

Somerville Law Induction Course 2020: Session 3

Study Skills and Essay Writing

Part E – Sample marked essay 2 – tutor’s comments in BOLD CAPS

What role, if any, should law play in helping people to live good lives?

This monumental jurisprudential question - having been contemplated as far back as Aristotle and Plato – is at once hugely difficult to answer, and hugely important to our overall understanding of the nature of law and its function in society. The literal scope of the question, as to what role the law should play in helping people live good lives, implicitly raises the issue of principled (as opposed to practical or means-end) limits on the law’s capacity to intervene on grounds of morality. Even if the law *could* in practice intervene in a given scenario to promote a ‘good’ life – *should it*, **[EXCELLENT FOCUS ON THE QUESTION SET, WELL DRAWN AND IMPORTANT DISTINCTION HERE – GOOD]** or should the law be more restrained in its interventions according to morality? **[VERY GOOD TO ANALYSE EXACTLY WHAT THE QUESTION IS ASKING IN THIS WAY]** It should be noted at the outset of my discussion that ‘good’ and ‘moral’ will be taken to be synonymous – for otherwise the question might soon become empty of meaning; however, what exactly the shared meaning is will be an important issue as the discussion proceeds. Another clarifactory linguistic point is that ‘helping’ will be taken in the broadest possible sense, to cover coercion, persuasion, and suchlike. **[AGAIN, VERY GOOD TO HAVE SUCH ACUTE FOCUS ON THE EXACT QUESTION SET. HOWEVER, AS THE EMPHASIS OF THE QUESTION IS ON *HELPING*, I THINK YOU MIGHT WANT TO CONSIDER WHETHER YOU DO WANT TO INCLUDE ALL *COERCIVE* MEASURES UNDER THIS HEADING. MOREOVER, GIVEN THE WAY THE QUESTION IS PHRASED IN TERMS OF “HELPING”, IT IS PARTICULARLY IMPORTANT HERE ALSO TO CONSIDER THE *NON-COERCIVE* MEASURES GOVERNMENTS MIGHT ADOPT TO HELP CITIZENS LIVE WELL, AND NOT TO CONSTRUE THE WHOLE TOPIC, AS SOME DO, AS THE LEGAL *ENFORCEMENT* OF MORALITY. SOMETIMES IT CAN BE THE LEGAL *ENCOURAGEMENT* OR *PROMOTION* OF MORALITY, WHICH PUTS A DIFFERENT SPIN ON SEVERAL ISSUES ARISING WITHIN THE TOPIC]** This essay will seek to canvass and assess the five foremost views, starting with that which argues for no role of the law in promoting a good life – and tracing an escalating importance of law’s role to the opposite end of the spectrum of juristic opinion. In so doing, this essay will endeavour to highlight the strengths and weaknesses of points along this spectrum – concluding with an assessment of where, I contend, the line should be drawn. **[GOOD CLEAR STRUCTURE, WELL ANNOUNCED AT THE BEGINNING. EXCELLENT TO ANNOUNCE AND THEN TO LEAD THE READER THROUGH THE ARGUMENT IN THIS WAY]**

One might first consider the possibility that the law should play no role whatsoever in attempting to ‘help’ people live good lives. That is, one might simply accept the force of “epistemic restraint” (mentioned by Stanton-Ife) arguments, taken to the n^{th} degree. The core of such an argument would be that, as we simply cannot know what it means to live a good (ie moral) life, we

cannot sensibly suggest that the law ought to enforce what we currently consider to be a ‘good’ life. **[WOULDN’T THIS ARGUMENT APPLY AS MUCH TO THE INDIVIDUAL AS THE STATE THOUGH? IF THERE ARE DIFFICULTIES WITH MORAL OR ‘GOOD LIFE’ KNOWLEDGE, THEN INDIVIDUALS, TOO, WILL FACE THEM DAY TO DAY AND OVER THEIR LIVES RE. HOW TO ACT. BUT EVEN IF WE HAVE SUCH DOUBTS AND BELIEVE IN SUCH LIMITATIONS, AS INDIVIDUALS WE CANNOT RESPOND TO THEM BY JUST EG SITTING PARALYSED INCAPABLE OF ANY ACTION JUST IN CASE WE ARE NOT ABLE TO ASCERTAIN CORRECTLY WHAT TO DO. WE HAVE TO TRY, DON’T WE? ARE THINGS ANY DIFFERENT IN THE CASE OF THE STATE? WHY/WHY NOT?]** Several hundred years ago, slavery was considered morally acceptable by many. Several decades ago, **[NICELY WRITTEN, NICE BUILDING TURN OF PHRASE HERE]** homosexuality was considered morally unacceptable by many. Yet we would, in 2011, be justifiably outraged if someone stated that the law should promote either view as part of a ‘good’ way of life. The point is that, whatever we may contemporaneously think, in decades and centuries to come our ‘good’ way of life may be lamented as a ‘bad’ way of life. Hence, we should be very wary of asserting that we have discerned the ‘good’ way of life by which to guide people: the law may, in time, be shown to have been compelling them towards a ‘bad’ way of life. Perhaps we will eventually come to view capitalism, underpinning much of what we would presently regard as a ‘good’ life, as a moral abomination – necessarily involving an unequal distribution of resources. Thus, so the argument goes, the law should not seek to help people live ‘good’ lives, but – rather – to fulfil what can plausibly be presented as its central task of resolving co-ordination issues between people and entities in society. Even seemingly moral judgments (eg criminalizing murder) should be viewed as amoral, and the product of law’s other roles of coordinating action and so on. Individuals, therefore, must be left to decide for themselves what they consider ‘moral’, and act accordingly – within, of course, the limits of the morality-free law. **[THIS OBJECTION/VIEW IS EXTREMELY WELL EXPLAINED. WELL DONE]**

It is submitted that this view raises three important points, but is ultimately entirely flawed. **[EXCELLENT TO IMMEDIATELY MOVE ON FROM EXPOSITION TO YOUR OWN CRITICAL ANALYSIS AND CRITICAL ENGAGEMENT WITH THE POSITION YOU HAVE OUTLINED]** As to its flaws, it is (1) self-defeating and (2) overly cautious. It is self-defeating because if we can *never* know what is the ‘good’ way of life then there is no point in worrying about whether what we are doing is the best possible option: we are as entitled to adopt (a) the course which we, all things considered, feel is best in the light of present opinion as (b) the attitude that, as we can’t know for sure, we shouldn’t bother at all. It is overly cautious because one cannot help but feel that we are, gradually, moving towards a superior moral outlook. **[ARE WE? EVIDENCE? POSSIBLE COUNTER-EXAMPLES? AND WHO COUNTS AS “WE” HERE?]** Reasoning from almost (if not entirely) universally agreed first principles of what is ‘good’ or ‘moral’, we seem to be striving towards reduced suffering. Hence, again, the powerful reply is that we should do the best we can – accepting that we may be forced to change our views as to what is a ‘good’ life in time. Nonetheless, canvassing the view is useful. Firstly, it raises the point Rawls notes: whatever we decide as to what the law must be doing, the debate as to what is a ‘good’ life is set to continue. **[GOOD POINT, AND ALSO A GOOD POINT THAT ACTING IN THE REALM OF PRACTICAL REASON SHOULD NOT**

ASSUME THE IMPOSSIBLE EG HUMAN MORAL INFALLIBILITY] Secondly, that our inability to state with precision what we mean by every term (eg ‘good’ or ‘moral’) is emphatically *not* a bad thing: it is, as we shall see with other views, simply an unavoidable reflection of the subtlety and difficulty of the issues at stake. **[THIS IS A VERY THOUGHTFUL AND SUBTLE POINT, GOOD]** Thirdly, the view makes clear that one must posit alternatives before rejecting an argument. If one rejects that law has any role in helping people live a good life one has to ask what it does.

The second viewpoint on the spectrum is that of neutrality; this view holds that the law’s role should be to remain “largely” (Dickson) neutral as between the different conceptions of a ‘good’ life in society – ‘largely’ because this view concedes that not *all* conceptions are tolerable. Under this view, therefore, the law has a fairly minimal role in helping people lead a good life: it will help (in the form of coercion) people not to be murderers, rapists, or the like – but the law will not rely on judgments between the relative merits of different ways of life that satisfy this threshold. **[VERY WELL AND PRECISELY EXPLAINED]** This has been expressed as allowing all ‘right’ (distinct from the more detailed question of ‘good’) conceptions of ways to live life. It is worth adding that the usual view is of a neutrality of justification, not of a neutrality of effect. For example, the state does not have to, through the law, improve the position of both outdoor-lovers and TV-lovers equally, when contemplating a national park that would infringe on TV reception; rather, the justification for such an act must simply not rely on favouring outdoor-lovers over TV-lovers. **[GOOD USE OF EXAMPLE TO ILLUSTRATE YOUR POINT]**

Nonetheless, it is submitted that neutrality is not a convincing way to conceive of the role of the law as regards helping to promote living good lives. The crucial factor, it is submitted, is the absence of any genuine way to distinguish between those conceptions of life that a neutrality view will permit and those that it will simply not allow. Once this is grasped, Stanton-Ife is right to point out that neutrality “has not advanced us at all”. For there must then be some underlying morality in order to explain why a fraudster is not a permitted way of life but a harmless prankster is. And we are then straight back onto examining other views for the answer. **[VERY WELL EXPLAINED AND ANALYSED]**

An increased role for law in guiding people towards living good lives is visible in the third viewpoint to be considered – the harm principle, expounded by Mill and defended by Hart – its “powerful champion in our times” (Raz). There are two essential strands to the law’s role in promoting a good life under Mill’s conception: (1) that the law can only (though – at least sometimes – *should*) coerce citizens in order to prevent harm to *others* (ie persons other than the actor); and (2) that it is perfectly legitimate for the law to seek to persuade, *but not coerce*, people to conform to a good life in any other circumstances. **[YES, GOOD, RAZ WOULD THINK OF THIS AS ONE DISTINCTIVE ASPECT OF HIS PERFECTIONIST VIEW, AND OF HIS REINTERPRETATION OF MILL’S HARM PRINCIPLE, ie THE SPACE MILL LEAVES FOR NON COERCIVE PERFECTIONIST MEASURES]** It will be noted that this can be presented as a neutralist principle – ie setting the boundaries in which the law will interfere and not interfering beyond this. Certainly, the harm principle excludes legal paternalism (that the law should intervene to prevent harm to the actor himself) and legal moralism (that the law should prohibit conduct on the grounds of its ‘inherent’ immorality, despite not causing *any* harm to anyone).

It is submitted, however, that the harm principle – whilst beginning to accord with what I would suspect many lay-people would state to be the moral relevance of the law **[IS IT IMPORTANT, AND IF SO, HOW IMPORTANT IS IT, FOR A LEGAL OR POLITICAL THEORY TO CHIME WITH LAY UNDERSTANDINGS OF ASPECTS OF THE PHENOMENA UNDER INVESTIGATION, AND WITH LAY, OR ANY “INTUITIONS” ON SUCH PHENOMENA? WHERE DO YOU STAND ON THIS?]** – is not a fully enlightening view of the role of law. Its chief failing lies in the oft-raised, but nonetheless telling challenge to the harm-principle to elucidate exactly what is meant by ‘harm’ – a problem not, it is contended, rectified by Hart’s subsequent analysis. Whilst Mill did point to a need for the ‘harm’ to be “distinct and assignable”, there is no satisfactory explanation as to either (1) how one differentiates a ‘general social harm’ not permitting coercion from a specific harm permitting (and, possibly, demanding) coercion, or (2) why this is a principled limit. Regarding (1), one might well ask whether the fears mentioned in *R v Brown* of promoting such behaviour in some general way would themselves be ‘harm’, sufficient for coercion. Should it be enough that there is the *potential* for an individual to subsequently be harmed, even if the actual conduct does not directly produce the result? There is no obvious answer. Expanding on (2), it seems unprincipled, and illogical, to start confining the justification for coercion to situations of specific harm when a ‘general’ harm could cause much more ‘damage’ to people leading good lives. **[THOUGHTFUL POINTS, VERY GOOD, WELL STRUCTURED ANALYSIS OF YOUR OWN]**

The penultimate view to be discussed as to the role of the law in guiding people towards living good lives is that of Raz. Raz sought to present a harm principle (it is submitted that it is more accurate to view it as Raz ‘re-inventing’ the harm principle, **[YES, NICE POINT]** rather than it being a re-interpretation of Mill’s original principle) that did not restrain the law’s role in helping citizens live a good life – that is, there is no principled limit on the pursuit of moral goals by the state. **[YES GOOD. INDEED FOR RAZ WE MAY SAY IT IS MORE THAN THIS: FOR HIM, IS IT PRECISELY THE POINT OF ALL GOVERNMENTAL ACTION TO HELP PEOPLE TO LIVE WORTHWHILE AND VALUABLE LIVES, AND TO DISCOURAGE EMPTY AND WORTHLESS ONES. WHAT ELSE ARE GOVTS FOR?, HE MIGHT SAY]** Nevertheless, the harm principle delineated how the law was to intervene, and in doing so limited the *means* that can legitimately be deployed in promoting the well-being of people. In this way, Raz is a clear example of a perfectionist: he posits that the state (including through the law) *should* promote and encourage living in accordance with a ‘good’ standard of morality. It is contended that the essence of Raz’s reasoning is as follows. (1) On a reinvention of Mill’s harm principle, autonomy can be seen to be critically important – “autonomy is a constituent element of the good life”. However, (2) in order to provide this autonomy, the state has to fulfil 3 duties: (a) the (self-evident) duty to provide the external capacity to be autonomy, ie not to, by default coerce; (b) “help in creating the inner capacities required for the conduct of autonomous life”; and (c) “the creation of an adequate range of valuable options to for him to choose from”. (3) Failing to fulfil these duties (ie failing to confer the capacity to be autonomous) amounts to ‘harm’ in the harm principle sense. Raz’s theory, therefore, involves an interesting re-thinking of the nature of ‘harm’ within an equally re-structured Millian harm principle. **[SUBTLY AND WELL EXPLAINED]**

There are, however, some flaws to the logic employed by Raz – and some questions that require answering. **[VERY GOOD TO MOVE ON TO YOUR OWN VIEW, YOUR OWN**

CRITICAL ANALYSIS HERE] Firstly, one must address why the law is restricted from suppressing those merely ‘worthless’ (ie non-harmful, but non-beneficial) options, if the autonomy principle entails providing an adequate range of valuable options and removing repugnant ones. Raz puts forward a twin response: “first, [that] it violates the condition of independence and expresses a relation of domination and an attitude of disrespect for the coerced individual”; “second, coercion by criminal penalties is a global and indiscriminate invasion of autonomy”. The second aspect of this, particularly in light of modern use of, electronic tagging, is rather unconvincing. Certainly, it is far easier to accept that imprisonment is a global and indiscriminate invasion of autonomy, than many modern criminal ‘sanctions’. This is largely unproblematic, however, as the first response – harking back to Raz’s presentation of autonomy as central – can account for how coercion violates the condition of independence. Stanton-Ife makes a further – insightful – criticism of Raz’s theory at this juncture. It is pointed out that there is not necessarily an asymmetry, as Raz seems to suggest; ie that (a) removing worthless options by coercion is always an autonomy-loss as “The availability of repugnant [non-harmful] options, and even their free pursuit by individuals, does not detract from their autonomy” but coercion per se infringes autonomy; but (b) removing, by coercion, the possibility of harming another is not necessarily autonomy-loss and, if done correctly, should produce autonomy-gain. Stanton-Ife, analogizing to a tree surgeon that cuts off some non-harmful branches in order to maximise the overall health of the tree, points out that overall autonomy may be increased by cutting off certain worthless options. **[EXCELLENT ANALYSIS, GOOD POINTS]**

A second problem, regarding Raz’s approach to negative freedoms is similarly difficult to overcome. The difference between a specific prohibition, that Raz asserts does not infringe autonomy, and one that allegedly “curtails one’s autonomy” seems to be a largely unexplained matter of degree. Thirdly, there does seem to be some circularity to Raz’s argument. For the state’s non-fulfilment of a duty to be understood as ‘harm’, one must have accepted Raz’s argument that a good life requires an adequate range of valuable options and that the state is, in effect, obliged to provide such. But neither is non-contentious; certainly, this seems to adopt a robust view as to the duties a state owes its citizens. **[YES, IT DOES. FOR RAZ THIS PARTLY COMES FROM THE FUNCTION/RATIONALE OF THE STATE, AND HIS “SERVICE” CONCEPTION OF AUTHORITY. THE FEEL IS ALMOST, WHAT ELSE ARE THESE STATES HERE FOR, WHY HAVE THEM, UNLESS THEY CAN HELP US BETTER ATTAIN AND LEAD VALUABLE LIVES THAT WE COULDN’T WITHOUT THEM. AS THAT IS THE KIND OF THING THE STATE IS, AS IT HAS PUT ITSELF IN THAT POSITION, AND AS THAT IS ITS JOB RE. ITS CITIZENS, IT HAS CERTAIN DUTIES TOWARD THEM, JUST AS HOW BEING THE KIND OF THING A PARENT IS, AND HAVING THE KIND OF “JOB” THAT ENTAILS VIS A VIS ONE’S CHILDREN ESTABLISHES STRINGENT DUTIES TOWARD THEM]** Whilst Raz does provide some insight, therefore, if one is to adopt this as the guiding principle by which law’s intervention to promote a good life is determined, one would expect question marks such as these to be resolved. Indeed, there is some considerable force to Stanton-Ife’s point that “perhaps it [Raz’s theory] should be thought of in this context not as a principle of criminalization or even of fixing the law’s limits in general, but as a principle governing the appropriate use of *imprisonment*”, ie rather than other legal methods of promoting good life living

(eg the less infringing possibilities of electronic tagging, and fines). **[WELL REFERENCED HERE]**

It is in the absence of any decisive argument that one turns to the final juristic approach to be considered – that of Lord Devlin. Devlin argues that there are *no* (principled) limits to the law’s intervention in accordance with morality – that is, a very large role for the law. The essential idea underlying Devlin’s analysis is that, whilst agreeing with Mill that the only justification for interference with another’s liberty of action is self-protection, Devlin conceives of ‘self-protection’ to cover the *state* protecting itself. Added to this is that, for Devlin, morality is not some independent set of principles: morality is “conventional”, ie it is the views of “the juryman” that determine the content of morality *for that society*. Hence, the law can be used to protect the current societal perception of morality and a good life, for “A common morality is part of the bondage” that keeps society together and “if the bonds were too far relaxed the members would drift apart” (Devlin).

With respect, it is submitted that, notwithstanding Devlin picking up the introductory thread on the difficulty on determining morality’s meaning, the view is highly objectionable. Firstly, Devlin is making an intriguing assumption that all societies are entitled to defend themselves. Yet, when the question is forced, it seems impossible to refuse the notion that some societies are “so lacking in legitimacy that it may be emphatically for the best that they disintegrate” (Stanton-Ife). Devlin’s view would entail that any society, even one whose law promoted what everyone else perceived to be grave moral iniquities in life, is right to defend its own morality via law. This, it is submitted, must not be accepted. Secondly, but tied in with this, it is submitted that Dworkin is right to argue that Devlin “has not focussed on moral argument at all”, instead confusing morality with emotion (ie disgust at a certain behaviour). Finally, Devlin’s argument does seem to produce the fallacy that you are always defending the status quo, until it de facto changes, at which point it becomes the norm to be defended. In only ever arguing for what de facto is the case in society at present, I would contend that morality is rendered vacuous: Devlin’s argument would legitimate the result of an emphatically bad way of life, provided it could emerge in some way. **[EXCELLENT, HARD HITTING ANALYSIS AND CRITICISM HERE. NB THOUGH: MIGHT DEVLIN BE RIGHT THAT SOCIETIES NEED TO SHARE SOMETHING IN COMMON, IF NOT TO AVOID DISINTEGRATION THEN TO ENSURE PROPER FUNCTIONING? E.G. SEE SOME OF THE CONCERNS EXPRESSED BY SOME RE. THE “DANGERS” OF TOO MUCH TOLERANCE AND MULTICULTURALISM AND THAT THE FAILURE OF SOME CULTURES TO MAINSTREAM ASSIMILATE CAN CAUSE PROBLEMS FOR THE SOCIETY AS A WHOLE (I TAKE NO VIEW ON THE TRUTH OF THIS HERE, BUT WE OFTEN HERE SUCH VIEWS EXPRESSED IN THE MEDIA). DO SUCH WAYS OF THINKING LEGITIMATELY REFLECT DEVLIN’S CONCERNS? ALSO, MIGHT THERE BE SOME VALUE IN A COMMUNITY REINFORCING ITS OWN VALUE SCHEMA NOT BECAUSE IT BELIEVES IT TO BE BETTER THAN ALL OTHERS, BUT SIMPLY BECAUSE IT IS THEIRS? E.G. SOMERVILLE VALUES FOR THE SOMERVILLIANS, REINFORCED VIA SOMERVILLE RULES; TEDDY HALL VALUES FOR THE ST EDMUNDONIANS, REINFORCED VIA THEIR COLLEGE RULES? IS THERE ANYTHING USEFUL TO SALVAGE FROM DEVLIN’S VIEWS?]**

Overall, therefore, it is clear that no one view can be confidently put forward as coherently and desirably setting out the role of the law in helping people to live good lives. I would submit that the answer lies somewhere within the Razian shades of the spectrum that has been suggested. Raz's view captures the watershed insight that Mill argued for – that harm to others was unique – whilst presenting a far more plausible assessment of the meaning of 'harm'. The problems referred to above are, it is submitted, not the result of a fundamental misunderstanding of the issue – but are problems emergent in scrutinising an approach that captures, in broad terms, the issues involved. Whilst it may be doubted whether such a debate will ever be subject to general consensus, it is submitted that Raz is the likely platform for further insight.

VERY THOUGHTFUL AND INSIGHTFUL WORK, WHICH IS KNOWLEDGEABLE, VERY WELL STRUCTURED AND ORGANISED, AND FEATURES EXTENSIVE, HARD HITTING CRITICAL ANALYSIS OF YOUR OWN. YOU MIGHT PERHAPS HAVE CONSIDERED ALSO IN MORE DETAIL THE NON COERCIVE MEASURES ASPECT OF RAZ'S WORK EG WHETHER PERFECTIONIST POLICIES PURSUED VIA NON COERCIVE MEANS REALLY ARE AS UNPROBLEMATIC AS RAZ SEEMS TO ASSUME, WHETHER IF THEY OPERATE VIA TAX/SUBSIDY THEY REALLY ARE TRULY NON COERCIVE AND NON MANIPULATIVE (WHICH RAZ ALSO REQUIRES THEM TO BE) ETC.

BUT I KNOW YOU CANNOT FIT EVERYTHING IN TO AN ESSAY OF THIS LENGTH, SO THAT'S JUST SOMETHING PERHAPS TO DEVELOP VIEWS ON IN THINKING ABOUT RAZ IN GENERAL AS YOU REVISE. WHAT IS HERE IS VERY GOOD INDEED AND VERY WELL RENDERED INTO A PUNCHY, CONVINCING, ACUTELY WELL FOCUSED ESSAY.

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