimate moral principles are those chosen in the Constitution

5. Madisonian democracy: idea that majority rules. Cannot look beyond- No moral principles except those written in. Only basis for morality is democratic process.

a. Rights: substantive exceptions to democratic process.

B. CRITICISM Idea that morality derives from democracy as highest goal is not neutral-

A. cannot infer this from C without preconeption that this is true.--

a. CONCRETE/ABSTRACT distinction of Framers intent.- Which to choose about framers intent w/respect to rights--e.g. Free Speech-to protect democracy or human dignity?

b. Abstract intent will not yeild democracy as highest value but C doersn't say which is their intent and cannot infer concrete intentions to preserve DEM as highest goal unless you had preconception that democracy is highest goal and did not merely infer it from framer's intent. BUT THEN DEMOCRACY WOULD NOT BE NEUTRALLY DERIVED.

C. John Hart Ely - Neutral/ Process Based-- Representation Reinforcing Rights-

1. Rights = Process: Rights are not substantive exceptions to emocratic process but designed to coorect process failures of democratic process

a. Judicial Review: compaitble w/democratic process: because rights are about making democracy work.

(1) Free Speech - keeps communication open.

(2) Equal Protection-- Eliminate prejudice from decision making process.

(a) prejudice when designed to treat a group worse simply to hurt them.

(b) bad fit between purpose of statute and legitimate goals of the state--

2. CRITICISMS --

a. Process = Substance-- therefore rights not neutral- legislation by representation and not by jury trial =substance.

b. What is legitimate goal of govt?? This will force judges to become involved in basic substantive decisions of government. E.G. Is law against theft prejudice against burglers-- if its allowed its because of a substantive dnot merely procedural decision about provate property in society. -- Asking judges to decide which group is proper object of prejudice will draw them into the most morally substantive decisions that can be made.

c. What about right to be different?:Very narrow protection of rights--

D. Cass Sunstein: Civic Republicanism And Deliberative Democracy

1. Framers rejected 3 aspects of Government Authoritarianism:

1. Monacrchy
2. Self interested representation
3. Tyranny of Majority

2. Republic of Reason: Government must justify actions on basis of reasons which are intelligable to all, and not on basis of naked power preference of the most powerful group even if that powerful group uses the vote to get their way.

(1) No “natural” or scientific order justifying tyranny: rejected european justification of authoritarianism based on natural order.

(2) Culture is man-made

(3) Therefore decisions of government must be justified according to reasons.

3. Framing Federalists were Civic Republicans

a. Believed in civic virtue as basis of government.

b. Governemnt must act on basis of common good and not merely for the will of all or the aggregate of self interest of different factions.

c. Contra most civic republicans they were not communitarians so they did not believe that civic virtue could only arise in small homogenious societies where everyone shared same experiences and therefore the same values.

1. Deliberative Democracy:

a. Federalists tried to set up institutions which would impose requirement of deliberation over government institutions so that different government officials would have to justify actions on basis of reasons that were "intelligably" for the common good and not jsut of most powerful faction.

b. Adopts Burkes idea that representatives are to use judgment to arrive at common good and not just reflect naked preferences.

5. Rejects interest group pluralism (IGP): idea of democracy that government is just about power and that power goes to the faction that pays the most (in votes) to buy it.

a. Government is about common good not factional interest. IGP argues that there is no public good apart from the aggregation of the many factional interests that we have.

b. Government institutions are about creating basis of deliberation to achieve this common good and to justify decisions accordingly.

c. Govt aims at TRUE INTEREST and not self interest of various groups.

6. Requirements

a. No Naked Preferences:Govt actions must serve some public value

b. Equal Treatment unless justified by reference to resaons relating to public good and not good of some faction.

7. Judicial Review insitution to encourage deliberative democracy by forcing democratic (political) branch officials to think about actions and justify them according to reasons related to the common good.

a. Weak Version: rational basis test: rationally related to some legitimate government purpose.

b. Hightened Scrutiny: Measure more likely to reflect naked preference so require more stringent justification.

c. Strongest Scrutiny: Impermissable Ends: Some things like violating equal protection of people suggest a naked preference almost per se and are usually disallowed.

1. Ronald Dworkin-- Forum of Substance-- Law As Embodiemnt of Moral Principles

   a. Judge looks to moral princplies embodied in institutional principles of society. Judge has no discretion to fill in gaps: never makes law but finds it in the preexisting grain of soicety's morality.

   b. Judge ALWAYS HAS A RIGHT ANSWER ABOUT Which RIGHTS EXIST:

   c. Dworkin, unlike Bork & Ely, bases rights on society's morality as expressed in the acknowledges the connectiuon between political and C theory which they deny--

      i. Political Theory of Rights:

         1. Basis of justice is equal concern and respect in design and administration of government.

         2. Government must be neutral between different conceptions of the good life.

         3. Law is about justification of force and force wouldn't be justified if people didn;t feel that law didn't respect their conception of good.

         4. Utilitarianism is basic element of democratic legitimacy - idea of mazimizing average utility. BUT...

(1) External preferences about the way other people ought to liver their lives is impermissable vioaltion of equal concern and respect: It counts persons vote twice and it violates principle of neutrality between conceptions of the good life.

MORAL BASIS OF LAW II: CONCEPTS OF JUSTICE:

Cases: Koramatsu v US

Lochner v. NY

32) Ten Commandment Contest.

Contestant: A Married Man had sexual relations with unmarried woman. Claimed he had not committed adultery.

i. BLUE -- No money because - Abstract intentionalism Because the modern context of adultery is different

or in the alternative Literal interpretation.

ii. GOLD -- No money.. Contest rules were interpreted. Textualism

Contestant B Married woman who had extra marital relations with husband's knowledge and consent.

iii. BLUE-- No money
iv. Gold -- No money.