

INTRO.

DESCRIBE / DEFEND liberal theory of law. 'o "ruling theory." (UTILITARIAN)

GEN. LEGAL THEORY: NORMATIVE AND CONCEPTUAL.

BENTHAM: LAST Anglo-American AUTHOR TO OFFER GENERAL theory OF law.

CONCEPTUAL PART: LEGAL POSITIVISM - H.L.A. HART

NORMATIVE PART: ECONOMIC ANALYSIS - WELFARE OF COMMUNITY

POSITIVISM: LAW MADE EXPLICIT SOCIAL PRACTICE OF INSTITUTIONAL DECISION. Formalism

REJECTS: product OF "GENERAL will."

CRITICS: LEFT = FORMALISM; Right = (BURKE): inability TO include morality.

∴ TRUST culture 'o social ENGINEERING.

REJECTS pre-existing RIGHTS AS non-EMPIRICAL; METAPHYSICAL

INTERPLAY: indiv. RIGHTS + COMMUNITY WELFARE

xi ESSAY: DEPARTS FROM older THEORIES - PRESUPPOSES METAPHYSICS

I. Jurisprudence:

STUDY OF difficult problems, eg. ETHICS; NOT AMENABLE TO ordinary legal TECHNIQUES.

3 ANALYTICAL JURISPRUDENCE: mid-CENTURY - DEFINITION OF TERMS' MEANING. [English]

- DIFFICULT TO CONNECT TO non-LEGAL VALUES.

AMERICAN JURISPRUDENCE: HOW COURTS DECIDE difficult SUITS

eg. HOLMES - ATTACKING ORTHODOXY

LED TO LEGAL REALISM: JUDGES DECIDE ACCORDING TO OWN POLITICAL / MORAL TASTES.

THEN FIT INTO RULES

- SOCIOLOGICAL + TACTICAL schools - FAILED

5 - NO ATTEMPT TO LOOK INTO moral DIMENSIONS

- ECONOMIC ANALYSIS = FAILED: IGNORED MORAL QUESTIONS

6 INSTRUMENTAL BRANCH, post-REALISM: HOW TO BEST ADVANCE GEN. WELFARE.

7 - ALL IGNORE THAT CORE ISSUES = MORAL.

- 7. HLA HART: ET AL. LEGAL RULES = COMPREHENSIBLE THRU POPULAR MORALITY + CONCEPTIONS.
- 11 GOVNT: MUST TREAT ITS CITIZENS W/ RESPECT + DIGNITY COMMUNITY CLAIMS AT LARGE.
- 12 EMPHASIZE LAWS CONSTRAINING MORAL PRINCIPLES '10 CONFLICTING GOALS.

II.
Model of Rules I

- 17 Positivism:
 LAW OF COMMUNITY = EXHAUSTIVE. IF SITUATION \neq COVERED, FORCES EXERCISE OF DISCRETION.
 LEGAL OBLIGATION = MUST FALL UNDER EXISTING RULE.
- 18 AUSTIN: CLASSES OF RULE: DEPENDS ON WHO WRITES... "SOVEREIGN" : TOO SIMPLISTIC.
HART: PRIMARY/SECONDARY RULES; REJECTS RULE = COMMAND.
 PRIMARY: GRANT RIGHTS, IMPOSE OBLIGATIONS.
 SECONDARY: HOW TO MODIFY PRIMARY (IE. CONGRESS, ETC.).
- 19 RULE \neq ORDER - NORMATIVE: SETS BEHAVIORAL STANDARD.
 VALIDITY = AUTHORITY TO GIVE. '10 FORCE.
 = ACCEPTANCE BY COMMUNITY OR ENACTED THRU SECONDARY RULE. (VALID):
 RULE OF RECOGNITION (COURT, LX, ETC.)
 \therefore RULES \neq PURE FORCE OF POWER; = CONSTITUTIONAL BACKGROUND.
- 24 ANALYSIS: LEGAL PRINCIPLES V. LEGAL RULES
- 28 PRINCIPLES: MOST AT WORK IN DIFFICULT CASES.
 - CHOICE BETWEEN BINDING V. DISCRETIONARY.
- 31 DISCRETION: ONLY EXISTS IN AREA LEFT OPEN BY BELT OF RESTRICTION.
- 37 POSITIVIST DOCTRINE - CHANGE EFFECTS SOME PRINCIPLE; TAKE INTO ACCOUNT COUNTER ARGS, PRECED
- 41 BUT: PRINCIPLES DRAW SUPPORT FROM LEGAL INSTITUTIONS, NOT DIRECT ENOUGH CONNECTION.
- 45 \therefore Positivism: TOO SIMPLISTIC.

MODEL OF RULES II:

46 wrong to suppose (positivism) : (COMMON, FUND. TEST TO DETERMINE LAW STANDARDS.

48 obligation v. duty:

Law: provides duty - ie judicial duties / no duty (discretion)

49 problem: Why Judges have such a duty?

HART: EXISTS WHEN SOCIAL RULES EXIST (PRACTICE - CONDITIONS) → BEHAVIOR

ie. Judges = SOCIAL BEHAVIOR : SOCIAL RULE THEORY.

[BUT : POSITION DENIES NORMATIVE, ACTUAL DUTY 'to PHENOMENOLOGY.]

ie. ASSERTION OF DUTY INFERS EXISTENCE OF SOCIAL RULE. [OR ~ SOMETIMES]

52 - CANNOT COVER ALL CIRCUMSTANCES. ie. NO CORRESPONDING SOCIAL RULE EXISTS.

eg. VEGETARIAN

OR ENTIRE AGREEMENT AS TO SCOPE. ESP. IN CONTROVERSY.

∴ SOCIAL RULE THEORY SURVIVES ONLY IF UNACCEPTIBLY WEAKENED.

59 POSITIVIST FUNDAMENTAL TEST FOR LAW:

HART: EVERY NATIONAL LEGAL SYSTEM = SOCIAL RULE SET.

69 DO Judges HAVE DISCRETION: DIFFERENT TYPES OF DISCRETION.

77 RULES v. PRINCIPLES

IV. HARD CASES:

81 positivism: hard cases = judicial discretion: legislates new rights. (wrong).

82 most popular theories of adjudication - place judging IN shadow of lx.

ie. NEW LAWS - LEGISLATIVE FUNCTIONS

Arg. of policy: COLLECTIVE GOAL OF COMMUNITY

Arg. of principle: IND. / GROUP RIGHT.

83 MAJOR LX: REQUIRES BOTH

84 TRADITIONAL OBJECTIONS TO JUDICIAL ORIGINALITY:

1. DIVERTS FROM POP. REPRESENTATION.

2. NEW DECISIONS AND RETROACTIVITY

- MOST SALIENT AS APPLIED TO POLICY '10 PRINCIPLES.

IE. Policy = POLITICAL PROCESS TO DETERMINE INTERESTS.

85 - JUDGMENT FROM PRINCIPLE - OBJ. & VIABLE. PRINCIPLE TRANSCENDS POLITICAL.

- RETROACTIVITY ≠ COUNT : RIGHT = RECOGNIZED.

87 RIGHTS THESIS: JUDICIAL DECISIONS ENFORCE EXISTING POLITICAL RIGHTS.

ORIGINAL DECISIONS: HISTORY + MORALITY TOGETHER '10 EXCLUSION. : COMPREHENSIVE.

INCLUDES POLITICAL RESPONSIBILITY : IE CONSISTANT W/A THEORY '10 ISOLATION.

89 IN SHORT: 1. DISTINCTION : INDIV. RIGHTS / SOCIAL GOALS

2. PRECEDENT / INSTITUTIONAL HISTORY

3. FORCED POLITICAL JUDGMENTS TO DETERM. LEGAL RIGHTS.

90 RIGHTS AND GOALS:

91 FOCUS: DISTRIBUTIONAL CHARACTER

POLITICAL RIGHT = INDIVIDUATED POLITICAL AIM.

GOAL = NON-INDIVIDUATED POLITICAL AIM. EG. GROUP DISTRIBUTION, ECONOMICS

COMPETING GOALS.

RIGHTS = ALSO ABSOLUTE OR LESS THAN ABSOLUTE; NORMALLY ≠ DEFEATED BY GOAL.

PRINCIPLES AND UTILITIES:

94 MORAL ANTHROPOLOGY: PRINCIPLES. CAUSALLY DETERMINED BY COLLECTIVE COMMUNITY GOALS.

95 - VAGUE CONCEPT, RULE UTILITARIANISM: RIGHT IF IMPROVES GENERAL WELFARE.

96 - NO DISTINCTION: PRINCIPLE / POLICY.

ECONOMICS AND PRINCIPLE: USUAL ASSUMPTION, ECON. = POLICY, BUT IGNORES ABSOLUT/CONCRETE RIGHT

EG. ECON. = CONCRETE RIGHTS; HAND ANALYSIS.

INSTITUTIONAL RIGHTS:

101 Rights Thesis: Judges decide hard cases by CONFIRMING / DENYING CONCRETE RIGHTS.

INSTITUTIONAL: REFERENTIAL TO RULE SET, THEORY

LEGAL RIGHTS:

105 LEGISLATION: INTENTION + PURPOSE: FUNCTION - JUSTIFICATION.

CONSTITUTION / STATUTE - LIMITS TO DECISION / CONTEXTUAL

111 COMMON LAW: RARELY ATTEMPT LEGISLATIVE DRAFTSMANSHIP; OFTEN INVITE NEW CASE DEFINITIONS

112 JUDGES OFTEN DISAGREE W/ EACH OTHER RE: RULE / PRINCIPLE STATUS

OFTEN AGREE OLD CASES = "GRAVITATIONAL FORCE"

IE. RARELY ASSUME INDEPENDENCE. [w/o PRECEDENCE]

113 GRAVITATIONAL FORCE: FAIRNESS OF TREATING CASES ALIKE. '10 WISDOM.

116 - USE OF CASE PRINCIPLE SCHEME TO JUSTIFY PRECEDENTIAL VALUE.

'10 STATUTES WHICH FIT, MUST FIND PRINCIPLES WHICH FIT, CASES + STATUTES -

IE. MUST SUPPORT PRIOR CASE DECISIONS.

119 PROBLEM W/ ACHIEVING TOTAL CASE CONSISTENCY

121 EG. MAY NEED TO ADMIT SOME ASPECT OF TX = WRONG: MISTAKE.

123 MISTAKE - AS LOSS OF FORCE = UNDERCUTS IT'S APPEAL TO FAIRNESS.

POLITICAL OBJECTIONS:

JUDGE RELIES ON OWN CONVICTIONS / MORALITY: 2 TYPES:

1. GROUP (POLITICAL) PRESSURE

124 2. INDIV.

127+ PERSONAL VARIANCES + INSTITUTIONAL RIGHTS.

- ABILITY OF JUDGE TO BE WRONG.

V. CONSTITUTIONAL CASES:

- 133 "VAGUE STANDARDS" OF Bill of Rights - CHOSEN DELIBERATELY INSTEAD OF CERTAIN RULES.
- USE OF STRICT: 1) INTERP. OF DOCUMENT OR 2) IMPOSITION OF STRICT MORAL OPINION
- 134 THEORY OF "STRICT" MEANING = LIMITS TO RIGHTS RECOG. BY LIMITED GROUP AT FIXED TIME.
HIGHLY CRUDE: INABILITY TO RECOG. NEED TO APPLY INSTRUCTIONS TO SITUATIONS.
: EG. DOES NOT RECOG. IDEA OF "CONCEPT" + BENCHMARKS
- 135 VAGUE CONCEPTS ≠ LIST + IMPOSES OBLIGATION TO USE INTELLIGENCE.
- 137 JUDICIAL ACTIVISM V. RESTRAINT:
- 138 SKEPTICISM: MAN = NO MORAL RIGHTS AGAINST STATE: = POSTULATORY AMORALISM.
REFERENCE: MAN = MORAL RIGHTS BUT BEST = POLITICAL CONTEXT.
- 140 LEARNED HAND - SKEPTIC: MORAL RIGHTS = ONLY EXPRESSION OF PERSONAL PREFERENCES.
INFERS: MAN = NO RIGHT AGAINST MAJORITY - ONLY MAJORITY (LEGISLATURE) CONTROL.
REFERENCE: POPULAR - ARGUMENT FROM DEMOCRACY: SHOULD BE DECIDED BY MAJORITY (LX).
% COURTS.
- 141 IMPROPERLY ASSUMES: 1. LX (PARTICULARLY STATE) = RESPONSIBLE TO PEOPLE.
2. DECISIONS = a) SOUNDER OR b) FAIRER
- 142 EG. ALWAYS FAIRER TO ALLOW A MAJORITY TO DECIDE.
BUT: WHY THEN = CONSTITUTIONAL SYSTEM?
MARBUY V. MADISON: REVIEW BY COURT = FUNDAMENTAL COMPONENT.
- 144 BICKEL: ACTIVISM = INTRINSICALLY UNSOUND: % COURT CANNOT = PRAGMATIC RESOLUTION.
∴ CONCEDES CT. = ENTITLED TO ACTIVISM BUT = ILLUSION % TEST = UTILITARIANISM
V. INDIV. MORAL RIGHTS AGAINST STATE. ∴ SKEPTICAL.
- 148 ∴ USE OF "MORALITY" W/ STRICT CONSTRUCTION + MAJORITARIANISM
= INCOHERENT, PRETENSE FOR SKEPTICAL RELATIVISM AND SEPARATION
OF LAW FROM Ø.

VI JUSTICE AND RIGHTS:

- 150 Rawls + SOCIAL CONTRACT THEORY: Rawls - differs = ORDINARY PEOPLE w/OUT MEMORY.
SELF-INTEREST = 1) largest degree of political liberty; 2) WORST-OFF BENEFIT
- 151 PROBLEM OF "CONTRACT" ITSELF.
- 152 - IS IT FAIR TO APPLY PARADIGM UNDER NON-CONSENSUAL CIRCUMSTANCES.
- 153 USES ANTECEDENT 'O REAL JUDGMENT
FACT THAT CHOICE AT ONE TIME = RIGHT ≠ FAIR TO ENFORCE AT ANOTHER
- 156 IS ORIGINAL POSITION A SUPPLEMENT TO 2 PRINCIPLES VIA REFLECTIVE EQUILIBRIUM?
(E.g. Rawls COOKING THE BOOKS?)
- 157 E.G. NOT ORDINARY MORAL UNDERSTANDING THAT PRINCIPLES = ACCEPTIBLE ONLY WHEN
CHOSEN IN ORIGINAL POSITION.
→ APPLICATION TO NORMAL WORLD = NEGLIGIBLE
- 158 RAWLS: SUGGESTS O.P. = A MAJOR SUBSTANTIVE PRODUCT OF THEORY:
i.e. "FUNDAMENTAL PRINCIPLES GOVERNING OUR MORAL POWERS + SENSE OF JUSTICE..."
E.g. INTUITIVE, COMMON TO ALL. : PASSIVE ASSUMPTION.
- 159 TECHNIQUE OF EQUILIBRIUM: (RAWLS)
JUSTICE - DERIVED FROM SENSE 'O INFERED OR REDUCED. : DIRECT PERCEPTIONS
- 160 2 MODELS: 1) NATURAL MODEL: OBJECTIVE MORAL REALITY - DISCOVERED
DENOTE ACTUAL, FUNDAMENTAL LAWS; OBSERVATION 'O INTERP.
Compels: STRICT ADHERENCE / NO COMPROMISE
- 161 2) STIPULATED FEATURES: TO BE CONSTRUCTED, NON-INDEPENDENT
Common law analogy - ACCOMMODATION 'O OBJECTIVE REALITY
Compromise; ACCOUNTABILITY FOR DECISIONS 'O OBSERVATION TRUST
CONSISTENCY = INDEPENDENT REQUIREMENT 'O PHYSICAL REALITY.
i.e. RECOG. INTUITIONS BUT NOT AS Ø DOGMA.
Accom. LARGER GROUP INTUITIONS.

168 CONTRACT:

Old IDEA; O.P. = APPLICATION: Rawls supposes we would accept O.P.

BUT: CONTRACT VALIDITY CANNOT = PER SE VALID. DEEPER THEORY:

DEONTOLOGICAL: Rights = FUNDAMENTAL IN POLITICAL MORALITY

171 THEORY WHICH MAKES RIGHTS FUNDAMENTAL = DIFFERENT THAN ONE WHICH = DUTIES.

CONTRACT AS INTERMEDIATE DEVICE: GOAL, RIGHT, DUTY-BASED. [UTIL, PAINE, KANT]

Goal: INDIV. = ONLY VALUE = GROUP. (FASCISM, UTIL.)

172 Right/DUTY: INDIV. = AT CENTER: DUTY = CONFORMITY; Right = INDEPEN.

173 RAWLS = RIGHT-BASED DEEP THEORY - DISTINCT INDIV.

177 ORIGINAL POSITION:

177 IGNORANCE IN O.P. = MODEL OF LIMITED POWER IN POLITICAL SITUATION.

179 LIBERTY = PRODUCT OF CONTRACT % CONDITION.

181 EQUALITY: NOT BY CONTRACT BUT AS RAWLS FUNDAMENTAL PREMISE.

182 THEORY ASSUMES NATURAL RIGHT TO EQUALITY.

UNLIKE OTHERS = NON-SPECIFIC

VII. TAKING RIGHTS SERIOUSLY:

184 BENTHAM - NO RIGHTS APART FROM WHAT LAW PROVIDES.

186 CONST. ≠ LIST MORAL RIGHTS OF CITIZEN V. GOVERNMENT.

MORAL RIGHT TO BREAK LAW: QUESTION OF SCOPE OF DUTY TO STATE.

197 IF = MORAL RIGHTS: MUST SURVIVE ANY CONTRARY LX. OF ADJUDICATION.

198 RIGHTS AGAINST GOV'T ≠ GIFT FROM GOD: COMPLEX - NOTIONS OF DIGNITY (KANT),

199 % BALANCING COMPETING RIGHTS

200 LIMITATIONS: CORE RIGHT ≠ AT STAKE; COMPETING RIGHT ABRIDGED; HIGH SOCIAL COST

VIII Civil Disobedience:

- 206 TOLERATION OF SOME DISOBEDIENCE ≠ COLLAPSE.
- 207 IMPLIES USE OF POLITICAL / PROSECUTORIAL DISCRETION.
- 210 DOUBTFULNESS OF LAW FACTOR.
- 217 GOV'T = SPECIAL RESPONSIBILITY TO THOSE WHO ACT ON REASONABLE JUDGMENT OF INVALIDITY
o RISK OF SOCIAL POLICY, HARM ANALYSIS.

IX REVERSE DISCRIMINATION:

- 223 DE FUNIS = SPLIT Philos. Allies: eg. liberal - RACE DISCRIM. = PER SE EVIL; AFF. ED. ACCESS
= MOOT; DOUGLAS = DISSENT = NO QUOTAS
- 225 CONST. ≠ CONDEMN RACIAL CLASSIFICATION DIRECTLY. % CENSORSHIP, STATE RELIGION
- 229 EQ. PRO - DOES NOT MAKE ALL RACIAL CLASSIFICATIONS ILLEGAL.
- 232 ARG: HELPS IMPROVE COMMUNITY = FORM OF UTILITARIANISM.

X. Liberty & Moralism:

- 240 (1958) LORD DEVLIN: ENFORCEMENT OF MORALS: IF SOCIETY = ABOMINABLE ∴ ERADICATE.
- 241 (HOMOSEXUALITY): PUBLIC DECENCY / ORDER = LAW; % PRIVATE MORALITY: BENTHAM
= WRONG: SOCIETY - RIGHT TO PUNISH BEHAVIOR WHICH IT STRONGLY DISAPPROVES.
1. SOCIETY'S RIGHT TO PROTECT ITSELF: MOST ATTENTION
- 243 STANDARDS WHICH MAJORITY PLACES BEYOND TOLERATION - NECESSARY FOR SOCIAL SURVIVAL
∴ CRIM. LAW TO ENFORCE TO PRESERVE NECESSARY CONFORMITY
BUT MUST ALLOW MAX. CONFORMITY FREEDOM CONSIS. W/ SOCIAL INTEGRITY.
ie. homo. = INTOLERANCE, INDIGNATION + DISGUST; - ABOMINABLE ∴ SELF-PROTECTION.
- 244 CRITICISM: HART - WRONGLY ASSUMES SOCIAL DESTRUCTION
- 245 ∴ FREEDOM = POSSIBLE ONLY WHEN SOCIAL OUTRAGE = MISDIAGNOSED.
- OUTRAGE = JUSTIFICATION IN ITSELF

246 2. SOCIETY'S RIGHT TO FOLLOW ITS OWN LIGHTS

ENGAGEMENT IN h. WOULD CHANGE SOCIETY: EFFECT CHILDREN, ETC.

247 Legislators: MUST DETERMINE IMMORALITY: DUTY TO ACT ON SOCIAL CONSENSUS.

IE. COMMUNITY PROTECTS ITSELF: ACT ON OWN LIGHTS.

CRITICISM: INVALID, "MORAL SOCIOLOGY"

249 : PROBLEM OF PREJUDICE, PERSONAL EMOTION, FACT: EG. LACK OF SUPPORTING CRITERIA

253 : MORAL POSITION REALLY = ANTHROPOLOGICAL W/O MORAL CREDENTIALS.

255 Although Devlin UNDERSTANDS distinctions, FOLLOWERS ~ WILL NOT. [ELITISM?]

256 Pornography:

LEADS TO CRIME = SPECULATIVE

258 PROBLEM OF RELIANCE UPON TASTE, DISLIKE OR ARBITRARINESS AS WAY TO ABRIDGE FREEDOM

XI Liberty + Liberalism:

259 Mill: ON LIBERTY: SERVED CONSERVATIVES BETTER THAN LIBERALS.

262 LIBERTY = INDISCRIMINATE - DOES NOT DISTINGUISH BEHAVIOR.

264 POINT OF BOOK = INDEPENDENCE OF PERSONALITY ≠ LICENSE + ANARCHY
= COMPONENT OF A JUST SOCIETY.

CONFUSION RE: MILL IN ALL SIDES.

XII What Rights DO WE HAVE?

267 liberty right: ABSURD TO SUPPOSE. TRADITIONAL: ABSENCE OF OBSTACLES; LIBERTY AS LICENSE.

BUT: LAWS NEEDED TO ATTACK INEQUALITY - ∴ INVOLVE COMPROMISE.

270 DIFFICULT TO VIEW LIBERTY AS A COMMODITY.

272 KEY CONCEPT: EQUALITY - GOVNT. MUST TREAT W/ EQUAL CONCERN RESPECT.

273 EQ. RIGHT TO TREATMENT AS AN EQUAL.