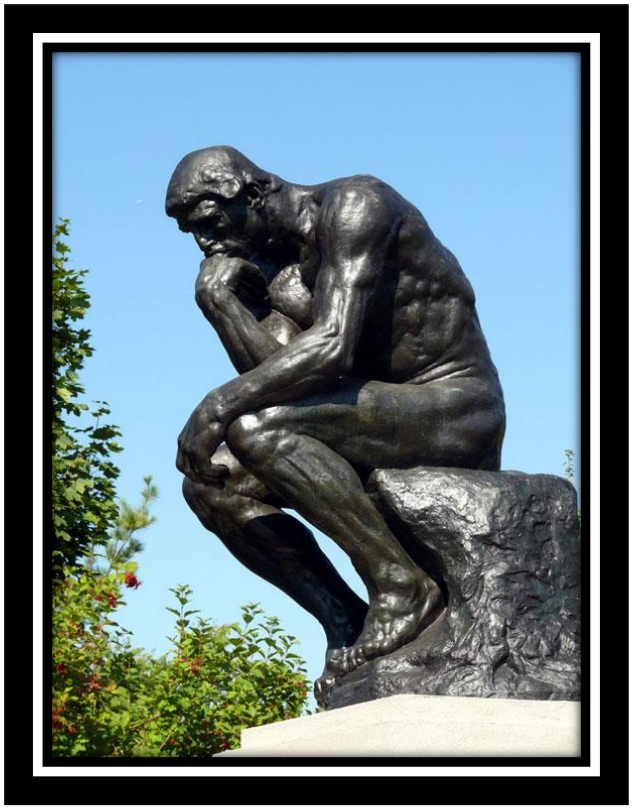
LAWS 5106
Legal Theory



SAMPLE EXTRACT

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Modern Natural Law

Lon Fuller's 'Internal Morality of Law'

- Procedural natural law approach (rather than substantive).
- Allegory of King Rex (failure not making bad law, but not making law at all).
- Inner morality of law condemned to remain largely a morality of aspiration & not duty.

- Law's purpose = to subject human conduct to the governance of rules.
- Law is a means to an end (if a set of rules cannot fulfil that end, it is not 'law').
- Contrast with external morality of law, which consists of substantive principles of justice & fairness.

- Eight Principles of Legal Excellence:
  - Generality = there must be rules, however un/fair they may be – can be directed towards a single named individual (unfairness belongs to the external morality of law).
  - Promulgation = laws must be published/available (no need to be explained to every citizen).
  - Non-Retroactivity = laws must generally be prospective (however sometimes may be necessary to advance the cause of legality).
  - Clarity = obvious that obscure/incoherent legislation can make legality unattainable (however too much clarity may render their application less useful).
  - Non-Contradiction = contradictory laws cannot effectively guide conduct (e.g. CC s109).
  - Possibility of Compliance = laws should not demand the impossible (issue if some persons cannot meet the standard of reasonable person).
  - Constancy = the law should not be changed too frequently (we are often condemned to walk the middle path between too frequent change & no change at all).
  - Congruence between Declared Rule & Official Action (managed by judiciary).

- Practical Application of Principles:
  - Some situations when full details of law must be kept secret (does not apply to a general law).
  - Infringements of legal morality tend to become cumulative.
  - Promulgation & retroactivity not as important if expressing community conceptions of justice.
  - Stringency & priority of principles depends on branch of law & kind of legal rule in question.
  - Application easy but to know where/when/how to achieve them is the task of a lawgiver.

- Government that is just/good is likely to also be good on formal/procedural matters.
- If proper procedures followed, some officials may be less willing to act in evil/corrupt ways.
- Likely too much to claim adherence would guarantee a substantively just system (Bix, 2009).

- Hart's Critique:
  - Agrees law may have to adhere to be effective (but questions existence of moral content).
  - Many efficient activities have a purpose, but not necessarily a moral purpose (e.g. poisoning).

- Nigel Simmonds' Critique:
  - Query whether a wicked legal system would have good reason to apply these principles.
  - An immoral legal system would not seek to apply such principles (if 'moral').
  - Though wicked regimes may seek to adhere for purposes of appearance (if instrumental).

Ronald Dworkin

The Model of Rules I:

- In hard cases lawyers make use of standards that do not function as rules but as principles/policies.
- Law consists of principles as well as rules.

- *Riggs v Palmer* (1889) – heir named in the will of his grandfather, heir murdered his grandfather to expedite the process, issue was could he inherit.
  - Held: if ordinary meaning of the words in statute enforced then Riggs would inherit, but there are general maxims that can be applied in interpretation (should not profit from own crime).
  - Contrary to Hart's theory (judge does not just exercise discretion – when rules run out, there are other standards that govern judicial determinations).

- *Henningsen v Bloomfield Motors* (1960) – issue whether car manufactures can limit their liability in cases of a defective car.
  - Held: general principle was applied (courts will not permit themselves to be used as instruments of inequity/injustice).

- Rule = a will is invalid unless signed by three witnesses.
- Principle = no-one shall be permitted by his own wrong.

- Principles are standards to be observed because they are a requirement of justice or fairness or some other dimension of morality.

- Able to build a model truer to complexity/sophistication of our own practices if we ignore Hart's.

Possible Counter Arguments for Legal Positivists:

- Principles are simply another form of rules (identifiable as such under the rule of recognition).
- Principles are merely an exercise of discretion (moral & political considerations rather than law).

Response by Dworkin:

- Rules & principles are logically distinct from one another.
  - Rules are applicable in an all-or-nothing fashion (either the rule applies or it does not).
  - Principles state a reason arguing in one direction but does not necessitate a particular decision.
  - Principles have a dimension of relative weight/importance (not so with rules).

- Principles cannot be recognised under the Rule of Recognition.
  - Test of pedigree (source of law) will not work in the above cases.
  - The origin of principles does not lie in a particular decision but are developed over time. [surely they can be recognised if it is understood they are a source of law].

Rules, Principles & Discretion:

- ‘Weak’ discretion = standards cannot be applied mechanically but need judgement (take five best men).

- ‘Strong’ discretion = bound by standards set by the authority in discretion (take any five men)

- There is only ‘weak’ discretion due to the existence of principles.
- Discretion is like a whole in a donut (legal principles surround discretion).
- Principles appear to be merit-based, rather than source-based (therefore basis of positivism is flawed).

- Hart must concede that judges have strong discretion (Dworkin).
  [but Hart could argue this is part of the Rule of Recognition or that his theory has a different task].

Issues with Dworkin’s Approach (Hart):

- Difference only one of degree (consider *Riggs v Palmers* where rule interpreted in light of principle).

- Many principles can be identified by the manner of their creation/adoption by an authoritative source (therefore Dworkin suggests principles cannot be captured because they are too numerous or fleeting).

Law’s Empire:

- Distinction between ‘propositions of law’ (claims about what the law requires) & ‘grounds of law’ (criteria for which propositions are true/false).

- Legal practice is argumentative (arguing about these propositions).

- <u>Empirical disagreement</u> = officials agree on grounds of law but disagree whether grounds satisfied in a particular case.

  - *Henningsen* = agreement about grounds of law but dispute about application.
    - Not difficult for positivists to accommodate.
    - Exclusivist route (judges legally obligated to apply extralegal norms in such cases).
    - Inclusive route (grounds of law can be moral provided convention among judges).

- <u>Theoretical disagreement</u> = officials disagree on grounds of law & advance different criteria on how law should be identified.

  - *Riggs v Palmer* (1889) – Gray J favoured a literal theory of interpretation while Earl J found interpretation IAW general principles.

  - Judges often disagree on what the grounds of law are.

  - More powerful objection to positivism (Shapiro).
    - Grounds of law are determined by convention for exclusive & inclusive positivists.
    - Positivism cannot explain prevalence (not accounted for under rule of recognition).
    - Positivism counter = repair argument (in such cases, judges are repairing the law).

Law as Integrity:

- Focused on legal adjudication (any judge's opinion is a piece of legal philosophy).

- Constructive interpretation.
  - Matter of imposing purpose on an object/practice to make it the best possible example of the form/genre to which it is taken to belong (not a matter of intention of the law-maker).

  - **Must fit** the relevant materials (legislation/decisions).

  - **Must justify** the relevant materials (presenting them in the most morally appealing light).
    - Make the law the best it can be.
    - Interpreter must ascribe some 'point' to the subject matter.
    - Purpose of law is to justify the use of collective power against citizens/groups.
    - Present law in best light of political morality (how power should be exercised).

  - Judge must extract/assemble the set of principles that offer the best fit & justification.
  - When principles are applied to the case they identify the correct decision & justify it.

  - Judge therefore aims to make the law morally coherent ('law as integrity').
    - Justice.
    - Fairness.
    - Due process.

  - *Engineers Case* (1920) – nature of federalism, grant of law-making power to Cth parliament, doctrine narrow interpretation of power (in light of reserved state powers) was removed.

    - Narrow interpretation = principles of federalism fit & justify the Constitution (dictate law-making power should be constrictively construed).

    - Broader interpretation = a better fit & justification for the Constitution.

    - Aimed to justify the coercive power of the Commonwealth over the States.

  - Like a chain novel (constrained by previous, consider direction & plot, try to make it the best it can be, not considering what prior novelists intended but how to make the novel coherent).

  - Role of principles, law & morality are intertwined given identifying the content of the law entails a judgement in political morality about the most morally appealing principles).

  - No simple description of law as it is.
    - Past decisions/actions cannot offer answer to a current legal question unless ordered.
    - Lawyers must go through reasoning process to derive answer from various materials.
    - Even recent decisions may be argued as inapplicable due to breadth, facts etc.

  - Challenges.
    - Threatens stability/certainty of the law.
    - Theory for judges rather than full theory of law (does not satisfy ordinary citizens).
      - "Bad man" – avoiding sanctions (Holmes J).
      - Important that different citizens view what the law is roughly the same way.

    - Lack of separation between jurisprudential & practical/doctrinal legal questions.

- "Right Answer" Thesis.
  - Perfected form (Plato; Fuller).
  - Law is a seamless web (looking at materials will reveal best principle that fits).

  - Even in difficult decisions, judges argue/decide/talk as if there were right answers to be found.
  - Judges must reach a result in questions before them (some answers are better than others).
  - Only way to prove = analyse difficult cases (correct answer vs. no better than alternatives).

  - Identifying the one right answer requires the intellectual skills of Hercules J.

  - Challenges (Bix).
    - Problems of incommensurability (stating a theory is better than another).
    - Problems of demonstrability (cannot conclude unique right answers to all questions).

  - Suggestion of at least best answers (rather than 'right' answers).
  - Ideal directs advocates/judges to principle, rather than relying on legislative questions.