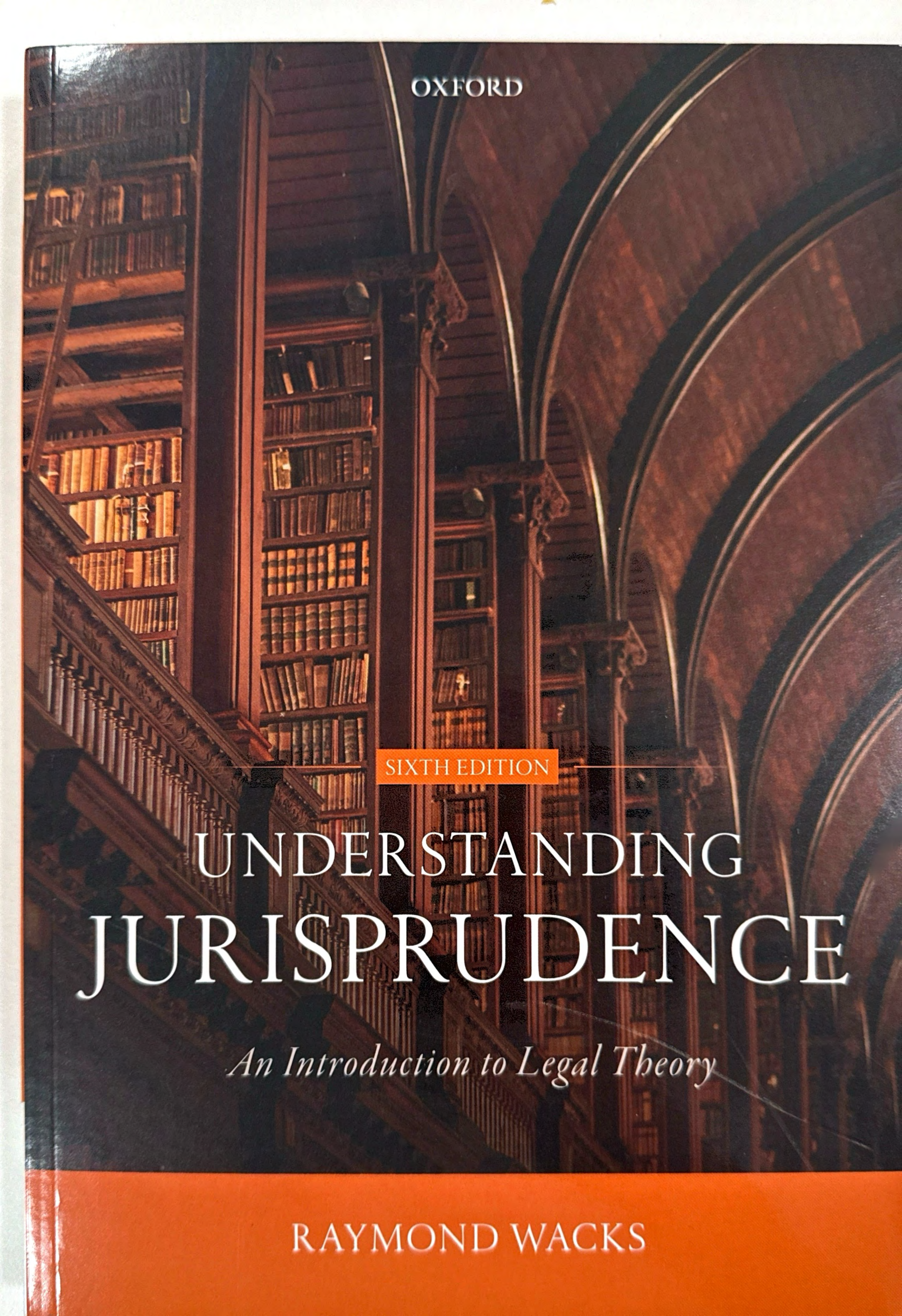




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UNDERSTANDING JURISPRUDENCE

An Introduction to Legal Theory

RAYMOND WACKS

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New to this Edition

- Expanded discussions of theories of justice, globalization, and environmental protection.
- New section on judicial review and democracy.
- Updated suggested further reading lists and self-test questions at the end of each chapter.

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Raymond Wacks, 'Judges and Moral Responsibility' in W Sadurski (ed), *Ethical Dimensions of Legal Theory*, Poznan Studies in the Philosophy of the Sciences and Humanities (Amsterdam: Rodopi, 1991), pp 111–29.

Oneworld Publications

Raymond Wacks, *Justice: A Beginner's Guide* (London: Oneworld Publications, 2017).

Franz Steiner Verlag

Raymond Wacks, 'Law's Umpire: Judges, Truth, and Moral Accountability' in Peter Koller and André-Jean Arnaud (eds), *Law, Justice, and Culture* (Stuttgart: Franz Steiner Verlag, 1998), pp 75–83.

Springer Nature

Alan Hunt, *The Sociological Movement in Law* (London: Macmillan, 1978). Tables 7.3 and 7.4 on pp 205 and 207 are adapted from diagrams on pages 107 and 119, respectively.

1

What's it all about?

Jurisprudence attempts to answer many fundamental questions about law.¹ What is law? What is its purpose? Does it consist merely of rules? Can anything be law? What does law have to do with justice? Or morality? Democracy? What makes a law valid? Do we have a duty to obey the law?

These—and several other, 'theoretical' questions—suffuse the fabric of jurisprudence and legal theory. Nor are they restricted to the philosophical reflections of contemplative jurists. Every substantive or 'black letter' branch of the law generates queries about its own meaning and purpose. Can the law of contract be properly understood without an appreciation of the concepts of rights and duties? How is the law of tort to be explained in the absence of economic theories of compensation? Is property law not founded on certain conceptions of private property that are steeped in theory? Can criminal law dispense with philosophies of punishment? And so on. Your negative responses to all these questions will, I hope, be deafening and unequivocal.

Jurisprudence is therefore pervasive. Its concerns are an inescapable feature of the law and legal system. But it is more. As will soon be evident, it is both informed by, and has significant implications for, economic, political, and social theory. Drawing the boundaries of this vast terrain is therefore a challenging exercise. Most university courses conceive the purpose of jurisprudence to include an examination of leading legal theories and selected legal concepts and an attempt to place them in the context of the legal system. This entails developing the intellectual skills essential to an evaluation of the acceptability or otherwise of ideas of law, justice, and the legal system. It requires an analysis of general theoretical questions about the nature of laws and legal systems in modern societies and the relationship of law with justice and morality. Many courses seek also to examine the function of law in society with particular

¹ Throughout this book, I use the words 'jurisprudence', 'legal theory', and 'legal philosophy' interchangeably, though, strictly speaking, 'jurisprudence' concerns the theoretical analysis of law at the highest level of abstraction (eg, questions about the nature of a right or a duty, judicial reasoning, etc are frequently implied within substantive legal disciplines). 'Legal theory' is often used to denote theoretical enquiries about law 'as such' that extend beyond the boundaries of law as understood by professional lawyers (eg, the economic analysis of law, Marxist approaches to legal domination, etc). 'Legal philosophy' or the 'philosophy of law', as its name implies, normally proceeds from the standpoint of the discipline of philosophy (eg, it attempts to unravel the sort of problems that might vex moral or political philosophers, such as the concepts of freedom or authority). For an introductory account of the nature of law, its past, present, and future, see Raymond Wacks, *Law: A Very Short Introduction* (Oxford: Oxford University Press, 2nd edn, 2015). See too John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford: Oxford University Press, 2014).

reference to the relations of law and power, and the concepts and techniques characteristically used in the operation of developed legal systems. And some endeavour to apply philosophical and sociological theories and methodologies to problems of and problems about the law.

1.1 A helping hand?

Jurisprudence seems, for some students, irrelevant to their legal studies. Given the choice, they would not choose to take the subject at all. And it is little consolation for them to be told that one day they will look back and recognize the value of their exposure to legal theory. Unlike most 'black letter' law courses, this one requires you to think, to read a copious assortment of often turgid—and even impenetrable—writing which appears to have little connection with 'the law', and frequently presumes an understanding of philosophy, sociology, economics, and even anthropology. There is little security here; you long for the friendly reassurance of a statute, or the simple pleasures of the judgment of a court. Suddenly you are plunged into the perilous depths of grand theory, a world inhabited by epistemology, teleology, and metaphysics. And your apprehension is compounded by the fact that some of your peers actually give the impression of understanding it all!

A great deal of the literature is highly technical, some of it simply unreadable; its intended audience is a professional one: other jurists rather than the harassed student. Indeed, one distinguished philosopher himself laments the depressing tendency of these analytical debates:

to be flat and repetitive ... revolving in smaller and smaller circles among a diminishing band of acolytes. Worse still, they are in danger of becoming uninterestingly parochial from a philosophical point of view, as we distance ourselves from the intellectual resources that would enable us to grasp conceptions of law and controversies about law other than our own conceptions and our own controversies, and law itself as something with a history that transcends our particular problems and anxieties.²

In these pages I do my best to avoid these indefensible lapses into obscurity. (And a glossary of the philosophical terms you are most likely to encounter in your jurisprudential journey is provided at the end of the book. The abbreviated definitions are intended both to ring a bell and to assist you to comprehend them when they appear before their more detailed discussion in the appropriate chapters.)

This book is not, however, intended to be a substitute for your reading of the materials prescribed for your course. Unfortunately no single text could achieve that Utopian ideal. Nor should it. Jurisprudence is a rich and diverse subject which is in a constant state of growth; most textbooks (and, indeed, courses) cannot aspire to a

² Jeremy Waldron, 'Legal and Political Philosophy' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), 352, 381.

great deal more than an eclectic skimming of its vast depths. And the book in your hands is not a textbook. Nevertheless, while its purpose is modest, I trust that what follows contains enough detail to be a reliable, helpful, and congenial guide to the major themes of this field of study. Limitations of space called for hard choices. This required concision, excision, and even omission. The editorial axe had to fall somewhere; its blade was stayed where the material in question struck me as essential or intractable, or both, and therefore clamouring for more space and, I hope, illumination.

Secondly, and almost as obvious, no two courses in jurisprudence are the same. There are a number of theorists and theories that are common to most university syllabuses—the core of this book—but beyond that, every teacher has his or her own preferences, conditioned by a wide range of factors, and you will inevitably be required to consult several books, essays, and articles which pertain to these topics. This book is intended to develop your skills in getting to the heart of the matter and, though it deals only with the major strands of legal theory, it aims to equip you to apply similar techniques in respect of the more exotic issues covered in your particular course.

Thirdly, the affliction most commonly associated with the study of jurisprudence is lack of confidence. Overwhelmed by the enormity of the subject and its associated reading materials, many students experience a combination of frustration and despair. Having ploughed through the often rarefied works of leading legal philosophers, they throw up their hands in exasperation at their complexity, density, or their sheer incomprehensibility. It is hoped that the chapters which follow may, while avoiding oversimplification, facilitate a better understanding of the ideas so as to increase your confidence both in reading and writing about them.

Fourthly, this book will help you to think more clearly about jurisprudence. It should encourage you to approach the literature with greater insight and understanding. To this extent, a great deal of your pain may be relieved, and the pages that follow may even assist you to enjoy this absorbing and important subject.

1.2 Reading

Jurisprudence has a prodigious literature. Most teachers, especially in the United States, eschew textbooks, and prepare their own, often comprehensive, materials tailored to their courses. There are, nevertheless, some useful works recommended by instructors in American law schools. Among them are George C Christie and Patrick H Martin (eds), *Jurisprudence: Texts and Readings on the Philosophy of Law*;³ Robert Hayman, Nancy Levit, and Richard Delgado, *Jurisprudence, Classical and Contemporary: From Natural Law to Postmodernism*;⁴ and Mark Murphy, *Philosophy of Law: The Fundamentals*.⁵ Undergraduate classes in the philosophy of law often use Joel Feinberg and Jules Coleman (eds), *Philosophy of Law*⁶ and Brian Bix, *Jurisprudence: Theory and Context*.⁷

³ 3rd edn (St Paul, MN: West Publishing, 2008).

⁴ 2nd edn (St Paul, MN: West Publishing, 2002).

⁵ (Hoboken, NJ: Wiley, 2006).

⁶ 7th edn (Belmont, CA: Wadsworth/Thomson Learning, 2003).

⁷ 8th edn (London: Sweet & Maxwell, 2019).

Elsewhere in the common law world, the prescription of textbooks that include extracts and commentaries is more common. Among the most widely used are MDA Freeman (ed), *Lloyd's Introduction to Jurisprudence*⁸ and James Penner, David Schiff, and Richard Nobles (eds), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*.⁹ Yet another helpful collection is *Jurisprudence: Texts and Commentary* by Davies and Holdcroft.¹⁰ Many students like JW Harris's *Legal Philosophies*,¹¹ McCoubrey and White's *Textbook on Jurisprudence*,¹² and NE Simmonds' *Central Issues in Jurisprudence: Justice, Law and Rights*.¹³ Also popular is the British version of Brian Bix's *Jurisprudence: Theory and Context*.¹⁴ For a thematic approach to the subject, look at Denise Meyerson's *Jurisprudence*.¹⁵ Another intelligent, lucid introduction to the subject from an explicitly philosophical perspective is Mark Tebbit, *Philosophy of Law: An Introduction*.¹⁶ You may also find useful S Veitch, E Christodoulidis, and M Goldoni, *Jurisprudence: Themes and Concepts*¹⁷ and Suri Ratnapala, *Jurisprudence*.¹⁸

A handy series of readers on a wide range of theoretical subjects has been published by Dartmouth. Called the *International Library of Essays in Law and Legal Theory*, it is divided into three sections: schools, areas, and legal cultures. Each volume contains about twenty essays. The books are fairly expensive, but it is likely that your library will have copies. New titles are constantly being added to the large number already published. There are, of course, a number of more specialist works (to which reference is made in the chapters that follow), and if you are a keen student—or simply an affluent one—it would be very useful to own copies of them. Full details of books are given in the 'Further Reading' sections at the end of each chapter. You will certainly be expected to read parts or all of them. Much depends, of course, on what your course attempts to cover. No course in legal theory is, in my experience, ever large enough. There is never enough time to devote to this vast and ever-expanding subject.

Articles in journals and essays in collections are, of course, every bit as important as books. Apart from the leading law reviews and journals, there are a number of specialist journals to which you may be referred. These include *Jurisprudence*, the *American Journal of Jurisprudence*, *Legal Theory*, the *Juridical Review*, *Philosophy and Public Affairs*, the *Philosophical Quarterly*, the *Journal of Law and Society*, the *Law and Society Review*, *Political Studies*, *Ratio Juris*, and the *Proceedings of the Aristotelian Society*. The *Oxford Journal of Legal Studies* devotes a fair number of its pages to essays legally philosophical and jurisprudential. There is also, needless to say, an abundance of material available at the click of a mouse on the Web. I particularly recommend the *Stanford Encyclopedia of Philosophy* which contains a wealth of material written by distinguished scholars.

1.3 Why jurisprudence?

As already mentioned, jurisprudence has generous frontiers. It accommodates copious subjects of intellectual enquiry. And the magnitude of this expanding discipline explains, in part, my disclaimer above. These pages attempt to identify and elucidate several of the major preoccupations of legal theory. And I cannot repeat too often that they are not a substitute for the reading of the primary sources themselves. My overriding purpose is, by distilling the essential questions of legal theory, to encourage you to read and reflect upon their original exposition and the controversy they have engendered.

No society can properly be understood or explained without a coherent conception of its law and legal doctrine. The social, moral, and cultural foundations of the law, and the theories which both inform and account for them, are no less important than the law's 'black letter':

Legal and political theories are not descriptions of brute facts. Nor are they merely postulated ideals or aspirations. Theories reflect and are reflected in our social relationships. And the historical development of our social life is itself a part of the intellectual evolution of our ideas ... And, if understanding a moral or political concept is a matter of understanding the 'form of life' to which it belongs, an articulation of this or that conception may well require attention to its history. Moral and political values thus cannot and should not be discussed in isolation from the institutions and social histories that shaped them.¹⁹

The import and validity of this claim will become evident, I hope, as you read the pages that follow.

Among the many topics within legal theory's substantial precincts is that of the definition of law, as well as legal concepts. It stands to reason that before we can begin to explore the nature of law, we need to clarify what it is we mean by this elusive concept. We can barely begin our analysis of the law and legal system without some shared understanding of what it is we are talking about. Or can we? Richard Posner, a leading theorist and judge (whose economic theories are described in 9.5) pours scorn on this simple goal:

If someone said to you 'time is an incredibly important and fundamental feature of the universe and human life, and therefore it is very important that we define it' you would be nonplussed ... I react the same way to efforts to define 'law'.²⁰

Yet jurisprudence—and the law itself—is haunted by questions of definition. This problem is, however, easier to state than resolve. Nevertheless, there is a relatively painless means by which you can begin to clarify your thoughts on this important question: read Professor Hart's 'Definition and Theory in Jurisprudence'.²¹ The fact

⁸ 9th edn (London: Sweet & Maxwell, 2014). ⁹ (London: Butterworths, 2002).

¹⁰ (London: Butterworths, 1991). ¹¹ 2nd edn (London: Butterworths, 1997).

¹² 5th edn (Oxford: Oxford University Press, 2012).

¹³ 5th edn (London: Sweet & Maxwell, 2018).

¹⁴ 6th edn (London: Sweet & Maxwell, 2012).

¹⁵ (Melbourne: Oxford University Press, 2011).

¹⁶ 3rd edn (Abingdon: Routledge, 2017).

¹⁷ 3rd edn (Abingdon: Routledge, 2018).

¹⁸ 3rd edn (Melbourne: Cambridge University Press, 2017).

¹⁹ NE Simmonds, *The Decline of Juridical Reason* (Manchester: Manchester University Press, 1984), 13.

²⁰ Richard Posner, *Law and Legal Theory in the UK and the USA* (Oxford: Clarendon Press, 1996), 1.

²¹ (1954) 70 *Law Quarterly Review* 37, reprinted in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1984).

that Hart devoted his inaugural lecture (after being elected to the Chair of Jurisprudence at Oxford in 1953) to this question gives you some indication of the importance he attached to the matter. In this essay, Hart warns against the danger of 'theory on the back of definition'. By this he means that we should not confuse the act of attempting to *define* a legal concept with an account of what one might call its *ideological function*; to do so conflates logical and political criteria.

Broadly speaking, there are three main approaches to the problem of definition in general. The first argues that 'to mean is to denote'.²² In other words, all significant expressions are proper names—what they are the names of are what the expressions signify. But this raises immediate difficulties when it comes to, for instance, fictitious or non-existent things (Mickey Mouse or a unicorn). Surely, it cannot be correct (as Ryle puts it) 'that to every significant grammatical subject there must correspond an appropriate *denotatum* in the way in which Fido (the dog) answers to the name "Fido"'.²³

A second approach therefore has emerged that rejects this 'denotationist' view; it is associated with the Cambridge philosopher, Ludwig Wittgenstein, who said: 'Don't ask for the meaning, ask for the use.' The use of an expression is the *function* it is employed to do, as opposed to any thing or person or event which it is supposed to *denote*. Thus, to use one of Wittgenstein's own examples, a 'knight' has meaning only once we know the rules of chess; unless we know these rules, it is merely a piece of wood in the shape of a horse. The chief attraction of this approach is that it enables us to fix a meaning to certain legal concepts without the need to employ fictions to correspond with the meaning of certain concepts.²³

A third position, known as 'essentialism' argues that particular things have essences which serve to identify them as the particular things they are. Thus Austin and Kelsen sought to define law by reference to its fundamental nature (as commands of the sovereign or a normative system, respectively).

You will, of course, realize that in seeking 'definitions' of law or legal concepts, several difficulties lie in wait. Our political or ideological preferences will inevitably intrude, as will historical, social, and moral considerations. Provided we are alive to these issues, we should not shy away from elucidating the ideas that infuse the legal system. Indeed, unless we do so, conceptual confusion may actually inhibit our attempt to improve the law.

1.4 Descriptive, normative, and critical legal theory

Descriptive legal theory seeks to explain what the law is, and why, and its consequences. Normative legal theories, on the other hand, are concerned with what the law ought to be. Put differently, descriptive legal theories are about facts; normative

²² G Ryle, 'The Theory of Meaning' in CA Mace (ed), *British Philosophy in Mid-Century* (London: George Allen & Unwin, 1957).

²³ See Hart's discussion of a 'corporation' in the essay mentioned at n 21.

legal theories are about values. Critical legal theory (the subject of Chapter 13) questions the very foundation of jurisprudence.

Descriptive legal theory may, first, be 'doctrinal'. It provides a theory to explain a particular legal doctrine. For example, freedom of expression might be justified by decisions of the courts on the limits of free speech. Doctrinal legal theory seeks to answer questions such as 'Can these cases be elucidated by some underlying theory?' Secondly, descriptive legal theory may be 'explanatory'; it attempts to explain why the law is as it is. Marxist legal theory, for example, is 'explanatory' in this sense, for it offers an account of law as expressing the interests of the ruling class. A third form of descriptive legal theory concerns the consequences that are likely to follow from a certain set of legal rules. For example, economic analysts of law (see 9.5) might use their tools of analysis to assess the probable behavioural effects of a strict liability regime on manufacturers.

Normative legal theory, on the other hand, is concerned with values. Such a theory may, for instance, seek to establish whether strict liability ought to be adopted in order to protect consumers. Normative legal theories tend inevitably to be associated with moral or political theories. In pursuing an evaluation of the law, normative legal theories might be either 'ideal' or 'non-ideal'. The former relate to what legal rules would create the best legal system if it were politically achievable. The latter presuppose an assortment of constraints on the choice of legal rules, such as the difficulty in enforcing such rules.

But there is no clear-cut distinction between these two categories of legal theory. A normative theory may rely on a descriptive theory to obtain its purchase. Thus, it is hard to sustain the normative theory of utilitarianism (see 9.4) without a descriptive account of the consequences of the application of a specific rule. How would a utilitarian know whether rule X causes the greatest happiness (result Y) without a description of these consequences? Similarly, a descriptive legal theory may, on the basis of predictions about the likelihood of success of, say, law reform, put a brake on the normative legal theory that gave birth to the improvement.

You will also perceive (especially in Chapter 5) how normative and descriptive theory may be grafted together to yield a sort of hybrid legal theory. In Ronald Dworkin's theory of 'law as integrity', for example, there is an amalgamation of the goals of descriptive doctrinal theory and normative theory. By claiming that a theory of law should both 'fit' and 'justify' the legal materials, his theory appears to allow descriptive doctrinal theory to coalesce with normative theory.

Critical legal theory has deep misgivings about the concept of a universal foundation of law based on reason. Jurisprudence, it argues, endows the law and legal system with a spurious legitimacy. The very notion of law as a unique and distinct discipline is doubted, for it overlooks the fact that, far from being autonomous, the law is inseparable from politics. Indeed, the law, in the minds of critical legal theorists, is anything but a determinate, coherent body of rules and doctrine; it is uncertain and indefinite. Nor is the law inevitably rational, neutral, or objective: it is expressive of political and economic power.

1.5 Is eating people wrong?

A popular launching pad for the comprehension of legal ideas is Lon Fuller's entertaining hypothetical 'Case of the Speluncean Explorers'.²⁴ It contains five judgments of the Supreme Court of Newgarth in the year 4300. Four members of the Speluncean Society were trapped in an underground cave. Huge efforts were made to rescue them, at a major financial and human cost (ten lives had been lost). On the twentieth day of their ordeal the ill-fated explorers decided that they could avoid death by starvation before they could be rescued only if they killed and ate one of their number. It was proposed by Roger Whetmore, one of the explorers, that they should cast dice to determine who should be eaten. After considerable vacillation, this was accepted, whereupon Whetmore declared that he withdrew from the agreement. The others nevertheless decided to proceed, and one of them cast the dice on Whetmore's behalf. The throw went against him, and he was duly killed and eaten. The survivors were eventually rescued, and charged with murder.

Each of the five judges adopts a different approach and conclusion to the case. And, not unlike judges in the real world, each emerges as a distinct personality. The Chief Justice, Truepenny, is a self-important formalist. Keen J is an unyielding positivist. Tatting J is indecisive and rather tortured. Handy J is an arch-realist. Foster J adopts a purposive vision of law, a thinly disguised version of Fuller's own position.²⁵ The import of each of these positions will become clearer when you have studied the various theories embodied in each of these judicial positions. It would therefore not be a bad idea to return to the Spelunceans when you have completed your study of natural law, positivism, and realism in the following chapters of this book.

The central issue confronted in the case is the extent to which conflicting legally protected values (human lives) can be reconciled. This dilemma provides a vehicle for Fuller's deeper belief concerning the very nature of legal theory, for, as he points out, 'the case was constructed for the sole purpose of bringing into common focus certain divergent philosophies of law and government . . . [which] presented men with live questions of choice in the days of Plato and Aristotle and which are among the permanent problems of the human race'.²⁶ Hence, as Professor Twining shows, the case reveals the Fullerian perspective of jurisprudential enquiry. He boils it down to the following sorts of questions:²⁷

²⁴ Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616. The facts are based on the two leading common law decisions on cannibalism and the defence of necessity in criminal law: *R v Dudley & Stephens* [1884] 14 QBD 273, affirmed [1885] 14 QBD 560, and *US v Holmes* 26 Fed Cas 360 (1842).

²⁵ 'It may startle my hearers for me to say so, but in many ways I feel myself closer to Foster than to anyone else on this court. If he could only rip off that metaphysical jacket he has put on himself, and gain a little more freedom of action, I think we might get along very well indeed.' Fuller, 'The Case of the Speluncean Explorers', 616.

²⁶ *Ibid.*, 645.

²⁷ William Twining, *Law in Context: Enlarging a Discipline* (Oxford: Clarendon Press, 1997), 217. I have slightly amended his formulation.

1. Is it ever morally
 - (a) justifiable
 - (b) excusable
 to kill and eat a human being?
2. Whether or not it is *morally* justifiable or excusable, is it *legally* justifiable to kill and eat a human being in order to save one's life? Alternatively, is *necessity* a defence to the charge of murder?
3. What is the connection, if any, between 1 and 2?
4. What is the proper role of an appellate judge in deciding a difficult case on a question of law? How does this differ from the role of other officials?
5. What kind of reasons are admissible, valid, and cogent in
 - (a) reaching
 - (b) justifying
 a judicial decision in a hard case? What is the relationship between (a) and (b)? In particular, should public opinion be taken into account in reaching and justifying such decisions? Do (a) citizens (b) judges owe an indefeasible duty of fidelity to the law?

Three of the judges in the case accept that Whetmore's killing was, to some extent, defensible. Keen J appears to regard it as entirely justifiable. The somewhat gauche Tatting J is uncertain of the morality of the defendants' actions. Truepenny CJ and Keen J conclude that the defendants were, despite the circumstances, guilty of murder. Handy and Foster JJ would overturn the conviction. Tatting J finds the case too difficult, and withdraws. As a result, the court is split and the conviction of the defendants is upheld.

Truepenny CJ and Keen J justify their decisions by focusing on what they conceive to be the clear language of the legislature. Tatting J prefers to rely on precedent and analogy. Foster J naturally appeals to the purpose of the law, which he regards as at variance with the statute. Handy rests his decision on 'common sense' supported by articulated public opinion. The most significant and instructive contrast is, I think, between the standpoints of Handy and Foster JJ. The former is a realist who conceives of the law as a matter of practical politics. He enjoys belittling Foster J's efforts to defend a middle ground between politics and formalism.²⁸

The contest between Handy and Foster exposes the nerve of Fuller's own equivocation about realism (see Chapter 6). It reveals his conviction that law cannot be considered as either 'is' or 'ought': normative or descriptive. Hence Handy J holds that 'government is a human affair' and bemoans the propensity to analyse a situation 'until all the life and juice have gone out of it and we have left a handful of dust'. He

²⁸ 'Formalism' emphasizes law's formal properties rather than its content. For further insights into this approach, see Frederick Schauer, 'Formalism' (1998) 97 *Yale Law Journal* 509. There is also a useful symposium, 'Formalism Revisited' in (1999) 66 *University of Chicago Law Review* 934.

urges an awareness of substance, popular will, and practical politics. Nevertheless, he acknowledges that substance is inadequate; there is frequently a need for form.

You will almost certainly be expected to read the 'Speluncean Explorers' in full. It provides, for many teachers of legal theory, an entertaining and valuable means of introducing their students to a number of the fundamental concerns of the subject, including the relationship between law and morality; legal positivism and natural law; the nature of the judicial function; the interpretation of statutes; the relationship between adjudication and legislation; the connection between law, democracy, and public opinion; whether law has a purpose; the concepts of justice and injustice; the process of legal reasoning, and many more. The case has retained its piquancy and relevance for more than half a century, and will, I believe, continue to do so for many more generations of students.

1.6 The rule of law

You will already have encountered this phrase in your constitutional law course or, if not, in the pervasive rhetoric of politicians, newspaper leader writers, and commentators. It is frequently used to champion a 'government of laws, not of men'.

1.6.1 Dicey

Though the concept dates back to ancient times, it is with the constitutional theorist, AV Dicey, that it is most closely associated, at least in its *formal* sense. Dicey, in his celebrated treatise, *Introduction to the Study of the Law of the Constitution*,²⁹ formulated three principles that stipulate the necessary institutional and constitutional requirements without specifying what the *content* of the law ought to be.

The first principle declares that 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.' This principle captures the important prerequisite that the laws under which individuals are punished should be enacted in accordance with proper legal procedures, and that guilt should be established only through the normal trial process. Dicey's reference to wide, arbitrary, or discretionary powers might extend to laws that violate certain fundamental rights, or it might describe laws properly enacted, but which are vague or uncertain so that citizens are unable to plan their lives in harmony with the law.

The second principle asserts that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'. This affirms the significance of equal access to the courts. Again,

²⁹ (1885) Classic Reprint, London: Forgotten Books, 2012.

Dicey here expresses a formal or institutional notion rather than a substantive concern with how judges actually *apply* the law to different individuals or social groups. The principle is therefore not incompatible with discrimination or special treatment. This is a far cry from contemporary theories of justice discussed in Chapter 9. Nor does it satisfy certain Marxist and Critical Legal Studies (CLS) theorists who contend that the rule of law is little short of a mask that conceals the oppression of the working class. See Chapters 7 and 13.

'We may say', Dicey stated thirdly, 'that the [British] constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public hearing) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts'. This is a claim of superiority of the British unwritten constitution over those written constitutions of continental Europe. For Dicey, individual liberty was more secure where it was the product of judicial decision rather than being susceptible to repeal or abrogation by authoritarian governmental fiat.

1.6.2 Modern approaches

Legal theorists in several jurisdictions have sought to adapt the conception of the rule of law to contemporary questions of legality, authority, and other virtues of democratic governance. So, for example, Lon Fuller's idea of the 'inner morality of law' (discussed in Chapter 2) specifies eight desiderata with which the law should comply if it is to achieve 'excellence'. Joseph Raz (see Chapter 4) attempts to add flesh to the bare bones of Dicey's principles, while stressing that the rule of law is not the sole virtue of a legal system.³⁰ His organizing principle is that the rule of law performs a crucial role in facilitating individuals planning their lives.³¹ To do so, he argues, the law ought to be prospective (as opposed to retrospective) and relatively stable; that particular laws should be directed by open, general, and clear rules; that the courts should be independent and accessible; and that those who enforce the law should not have untrammelled discretion.

From the perspective of justice, however, an unjust legal system could satisfy these norms (or even Fuller's) while enacting wicked laws. See the case study of apartheid South Africa in Chapter 2. Nevertheless, as Raz insists, a formal (or content-neutral) conception of the rule of law permits us to evaluate the operation of a legal system *independently* of its political or moral quality. He recently revised his earlier account to emphasize the rule of law's objective to prevent arbitrary government. He contends

³⁰ Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195. See further J Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1994) at 362; John Gardner, 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 *Cambridge Law Journal* 502 at 511–20. For the perspective of a British judge, see Tom Bingham, *The Rule of Law* (Harmondsworth: Penguin, 2010). See too Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467.

³¹ 'The rule of law . . . implies the precept that similar cases be treated similarly. Men could not regulate their actions by rules if this precept were not followed.' John Rawls, *A Theory of Justice* (Harmondsworth: Penguin, 1971) at 237. Rawls is discussed in Chapter 9.

that it requires that government action exhibits the intention to defend and advance the interests of the governed. It therefore becomes a near essential condition for the law to satisfy other moral demands, and it operates as a coordinating and cooperative force both domestically and internationally.³²

A number of jurists have rejected this approach and look instead to the power exercised by the judiciary over the executive. Judicial review is an important means by which government is kept in check and thereby rendered more accountable, both procedurally and substantively. For example, Dworkin (the subject of Chapter 5) argues that 'propositions of law are true if they figure in or follow from the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice'.³³

Dworkin places the courts at the epicentre of the legal system. It is their function to decide what rights individuals have. In this endeavour, as we shall see, judges ought to select the interpretation of the law that best fits with the commitment of the law to justice, and displays the community's institutions in the best light. The formal (or 'rule book') notion of the rule of law, Dworkin contends, neglects the centrality of individual rights; citizens have moral rights and duties with respect to one another, and political rights against the state. Such rights should be recognized in positive law, in order that they can be enforced by the courts. The conception of the rule of law 'does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights'.³⁴

You will want to return to this debate after you have studied the jurists mentioned above.

1.7 Is judicial review undemocratic?

Related to the subject of the rule of law is the role of judicial review (JR), a proceeding in which the lawfulness of a decision by government or other bodies performing a public function is challenged in court. Should the application succeed the decision of the public body may be declared unlawful and quashed. This may require that decision to be reconsidered.

In recent years there has been a significant growth in the number of cases of judicial review. This has led to many questioning whether JR is democratic. Surely, it is argued, since it often entails the overruling of a decision by an elected body like

³² Joseph Raz, 'The Law's Own Virtue' (2019) 39 *Oxford Journal of Legal Studies* 1. See too James A Grant, 'The Ideals of the Rule of Law' (2017) 37 *Oxford Journal of Legal Studies* 383.

³³ R Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 225.

³⁴ R Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 11–12. See too TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001); J Jowell, 'The Rule of Law Today' in J Jowell and D Oliver (eds), *The Changing Constitution*, 5th edn (Oxford: Oxford University Press, 2000), Ch 1. TAO Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1.

Parliament by unelected judges, it is profoundly undemocratic. How can a democratic society tolerate this exercise of judicial power?³⁵

1.7.1 Judges as protectors of the law

The most cogent argument in support of the role of judges in defending the values of the law is Ronald Dworkin's whose legal philosophy is the subject of Chapter 5. In essence, Dworkin regards the judiciary as best able to safeguard substantive individual rights. 'The courts,' he famously declares, 'are the capitals of law's empire, and judges are its princes...'³⁶

The foundation of American constitutionalism is the notion that government is committed to protecting certain rights by the authority that shapes and authorizes its procedures; this commitment should, he maintains be enforced by the courts. Even when judges attempt to be faithful to the text of the law, their subjective conceptions of justice are fundamental to their decisions. It is the responsibility of judges to determine the moral principles which underpin the law and employ them as loyally as they would the law itself.

In *Freedom's Law* he contends that not only is JR a check on the tyranny of the majority, it is also consistent with—and potentially protective of—democracy.³⁷ He conceives strong judicial review as fundamental to the protection of individual rights and the upholding of the moral integrity of the law.

This view is rejected by, for example, Jeremy Waldron, who argues that a democracy is normally expected to have citizens and legislators who are concerned about, and have the capacity to protect individuals' rights. Hence, he claims, there is no compelling case in favour of judicial decisions over those of legislators where rights are at stake. Judicial review therefore weakens essential democratic values and rights.³⁸

Parliaments are a better—more democratic—forum for the deliberation of important social, political, and moral questions. A reasonably functioning democracy can be assumed to possess the following four features that, together, render strong judicial review offensive to democratic values:

1. A representative legislature, elected by universal adult suffrage, in which debates about how to improve society's democratic institutions 'are informed by a culture of democracy, valuing responsible deliberation and political equality'.³⁹
2. Judicial institutions are in reasonably good order, established on a non-representative basis to hear individual law suits, settle disputes, and uphold the rule of law.

³⁵ For an excellent discussion of the theory and practice of JR, particularly in relation to the protection of socio-economic rights, see David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2008), Chs 4 and 5.

³⁶ R Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), 407.

³⁷ R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996).

³⁸ Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

³⁹ Ibid, 1361.

3. Most members of society and most officials are committed to the idea of individual and minority rights.
4. There is 'persisting, substantial and good-faith disagreement about rights ... among those members of society who are committed to the idea of rights'.⁴⁰

In a nutshell, his position is that legislatures have democratic legitimacy. Unelected judges do not.

1.7.2 The arguments

Two main types of argument are generally mounted in support or against JR. The first is a *consequentialist* one that claims that JR is good (or bad) because it produces better (or worse) results than other procedures for resolving rights disputes. Secondly, there is a *proceduralist* view that is normally made against JR. It asserts that JR is good (or bad) because it produces a procedure that is (or is not) consistent with democracy.

Dworkin, however, deploys the following *deliberative* argument:

When an issue is seen as constitutional ... and as one that will ultimately be resolved by courts applying general constitutional principles, the quality of public argument is often improved, because the argument concentrates from the start on questions of political morality ... a sustained national debate begins, in newspapers and other media, in law schools and classrooms, in public meetings and around dinner tables. That debate better matches [the] conception of republican government, in its emphasis on matters of principle, than almost anything the legislative process on its own is likely to produce.⁴¹

In short, Dworkin claims:

- (1) Public deliberation is good for democracy.
- (2) JR facilitates public deliberation.
- (3) Therefore JR is consistent with (or contributes to) the conditions of democratic rule.

Waldron rejects this position, contending that debates about matters such as abortion are no less vigorous and well-informed in Britain and New Zealand (which both lack the strong form of judicial review exercised by the United States Supreme Court) than they are in the US.

He raises five challenges against the alleged democratic nature of JR:

1. Debates about matters such as abortion are no less vigorous and well-informed in other democratic countries such as the UK or New Zealand (which do not have 'strong' JR) than in the US.
2. JR can taint public deliberation by substituting the central moral questions with obscure and technical questions of constitutional interpretation.

⁴⁰ Ibid, 1360.

⁴¹ Ibid, 34.

3. When public debates have to be filtered through a legal or constitutional prism they are often mystified which alienates the general public.
4. The public is discouraged from entering into public debate because they anticipate that they may be contrary to the interpretation of certain provisions of the constitution.
5. The public is reduced to onlookers when questions of political or public morality are determined by JR.

1.7.2.1 Waldron's 'necessary connection' argument

It argues that there is a necessary connection between *certain individual rights* and democracy. Unless such rights are protected, legitimate democratic governance is not possible. Moreover, it claims, JR can help to protect these rights from majoritarian infringement; thus JR is fundamentally consistent with democracy.

What rights might these be? Waldron identifies two:

Participatory Rights: They facilitate participation in democratic government (eg, the right to vote, the right to be heard).

Legitimacy Rights: These are rights that—unless recognized—would undermine the legitimacy of democratic government (eg, freedom of speech, association, and conscience). This is a more controversial argument because it raises a number of controversial questions regarding which rights are actually required for democratic legitimacy? The right to vote is obvious, but is the system of 'first past the post' (FPTP) more or less democratic than proportional representation (PR)? How do we evaluate which democratic rights are important? Are we concerned with the *outcome* or the *means* by which they are reached?

Of course, it may be asked whether legislatures necessarily enjoy democratic legitimacy. Or whether courts lack it. It must surely depend on the circumstances in respect of both institutions. For example, where a supreme or constitutional court has popular support (for example, as a result of the method of appointment of its members, its powers, or its record) its legitimacy is likely to be manifest. The post-apartheid Constitutional Court of South Africa seems to satisfy these requirements. It has been hailed as one of the most progressive in the world, and has been widely praised around the world.

1.7.2.2 Conclusion

The debate raises large questions about the very nature of democracy and how best to protect or defend its chief values and institutions. To support JR is not to deny that judges may themselves be influenced by subjective moral or political considerations, but that is less likely to occur than in the case of elected legislators answerable to their party or constituency. Moreover, removed from the rough and tumble of parliamentary rhetoric and oratorical persuasion, judges have both the time and, in many cases, the expertise, to examine both sides of the argument presented to them in an atmosphere of tranquil reflection and deliberation.

To summarize, JR is a powerful means by which perceived failures in democratic outcomes may be 'corrected'. Secondly, courts, unlike legislatures, are fora of non-political decision-making. Thirdly, disagreements between judges are based on principle rather than popularity. Fourthly, courts are able to protect non-majoritarian representative democracy. Fifthly, JR enables individuals to vindicate their rights against government. Finally, its undemocratic nature may be offset by its general legitimacy ingrained in its contribution to the protection of individual rights.

It may be that Waldron's case against JR goes to *effectiveness of procedure* rather than democracy itself. It is also important to note that the legitimacy of the judiciary often turns on how judges are appointed. This point is often neglected, but where appointments to the bench are generally perceived as fair, transparent, and non-political, the prospect of the courts experiencing popular democratic legitimacy is enhanced.

1.8 The point of legal theory

Injustice pervades our world. War, hunger, exploitation, corruption, persecution, discrimination, disease, and poverty seem to be an inevitable feature of our planet, more than a billion people live in extreme poverty, earning less than US\$1 per day.⁴²

There are some signs that this situation is improving, although famine, environmental degradation, disease, deforestation, natural disasters, and war are almost endemic to the Third World. These problems are aggravated by the displacement of millions of people as a result of war, terrorism, and religious and tribal conflict. Fighting in countries such as Somalia, Sudan, Syria, Iraq, is thought to have spawned more than 50 million refugees, many of whom are housed in squalid camps where disease is often rife. In the face of this agonizing misery and suffering, the futility of academic discourse often appears overwhelming, or worse. Noam Chomsky may be right:

By entering the arena of argument and counter-argument, of technical feasibility and tactics, of footnotes and citation, by accepting the legitimacy of debate on certain issues, one has already lost one's humanity.⁴³

⁴² According to the World Health Organization (WHO) approximately 1.2 billion people in the world live in extreme poverty (less than one dollar per day). Ten per cent of the world (ie, more than 700 million people) lives on less than \$2 a day—the World Bank's international line for extreme poverty. Of all the children living in extreme poverty, 75 per cent live in Sub-Saharan Africa and Asia. In Sub-Saharan Africa 41 per cent survive on less than \$1.90 a day. For every 1,000 children born, thirty-nine will die before their fifth birthday from preventable diseases such as malaria, pneumonia, and diarrhoea which are mostly caused by malnutrition, contaminated water, and poor sanitation and hygiene. These are shocking statistics, but there are signs of improvement: for example in 1990 UNICEF reported that there were ninety-three deaths per 1,000 births, in 2017 this figure had fallen to thirty-six. See generally the UN Development Report of 2019, *Human Development Report* and the various publications by the WHO at: <https://www.who.int/hdp/publications/en/>.

⁴³ N Chomsky, *American Power and the New Mandarins* (Harmondsworth: Penguin, 1969), 11, quoted in S Clark, *The Moral Status of Animals* (Oxford: Clarendon Press, 1977), 1.

We must hope that he is wrong, and that moral sensibility and rational argument can indeed coexist. In the face of evil, it is all too easy to descend into tenuous simplification and rhetoric when reflecting upon the proper nature and function of the law.⁴⁴ Analytical clarity is especially urgent in times of turmoil when the voice of the demagogue is loudest. Scrupulous jurisprudential consideration of the most fundamental questions of law, justice, and the meaning of legal concepts is essential. Legal theory has a crucial role to play in defining, shaping, and safeguarding the values that underpin our society. These central questions arise in numerous chapters of this book, especially the account of natural law (Chapter 2), the philosophy of Ronald Dworkin (Chapter 5), social theory (Chapter 7), justice (Chapter 9), rights (Chapter 10), critical legal theory (Chapter 13), and feminist theory (Chapter 14).

There is, of course, no substitute for reading the primary sources. While scholarly secondary texts—books and articles—to which I have made copious references, afford invaluable analysis and insight, the process of engaging directly with the writing of the theorists themselves is an indispensable path to both comprehension and appreciation of their work. There was a time when Hart's *The Concept of Law* was prescribed reading for almost every university jurisprudence course. How many students now read this seminal work?

Responsibility for this lamentable state of affairs could perhaps be laid at the door of books such as this! Am I (and the authors of similar volumes) guilty of steering students away from the fundamental works of legal theory? Should introductory texts like this one be banned, or at least shunned? Naturally I think not. A *vade mecum* properly used can only assist the reader in his or her quest for advice, guidance, and understanding. And I am deeply gratified that this has indeed been the substance of the reaction that I have received from students in many parts of the world. It is certainly the spirit in which the book was written.

Two overriding criteria determined what I have included in the pages that follow. First, I consulted, wherever possible, the syllabuses of undergraduate jurisprudence and legal philosophy courses offered by major law schools. There is, as you might expect, a considerable degree of diversity in both the content and the method of teaching legal theory. Yet I discovered a discernible core of subjects common to a great many of these courses. It is these that I identified as essential for inclusion in the book. Secondly, there are a number of topics with which I found, in teaching jurisprudence for almost thirty years in three jurisdictions, my students encountered particular difficulty (the sometimes impenetrable works of Hans Kelsen is one example). I therefore devoted more space to them in an attempt at illumination and explanation.

My selection has not, however, proved uncontroversial. Among the distinguished anonymous readers of the second edition, for instance, one urged me to eliminate altogether Chapters 6, 7, 8, and sections of Chapters 13 and 14 because they were 'mainly empirical'—and insufficiently intellectual. Another thought these 'sociological'

⁴⁴ See the discussion of socio-economic rights in Chapter 10. The recognition and enforcement of such rights have an important, if problematic, role to play in addressing poverty. See David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2008).

questions, including the material covered in Chapters 13 and 14 should be considerably expanded! And some of the reviewers of the manuscript for the fourth edition suggested that I drop Chapters 7, 9, 10, 11, and 12! One reviewer of the fifth edition suggested dropping Chapter 6. There were also recommendations I should include discussions of international law/foreign relations in relation to the natural law, ecological jurisprudence, and 'post-truth society (digital myopia/self-propaganda/surveillance capitalism)'. All good ideas, but the book is already 400 pages long, and I am not sure that an increase in its size would be a welcome development.

These differences are understandable. The focus of several courses tends towards the explicitly philosophical, with a predictable emphasis placed on 'theory'. Other syllabuses, however, are considerably more extensive, embracing social and political theory in substantial detail. And there are still other jurisprudence syllabuses that extend their reach to incorporate globalization, liberalism, post-colonialism, religion, and anarchism—some of which are only touched upon in this book.

Despite these incursions into what, for many teachers of jurisprudence, is alien and inhospitable terrain, the primary questions persist. What is law? Does it consist of universal moral values in accordance with nature? Or is law merely a collection of predominantly man-made rules, commands, or norms? Does the law have a specific purpose such as justice; the protection of individual rights; or economic, political, gender, and racial equality? Can the law be understood without a proper appreciation of its social, historical, or anthropological context? What of unjust law: do we have an obligation to obey its directives? How do we justify punishing offenders?

While these—and myriad related—subjects vivify a good deal of legal theory, the apparently intractable problem of the relationship between law and morals continues to dominate current academic debate. Can law be value-free as legal positivists seek to demonstrate, or is law marked by an inescapable morality? The former position defends the unity of value; the latter adopts an instrumental model of law. Is the pursuit of objectivity by legal positivists—from Austin and Bentham to their contemporary followers—ultimately illusory? Is a 'science of law' embodied in Kelsen's 'Pure Theory' a chimera?

None of these questions have simple answers. But it is in their asking—and careful reflection upon them—that the nature of law might be revealed, and thereby the path towards understanding jurisprudence.

Questions

1. Why study jurisprudence?
2. What is the difference between descriptive and normative jurisprudence?
3. What is 'critical legal theory'?
4. Are any of Dicey's three principles of the rule of law controversial?
5. Why might eating people be wrong?

6. Is Fuller's conception of the 'inner morality of law' (discussed in detail in Chapter 2) simply another way of expressing the rule of law?
7. How does Raz's account of the rule of law differ from Dicey's?
8. What are the main arguments in favour of judicial review (JR)?
9. Is JR necessarily anti-democratic?
10. What are the central points of disagreement between Dworkin and Waldron on the exercise of judicial discretion?

Online resources



Understanding Jurisprudence is accompanied by online resources to support and enhance your learning. Visit www.oup.com/he/wacks6e/ to access self-test questions, a flashcard glossary, and guidance on studying jurisprudence.

Further reading

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