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IN BRIEF

STUDENT HANDOUT

LEGAL PHILOSOPHY

Philosophy explores the big questions of human existence: what it is to be a person, how we can know anything, and how we should live. In fact, one major branch of philosophy is devoted to trying to understand "the good life" – a way of living so that we are happy, true to ourselves and fair in our treatment of others. This branch is called *ethics,* or *moral philosophy*, and focuses on concepts such as good and evil, right and wrong, and justice and injustice.

Morals are the beliefs about what is right and wrong that guide us in our behaviour. When an individual acts in ways their community considers *immoral,* that community has various ways of responding to that individual depending on the severity of the misbehaviour. Within moral philosophy, thinkers have pondered the relationship between a community's values, or morals, and its formal laws – the rules it writes down and expects its members to follow, and the way it treats those who do not follow them. This includes rules about what behaviours are, or are not, acceptable. While many kinds of behaviour might be seen as immoral, it is only those that break these formal laws that are considered criminal.

Philosophy also considers how we define what behaviours should be seen as criminal or as non-criminal, so law has historically been an area of great interest to philosophers. In fact, legal philosophy is an area of study unto itself, often called "jurisprudence", which comes from the Latin words *juris* (of law) and *prudentia* (knowledge).

One big question philosophers have wrestled with is deceptively straightforward: Where does law get its authority? Why do people obey rules, like laws, if this means losing a certain degree of freedom? Wouldn't we be happier if we did as we pleased and followed our desires all the time, rather than following rules?

Think about your own experience as a student: in Canada, the law says that young people must go to school.

a) Do you think this makes people more or less happy?

b) Do you think it makes Canadian society stronger?

In response to questions like these, philosophers developed the idea of the *social contract*. It suggests that without rules, people are in a *state of nature* – largely free to do as we wish, but also subject to violence, exploitation, unpredictability and disorder. By entering into a social contract with one another, people agree to give up some of our freedom in exchange for some amount of security against these various kinds of harm. As part of this social contract, we also agree to abide by the laws that surround us.

For instance, we agree to respect other people's property on the condition that they will respect ours.

c) How well would schools function if students were not required to respect one another's property? What would happen?

d) Review your school's code of conduct. Try to find an example of a rule that protects your right to your own property and one that challenges this right.

While reading about the philosophical perspectives presented below, keep this idea of a social contract in mind. What is the deal that we make? And, is it fair?

Natural Law

Some philosophers have argued that the world follows fundamental rules of fairness and justice that are always morally correct. To commit murder, for example, seems wrong at any time in any place. In this view, the laws made by people are less important than these "natural" laws. Human beings have the ability to use reason and can recognize these higher laws, and so have a moral duty to follow them, even when the laws written down by our societies say otherwise. Conversely, if a law is contrary to these fundamental principles, that law is immoral and unjust, and should not be followed. Hence, natural law is known by the slogan, "*An unjust law is no law at all*".

Legal Positivism

The theory of legal positivism is in sharp contrast to that of natural law. Whereas natural law sees a powerful connection between morality and law, positivists insist that a law need not be moral to be a law – rather, t*he law should be followed simply because it is the law.* Legal positivism argues that law is always:

- Decided by formal institutions, governments and officials;
- Systematically written down; and
- Enforced by governments and government agents

In this view, law gets its authority from the power of government. While laws often reflect important moral values, these values are not necessarily natural or universal. This is why different countries can have different laws about the same behaviours, such as prostitution or drug use. In this view, laws are established by governments to maintain social order and to secure the best possible life conditions for their citizens. People should respect laws and legal institutions because they serve the population by keeping social life predictable, safe and orderly. Therefore, it is also just and fair that the state has the power to impose serious consequences if laws are broken.

Legal Realism

Legal realism is considered a sub-category of legal positivism because it also holds that values are variable, not universal. In this view, what is true, moral and fair depends upon the perspective of the individual. However, it differs from both natural law and legal positivism in that it tries to explain the law through the real actions of individual lawmakers rather than through ideas about nature or government. Legal realists argue that in reality, the law is flexible. Judges' interpretation of any law is influenced by their own experiences and by the prevailing values of their communities. This explains why two different judges can come to different conclusions with an identical set of facts about a case. When judges make these

decisions, they are actually creating the law by applying it. Individual bias is built into every legal decision – for legal realists, *the law is essentially whatever the lawmakers say it is*.

Critical Legal Theory

In the words of the writer and political activist Audre Lord, "*the master's tools will never dismantle the master's house*". In other words, those with a great deal of power in society are not likely to give people with less power the means to make social change. Law is a powerful tool, and critical legal theory extends the ideas of legal realism to form a strong critique of law in society. It argues that since laws reflect individual values, they can contain the biases of powerful social groups. Critical legal scholars argue that while the law appears to offer justice for all, in practice it is a tool most easily used by people who already have a high degree of social power and status. This means that the law can actually maintain social inequality by advancing the interests of powerful groups over the interests of marginalized groups. This body of scholarship has focused on bias and discrimination in the law with respect to gender, race, ethnicity, religion, economic class, sexuality and disability.

SCHOOLS OF THOUGHT

The law is whatever lawmakers say it is.

Laws are variable, not universal. They are dependent on the interpretation of the individual creating or enforcing it.

The law can be understood through the real actions of individual lawmakers rather than through ideas about nature or government.

There are fundamental rules of fairness and justice that are always morally correct (example: murder is always wrong).

There are natural laws that exist and humans can recognize these higher laws through reason and judgment.

Since laws reflect individual values, they can contain the biases of powerful social groups.

What is true, moral and fair depends on the perspective of the individual.

Laws are formed by formal institutions, systemically written down and enforced by governments.

While the law appears to bring justice for all, in practice, it is a tool used by people who have power and status.

If a law goes against fundamental principles, it is called an unjust law.

Laws should be followed simply because they are laws.

Law gets its authority from the government rather than from fundamental, universal principles.

Humans have a moral duty to follow natural laws even when laws written down by society say otherwise.

Laws are established to maintain social order and can differ from country to -country (not universal).

Certain groups (based on: gender, race, ethnicity, religion, etc) are discriminated against through law.

It is just and fair for the State to impose consequences if laws are broken.

A judge's interpretation of the law is influenced by his/her perspective. For example, individual bias exists within every legal decision.

A law need not be moral to be a law.

The law can maintain social inequality by advancing the interests of more powerful groups.

Sub-category of legal positivism.

SCHOOLS OF THOUGHT

Following the example, record key ideas belonging to each of the philosophical schools of thought you have learned about.

Natural Law	Legal Positivism	Legal Realism	Critical Legal Theory
There are fundamental principles that are always morally correct (e.g., murder is always wrong)	Laws should be followed simply because they are laws	What is true, moral and fair depends on the perspective of the individual	Laws reflect the biases of powerful social groups

CASE SUMMARY - *EATING THE CABIN BOY: R v DUDLEY AND STEPHENS (1884)*

Facts

In May 1884, four men set sail for Australia from England in a medium-sized yacht called the *Mignonette*. Their names were Tom Dudley, aged 31, Edwin Stephens, aged 37, Edmund Brooks, aged 49 and Richard Parker, a 17-year old orphan and cabin boy. On July 5, the Mignonette was struck by a large wave and capsized. The four men managed to escape in a small lifeboat with nothing but two small tins of turnips to eat, and no drinking water.

They spent nearly a month in the lifeboat. The turnips were quickly consumed, and they had only the small amount of fresh water that they were able to catch in their oilskin coats to drink. As their hunger and thirst grew, so did their desperation. Richard Parker's thirst was so great that he drank seawater, which quickly made him very ill, and he became unconscious.

It was a widely accepted custom of sailors that if a crew was shipwrecked, the survivors could draw lots to select which of them would be killed and eaten. On the 18th day, Dudley, Stephens and Brooks began to talk about sacrificing one man to save the others. At first they discussed drawing lots to decide who it should be.

Later though, Dudley and Stephens said it should be Parker, because he was closest to death from drinking the seawater and he alone had no wife or children. Parker was unconscious and was not included in the conversation.

The next day, Dudley killed Parker by stabbing him in the throat while Stephens held his legs. Brooks did not participate in the killing, but all three drank his blood and ate his flesh. Four days after the killing of Parker, they were rescued by a passing German ship, the *Montezuma*. They were returned to England early in September.

Trial

It is likely that without Parker's blood, all would have died of dehydration. The men believed that their actions were permitted under the custom of the sea, and made no attempt to conceal what they had done. It would have been easy to simply pretend that Parker had died of natural causes before being eaten. They were arrested as a formality, and even the arresting officials expected that would be freed on the grounds that they had followed an established custom and acted only in order to save their own lives.

As news of the case spread around England, public opinion was very strongly in support of the three surviving sailors. It caught the attention of Sir William Vernon Harcourt, Secretary (leader) of the Home Office, the agency responsible for policing

in England. Harcourt's personal view was that the sailors' actions were reprehensible, and in a move that surprised many, he decided to prosecute them.

The charges were dropped against Brooks and the murder trial of Dudley and Stephens began on November 3, 1884. They attempted to defend themselves on the grounds of necessity – that they had a legal right to preserve their own lives, even though that had meant killing Parker. This meant that something other than their own futures was at stake: depending on the outcome of the trial, the court would set a precedent that would influence future cases. This case would establish whether necessity would become an accepted legal defence for murder in similar situations.

As part of the defence strategy, Dudley and Stephens' lawyer pointed to the long-standing custom of sacrificing one person to save others, suggesting that since this was an historically accepted practice, it should also be legally accepted. In support of this, the defence was able to offer examples of cases involving the sacrifice of some people to save others in the face of disaster, in which the accused were not found guilty. However in these cases, those who were killed had been consulted and given their consent to the practice.

Outcome

The case was sent to a panel of judges, who found Dudley and Stephens guilty of murder. They reasoned that necessity could not be used as a defence for murder unless the victim posed an urgent threat to the accused. Since Parker never consented to be sacrificed, and never represented an immediate danger to the others, Dudley and Stephens' defence was rejected and they were sentenced to death by hanging. Later, however, this sentence was commuted to six months imprisonment.

EXPERT GROUP QUESTIONS

Natural Law

It might seem 'natural' that parents care for their offspring, and teach them the skills they will need in life, until they are able to fend for themselves.

a) Given this statement, how would natural law view compulsory schooling? Try to develop two opposite responses that both use natural law as justification.

EXPERT GROUP QUESTIONS

Legal Positivism

From a legal positivist perspective, the question of whether compulsory schooling is moral or natural is not important – it is simply the law.

a) How do you think a legal positivist would justify compulsory schooling?

b) How moral is Canada's legal system? How does it compare to other countries?

c) How similar are school rules to laws?

EXPERT GROUP QUESTIONS

Legal Realism

In 2011, the Toronto District School Board changed its policy to allow cell phone use in the classroom. The rule banning them was only four years old at the time. Now cell phones are allowed, but their use is up to individual schools and teachers.

a) Do you believe cell phone use changed dramatically between 2007 and now? Does the change in policy reflect change in the community?

b) Should all teachers be required to permit the use of cell phones in class? Explain.

c) Imagine you are the policy/lawmaker in this case: What are some of the pros and cons of allowing cell phones to be used in classrooms? What rules should be made to control how they are used in classrooms?

EXPERT GROUP QUESTIONS

Critical Legal Theory

The *British North America Act* of 1867 outlined many legal principles to govern Canada. Within the Act, the word "persons" was used to refer to more than one person. The *Act* was interpreted by both Canada and Britain to exclude women from being considered a "person". Without the legal status of "persons", women were unable to run for office or hold a position within the Senate. It was not until 1929, due to the advocacy and suffrage of women, that women were considered persons under the law and eligible to become members of the Senate of Canada.

a) From what perspective was this law written? What groups did it privilege and what groups did it marginalize?

a) How did the historical ideology surrounding the treatment and status of women influence the creation or interpretation of this law?

c) How might the lack of female voices (and perspectives) in the higher ranks of government and decision making serve to further marginalize women?