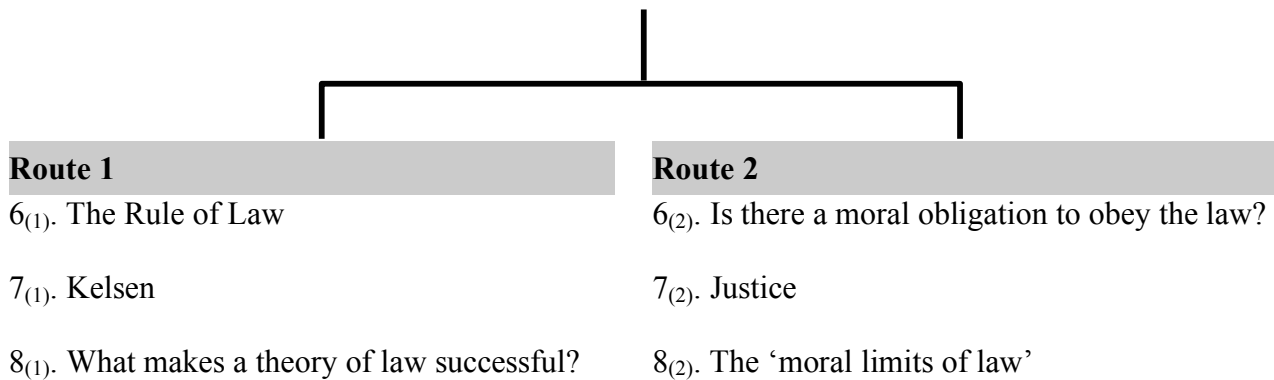


Topics

1. Hart (I): Primary & secondary rules
2. Hart (II): Internal v external point of view
3. Natural law theory
4. Dworkin and adjudication
5. Authority



Method

We will do one topic per tutorial. By tutorial 5 you will be asked to choose either Route 1 or 2 for your three remaining tutorials.

The Tutorials website is at

<http://users.ox.ac.uk/~univ1907/juris/index.htm> (or just *google* 'jurisprudence tutorials')

There you will find important information about Jurisprudence tutorials, lectures and exams, and advice for studying the subject and writing your essays.

Rules on Essay-Writing

In addition to the substantive rules on essay-writing you'll find on the website ('How to write a bad jurisprudence exam essay'), please note the following procedural rules:

Weekly essays (max. 1500 words) on any of the topic's questions (including 'past exam questions') should be brought to the tutorial.

Please:

- ✓ Single-space your essay, and where possible print on both sides of the paper
- ✓ Your name, College, and the date should appear on each page
- ✓ Write the chosen question (*verbatim*) as the title of your essay
- ✓ Don't use footnotes, unless it's absolutely necessary (you won't be able to use footnotes in the exam!)
- ✓ Don't use quotes, unless it's such an important quote that you'd be prepared to memorise it for the exam (it's generally not expected that you'll do so, except for the odd funky phrase)
- ✓ Always indicate where you've taken an idea/phrase from: mention the author and, if necessary, the book (eg 'As Dworkin argues in *Law's Empire*,...' and explain it in your own words)
- ✓ Always bring three hard copies of the essay to the tutorial, and please don't staple my copy
- ✓ Other than in exceptional cases (e.g. disability), it is not acceptable to use your laptop in the tutorials to either read or type, even if it's a Mac ☺ ('cause my office has good wi-fi reception)
- ✓ If you get sick during the days preceding the tutorial, such that you're unable to do the reading and write the essay, please get an officer of your College (Nurse, Secretary, ...) to send me an email. If you feel better on the day of the tutorial despite not having produced an essay, please do attend and send me the essay as soon as possible thereafter.
- ✓ Late essays will not be accepted, unless there's a good reason for the delay. This is in your own interest, and in fairness to your colleagues and to me.
- ✓ Email me anytime with questions or concerns. You should contact me before writing the essay if you have major doubts about your reading, doubts that other readings or textbooks haven't clarified. Jurisprudence is a subject of basic, fundamental questions. No question is too basic or too silly.

Note on 'Questions'

'Past Exam Questions' are taken from Finals papers set between 2000 and 2010 (the more recent ones being at the end). It is good training to take a couple of such questions each week and to think, at least, about how you would structure your answer. Although I have assigned each question to one topic only, you should not assume that a satisfactory answer will only involve engaging with debates listed under that topic: in many cases, the questions are relevant to more than one topic (indeed, they *require* you to connect – compare, contrast, or otherwise relate – debates which appear under different headings in your reading list).

Textbook?

If you feel you need a textbook by way of general reference, I recommend NE Simmonds, Central Issues in Jurisprudence (3rd ed, 2008) and JM Kelly, A Short History of Western Legal Theory (1992). **But note:** a textbook is, at most, a **complement** to the readings on your reading list. It can help you put in perspective some of the debates. But the perspective will always be the perspective of the person writing the textbook. And there are bound to be other, equally sound, perspectives. This is true of Law textbooks, and all the more so of Jurisprudence textbooks. *A textbook is always always always secondary.*

Classes and Lectures

We'll normally have a small class (at Worcester) a couple of days before the respective tute. The main purpose of the class is to dispel some common misunderstandings of the relevant topic, to fill you in with any important or interesting background information, and to answer any questions. Where possible, you should have done the readings before the class. Obviously the class isn't a substitute for all or any readings, and **in your essay you will be expected to go well beyond anything said in the class**. The classes also aren't a substitute for the Faculty lectures in Hilary Term (*Jurisprudence: A Guide Through the Subject*). It is likely that you will find these lectures helpful, and I strongly encourage you to attend them.

Debates

We'll usually approach a topic by having a mini-debate amongst two of you (or one of you with me), defending different sides of an important jurisprudential controversy. Whoever debates on any given week won't have to do an essay for that week (your mark for that week will correspond to your performance in the debate). *Everybody is required to do at least one debate* (and may do at most 2).



1. Hart (I): Primary & Secondary Rules

'A fresh start'...

The basic text: H. Hart, The Concept of Law (1961), ch. 1-7

Hart is also reacting against Kelsen, but doesn't say so explicitly: H. Kelsen, Pure Theory of Law (2nd ed., 1967), Section V, 34 ('The Reason for the Validity of a Normative Order: The Basic Norm'), a-d)

Some trouble for Hartian secondary rules: N. MacCormick, H.L.A. Hart (1981), ch. 9 (on the 2008 2nd ed. it's ch. 10) – please note that MacCormick later (*) distanced himself from his 'historical' reconstruction of the 'rule of recognition', arguing that the 'vicious circle' could not be broken

(*) N. MacCormick, 'The Concept of Law and *The Concept of Law*', in R. George (ed.), The Autonomy of Law (1996), 179-180 [this is **optional** reading]

Optional reading:

On the 'command theory'

J. Austin, The Province of Jurisprudence Determined (1861), lecture I and VI

J. Bentham, Of Laws in General (1782), chs. 1 and 2

H. Hart, Essays on Bentham (1982), Introduction

On power-conferring rules

H. Hart, Essays on Bentham (1982), ch. 8

N. MacCormick, H.L.A. Hart (1981), ch. 6 (on the 2008 2nd ed. it's ch. 7)

J. Raz, Practical Reason and Norms (1975), ch. 3 section 2

On Hart's life and personality...

N. Lacey, A Life of H.L.A. Hart: The Nightmare and the Noble Dream (2004)

Kelsen's very different distinction between primary and secondary norms (primary norms are the only real norms, and they all contain a sanction):

H. Kelsen, General Theory of Law and State (1945), Part One: Section IV ('The Legal Duty'), C ('The secondary norm')

H. Kelsen, Pure Theory of Law (2nd ed. 1967), Section I, 6 ('The Legal Order'), d) and e) – on dependent norms

The famous criticism of Hart's 'practice theory of rules'

J. Raz, Practical Reason and Norms (1975), ch. 2 section 1

Questions:

- Is it useful to think of secondary rules as power-conferring, and of primary rules as duty-imposing?
- What is legal validity? Can there be legal validity without secondary rules? Without power-conferring rules?
- Does the UK have one or more rules of recognition?

- d. What is the practice theory of rules? Can moral rules (if there are any) be explained by this theory?
- e. How central are sanctions to the nature of law?

Past exam questions:

- f. Could there be valid law without courts?
- g. Can the law really regulate its own creation?
- h. Does Hart's acknowledgement that the rule of recognition may give uncertain direction make his account of law more attractive or less?
- i. Use any area of the law you have studied to illustrate and explain the importance of the distinction between power-conferring and duty-imposing rules.
- j. Should any ultimate rule of recognition be said to be valid?
- k. Does the existence of a legal system depend upon power?
- l. Do power-conferring rules guide behaviour?
- m. Is coercion essential to law? Does this depend on whether a sanction is essential to every law?
- n. 'The coercive dimension of the legal system is as important in private law as it is in criminal law.' Do you agree?

2. Hart (II): Internal v External Point of View

The 'viewpoint turn' in Jurisprudence...



The basic text: H. Hart, The Concept of Law (1961), ch. 5 and 6 (reread), 8 and 9

Gulliver's Travels: N. MacCormick, Legal Reasoning and Legal Theory (1978), Appendix

American Legal Realism, the external viewpoint: O.W. Holmes, 'The Path of the Law', 10 Harvard LR (1897) 457

Scandinavian legal realism, a moderate external viewpoint?: A. Ross, On Law and Justice (London 1958/Berkeley 1959), ch. 2

Note: The chapter deals with, and should be entitled, 'The Concept of Law in Force', but the English translation renders 'law in force' as 'valid law' thus obscuring Ross's crucial distinction between the two expressions. Please read the text as referring to 'law in force' where it says 'valid law' (and to 'being in force' where it says 'validity'), except where Ross discusses the 'traditional', 'metaphysical' or 'idealistic' notion of validity (e.g. section XI).



and A. Ross, 'Review of "The Concept of Law"', 71 Yale LJ (1961-2), 1185

The real internal viewpoint?: J. Finnis, Natural Law and Natural Rights (1980), ch. 1

Optional reading:

American Legal Realism

F. Cohen, 'Transcendental Nonsense and the Functional Approach', 35 Columbia LR (1935) 809

K. Llewellyn, 'A Realistic Jurisprudence – The Next Step', 30 Columbia LR (1930) 431

Hart on American Legal Realism

H. Hart, Essays in Jurisprudence and Philosophy (1983), ch. 4 ('American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream')

Hart on Scandinavian Legal Realism

H. Hart, Essays in Jurisprudence and Philosophy (1983), ch. 6 ('Scandinavian Realism')

Raz on legal validity

J. Raz, The Authority of Law (1979), ch. 8

Finnis on Hart

J. Finnis, 'On Hart's Ways: Law as Reason and as Fact', American Journal of Jurisprudence 52 (2007), 25ff (also available through SSRN)

Questions:

- What is the relation between the 'rule of recognition' and the 'internal viewpoint'?
- Is there any relevant difference between 'feeling obliged' and 'having an obligation'? Did Hart manage to explain it?
- Can you understand law from the internal point of view only? And from the external point of view only?
- Does Hart really disagree with Ross?
- Is the Realists' emphasis on prediction compatible with Hart's 'internal viewpoint'?
- What makes an attitude towards law 'critical' and 'reflective'?

Past exam questions:

- h. Is Legal Realism sufficiently realistic about law?
- i. Is the law-abiding citizen's view on the law more important than the view of the 'bad man'?
- j. 'After Hart's criticisms, it is clear that Realism has nothing to offer as a philosophical, rather than a sociological, understanding of the law'. Discuss.
- k. Are statements of law best understood as prophecies of what courts will do?
- l. Does the law give rise to obligations?
- m. Are legal rules best understood as prophecies of what the courts will do?
- n. Can law be understood from an external point of view?
- o. Is law best understood by trying to reproduce the 'internal viewpoint' of those who accept some set of rules of law?

3. Natural Law Theory

'An unjust LAW is not a law'...



The basic text: J. Finnis, Natural Law and Natural Rights (1980), especially chs. 1, 9, 10 and 12 (but you'll need to at least flick through chapters 3, 4, 5 and 6 to understand where he's coming from)

A nutshell version, by the same author: J. Finnis, 'Natural Law Theories of Law', Stanford Encyclopaedia of Philosophy [online at <http://plato.stanford.edu/entries/natural-law-theories/>]

Clarifications on the supposed contrast between 'legal positivism' and 'natural law theory': J. Gardner, 'Legal Positivism: 5 ½ Myths', American Journal of Jurisprudence 46 (2001), 199ff

Prominent critics of natural law theory:

L. Green, The Authority of the State (1988), ch. 4 (analyses Finnis as a 'conventionalist')

H. Kelsen, Pure Theory of Law (2nd ed. 1967), Section V, 34 i)-j) (on natural law theory)

H. Hart, The Concept of Law (1961), ch. 9 (reread)

On the idea of a coordination problem, as relevant to (natural law) legal theory: M. Köpcke Tinturé, 'Coordination in Law', unpublished manuscript [copies will be provided], sections 4.2 and 4.4

Optional reading:

On the relation, if any, between 'legal positivism' and 'natural law theory'

J. Finnis, 'On the Incoherence of Legal Positivism', Notre Dame L. Rev. 75 (2000), 1597ff

J. Finnis, 'The Truth in Legal Positivism', in George (ed.), The Autonomy of Law (1996)

J. Finnis, 'Law and What I Truly Should Decide', American Journal of Jurisprudence 48 (2003)

Video debate between Gardner, Finnis and Kramer, on the question 'Can there be a "positivist" theory of law?' (2007, Oxford Jurisprudence Discussion Group: at http://www.oxford-jdg.net/2010/09/blank_21.html)

On natural law theory as such:

Aristotle, Nicomachean Ethics, book 1

J. Finnis, 'The Priority of Persons', in Horder (ed.), Oxford Essays in Jurisprudence: Fourth Series (2000)

J. Finnis, Aquinas (1998), ch. 8

J. Finnis, 'Natural Law and Legal Reasoning', in George (ed.), Natural Law Theory (1992)

Overview of contemporary Juris topics from the viewpoint of natural law theory

J. Finnis, 'Natural Law: the Classical Tradition', in Coleman & Shapiro (eds.), Oxford Handbook of Jurisprudence & Philosophy of Law (2002)

...And the related topics 5 and 8(1) in this reading list.

Questions:

- a. Is co-ordination a more important function of law than the prevention of crime?
- b. What features of a legal system serve law's co-ordinating function best?

- c. 'Finnis and Hart agree about what a legal system is; the difference between them is that Finnis, unlike Hart, argues that such a system is morally valuable to the community.' Discuss.
- d. Could there be co-ordination without law?
- e. Does Natural Law Theory hold that 'an unjust law is not a law'?
- f. Have contemporary 'legal positivists' misunderstood Natural Law Theory?
- g. Is there such a thing as Legal Positivism?
- h. Would it be helpful for legal theory to use the model of a co-ordination problem exactly as developed by game theory?

Past exam questions:

- i. Is the idea of the common good central to the concept of law?
- j. Is the idea of the common good helpful in understanding the nature of law?
- k. Could there be law without sanctions?
- l. Would an ideal society need law? Would it need lawyers?
- m. Is it in the nature of law that it is supposed to help pursue the common good?
- n. Can the law produce valuable coordination? Is it important whether it can?
- o. Does a sound understanding of law include the idea that unjust laws are not laws?
- p. In what sense (if any) is law normative?
- q. Is coercion essential to law? Does this depend on whether a sanction is essential to every law?
- r. Is it necessary to have a legal system so as to achieve coordination between people? Is the ability to provide solutions to coordination problems an important characteristic of all legal systems?
- s. Does law have a unifying point or function?
- t. 'The central case of law and legal system is the law and legal system of a complete community, purporting to have authority to provide comprehensive and supreme direction for human behaviour in that community, and to grant legal validity to all other normative arrangements affecting the members of that community' (FINNIS). Do you agree?

4. Dworkin and Adjudication

‘Jurisprudence is the general part of adjudication, silent prologue to every decision at law’...



The ‘early Dworkin’: R. Dworkin, Taking Rights Seriously (1977), ch. 2 (first published 1973)

The ‘later Dworkin’ (p l e a s e note that here Dworkin no longer talks of principles v rules; be sure to understand: the dimensions of ‘fit’ and ‘justification’, the chain novel analogy, and the two ‘theories’ – ‘conventionalism’ and ‘pragmatism’ – which law as integrity supposedly opposes): R. Dworkin, Law’s Empire (1986), chs. 3 and 7 are essential (but you’ll need to at least flick through chs. 1, 4 and 5 to understand where he’s coming from)

Hart’s reply to Dworkin: H. Hart, The Concept of Law (1961), Postscript (to the posthumous 1994 2nd ed.)

Finnis on Dworkin and adjudication: J. Finnis, ‘On Reason and Authority in Law’s Empire’, *Law and Philosophy* 6 (1987) 357ff

Endicott on Dworkin and adjudication: T. Endicott, ‘Adjudication and the Law’, 27 *Oxford Journal of Legal Studies* (2007), 311ff

Raz on Dworkin and adjudication: J. Raz, Ethics in the Public Domain (1994), ch. 13 and 14 (‘The relevance of coherence’ and ‘On the autonomy of legal reasoning’)

‘Inclusive’ (aka soft) v ‘exclusive’ (aka hard) legal positivism (read **at least** one from each side, not including Hart):

Some Inclusionists	Some exclusionists
Hart in the Postscript (<i>arguably</i>)	J. Raz, <u>Ethics in the Public Domain</u> (1994), ch. 10 (‘Authority, Law and Morality’) (<i>note: better reserve this for next week, since Raz’s main argument for exclusive legal positivism is derived from his theory of authority</i>)
J. Coleman, <u>The Practice of Principle</u> (2001), Lecture Eight	J. Raz, ‘Incorporation by Law’, 10 <i>Legal Theory</i> (2004), now published as ch. 7 of J. Raz, <u>Between Authority and Interpretation</u> (2009)
K. Himma, ‘Inclusive Legal Positivism’, in Coleman & Shapiro & Himma (eds), <u>The Oxford Handbook of Jurisprudence and Philosophy of Law</u> (2002)	S. Shapiro, ‘On Hart’s Way Out’, <i>Legal theory</i> 4 (1998), also published in Coleman (ed), <u>Hart’s Postscript</u> (2001)
W. Waluchow, <u>Inclusive Legal Positivism</u> (1994), ch. 4	A. Marmor, <u>Positive Law and Objective Values</u> (2001), ch. 3
M. Kramer, <u>Where Law and Morality Meet</u> (2004), section 1 of the Introduction and one of chs. 1-4	
P. Soper, ‘Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute’, <i>Michigan Law Review</i> 75 (1977)	

Optional reading:

Dworkin’s legal theory:

R. Dworkin, Taking Rights Seriously (1977), chs. 3, 4

R. Dworkin, Law’s Empire (1986)

R. Dworkin, Justice in Robes (2006)

N. Stavropoulos, 'Interpretivist Theories of Law', in Stanford Encyclopaedia of Philosophy
[online at <http://plato.stanford.edu/entries/law-interpretivist/>]

Dworkin on inclusive and exclusive legal positivism (a must-read for Dworkin fans!)

R. Dworkin, 'Thirty Years On', *Harvard Law Review* 115 (2002), 1655, now published as ch. 7 of R. Dworkin, Justice in Robes (2006)

More criticisms of Dworkin

J. Gardner, 'The Legality of Law', *Ratio Juris* 17 (2004), 168, section 1

J. Gardner, 'Law's Aims in Law's Empire', in S. Hersowitz (ed.), Exploring Law's Empire: The Jurisprudence of Ronald Dworkin (2006)

Cohen (ed.), Ronald Dworkin and Contemporary Jurisprudence (1984): J. Raz, 'Legal Principles and the Limits of Law'; A. Woozley, 'No Right Answer'; J. Mackie, 'The Third Theory of Law'

On legal interpretation and legislative intent (also relevant to Topic 5: Authority)

J. Waldron, Law and Disagreement (1999), chs. 5 and 6

J. Raz, 'Intention in Interpretation', in George (ed), The Autonomy of Law (1996); now published as ch. 11 of J. Raz, Between Authority and Interpretation (2009)

A. Marmor, Interpretation and Legal Theory (2nd ed. 2005), ch. 8

On some implications of being an 'exclusive legal positivist'

T. Endicott, 'Raz on Gaps – The Surprising Part', in Meyer & Paulson & Pogge (eds), Rights, Culture and the Law: Themes from the Legal and Political Philosophy of Joseph Raz (2003)

The article that significantly fuelled the inclusive/exclusive positivism debate:

J. Coleman, 'Negative and Positive Positivism', *Journal of Legal Studies*, 11 (1982)

Questions:

- a. Does Dworkin have a natural law theory? Does he have a third theory of law?
- b. What distinguishes a 'hard case' from an 'easy' one?
- c. 'Jurisprudence is the general part of adjudication, silent prologue to any decision at law' (Dworkin). Discuss.
- d. Can Hart's theory not account for disagreement in 'pivotal cases'?
- e. What does Dworkin mean by 'the grounds of law'?
- f. How much attention should legal theory pay to what judges say they do?
- g. Can Dworkin distinguish between legal and moral reasoning? Should he?
- h. '[The best account of judicial reasoning] will include the claim that, in carrying out their responsibilities, judges may act on considerations that are new to the law at the time of the court's decision, in the focally important respect that they are good reasons for decision even though the institutions of the system have not already committed the court to act upon them. And the best account of good judicial reasoning need not term these considerations "the law"' (Endicott). Discuss.
- i. Does it matter whether law 'incorporates' morality?

- j. Should legislation be interpreted? If so, how?

Past exam questions:

- k. Does it take rights sufficiently seriously to regard them as products of interpretation?
- l. Does it matter whether there is a right answer to controversial legal questions?
- m. Is legal validity to be determined in terms of moral worth?
- n. Does Hart's acknowledgement that the rule of recognition may give uncertain direction make his account of law more attractive or less?
- o. Can legal principles be identified by reference to a source (or sources)?
- p. State and assess the case for saying that, even when competent lawyers disagree about the legally proper resolution of a question of law, there is (with trivial exceptions) only one right answer to that question.
- q. 'Soft legal positivism is a "positivistic" theory of law in name only'. Discuss.
- r. Is all law source-based? Are all sources of law social facts?
- s. Has it been helpful to regard legal theory and practice as interpretation?
- t. Is it important to distinguish between *law* and *the law*?
- u. '[*Law's Empire*] emphasizes the interpretive rather than the phenomenological defects of positivism, but these are, at bottom, the same failures' (Dworkin). Has Dworkin shown positivism to be flawed?
- v. Is 'law' best understood as an interpretive concept?
- w. Is the judge's point of view the best perspective from which to understand law?
- x. Is purposive construction of legislation possible? If it is, is it desirable?
- y. Is legal interpretation exclusively or primarily a matter of explaining the meaning of legal language?
- z. Does law in its nature embody or serve an ideal?
- aa. Must lawyers suppose that the basic constitutional arrangements in their country are morally justified?
- bb. Is it consistent with Hart's explanation of law in terms of a rule of recognition to say that certain principles bind judges and citizens as law?
- cc. Discuss the idea that a proposition of law is true if and only if it follows from the best all-embracing justification of a community's political practice.
- dd. Can rules of recognition accommodate legal principles?
- ee. May litigants properly ask courts to enforce their legal entitlements, even where competent lawyers disagree about what these are? May courts do otherwise?
- ff. Assess the significance of uncertainty of rule makers' purpose(s) in the interpretation of their rules.
- gg. Should we think of our law as what has been laid down by the acts and facts we call sources, or instead as the standards that our courts have a duty to enforce?



- hh. What (if anything) constrains legal interpretation in hard cases?
- ii. Can we pursue a theory of adjudication separately from a theory of law?
- jj. Suppose that it turned out that judges generally treat the best interpretation of institutional practice as determining the law. Would that be important for our understanding of the nature of law?
- kk. Can the law be both determinate and controversial?
- ll. Is there truth in the proposition that a theory of law informs every judicial decision?
- mm. Is it always necessary to interpret law in order to apply it?
- nn. What effect, if any, does the doctrine of precedent have on the scope for judicial law-making?
- oo. What role, if any, is played by past decisions of legislatures and courts in identifying the law in novel cases?



5. Authority

A 'service' to improve one's conformity with right reason...

The challenge: R.P. Wolff, In Defense of Anarchism (1970), ch. 1

Raz's theory of authority: J. Raz, Ethics in the Public Domain (1994), ch. 10 ('Authority, Law and Morality')

and either J. Raz, The Authority of Law (1979), chs. 1 and 2 *or*
J. Raz, The Morality of Freedom (1986), chs. 2 and 3

Endicott on authority and Raz: T. Endicott, 'Interpretation, Jurisdiction, and the Authority of Law', 6 American Philosophical Association Newsletter on Law and Philosophy (2007), 14ff (also available on SSRN)

Dworkin's criticism of Raz: section III ('Ptolemaic Positivism') of R. Dworkin, 'Thirty Years On', Harvard Law Review 115 (2002), 1655, now published as ch. 7 of R. Dworkin, Justice in Robes (2006)

Hurd's criticism of Raz: Part I, section B ('The Paradox of Practical Authority') of H. Hurd, 'Challenging Authority', Yale Law Journal 100 (1991), 1611; reprinted in H. Hurd, Moral Combat (1999), ch. 3 (section entitled 'The Paradox of Practical Authority')

Recall natural law theory's account of authority (what's the relationship with Raz's account?): J. Finnis, Natural Law and Natural Rights (1980), chs. 9 and 10 (reread)

Authority and the difference between legislated law, case-law and customary law: J. Gardner, 'Some Types of Law', in Edlin (ed.), Common Law Theory (2007), 51ff.



Optional reading:

On Raz's theory of authority

Recent refinements: J. Raz, 'The Problem of Authority: Revisiting the Service Conception', Minnesota Law Review 90 (2006), 1003; now published as ch. 5 of J. Raz, Between Authority and Interpretation (2009)

Green's development: L. Green, The Authority of the State (1988), chs. 1-3

Contextual statement: L. Green 'Legal Obligation and Authority', in Stanford Encyclopaedia of Philosophy [online at <http://plato.stanford.edu/entries/legal-obligation/>]

On the law's claims: J. Gardner, 'How Law Claims, What Law Claims', in Institutional Reason: The Jurisprudence of Robert Alexy (2011), M. Klatt (ed.), ch. 1 (also available through SSRN)

Critical readings of Raz (warning: difficult stuff)

D. Regan, 'Authority and Value: Reflections on Raz's *Morality of Freedom*', Southern California Law Review 62 (1989), 995ff

M. Moore, 'Authority, Law, and Razian Reasons', Southern California Law Review 62 (1989), 827ff

S. Perry, 'Second-order Reasons, Uncertainty and Legal Theory', Southern California Law Review 62 (1989), 913ff

On the natural law understanding of authority

J. Finnis, 'Law as Co-ordination', *Ratio Juris* 2 (1989), 97ff

J. Finnis, 'The Authority of Law in the Predicament of Contemporary Social Theory', 1 Notre Dame Journal of Law Ethics and Public Policy (1984), 1ff

On legal interpretation and legislative intent

J. Waldron, Law and Disagreement (1999), chs. 5 and 6

J. Raz, 'Intention in Interpretation', in George (ed), The Autonomy of Law (1996); now published as ch. 11 of J. Raz, Between Authority and Interpretation (2009)

A. Marmor, Interpretation and Legal Theory (2nd ed. 2005), ch. 8

Questions:

- a. What is the difference, if any, between conformity, compliance, and obedience? Do authors use these notions consistently?
- b. Does the law claim to be morally binding?
- c. What, if any, is the connection between authority and coordination?
- d. What is Raz's argument, based on authority, for 'exclusive legal positivism'? Is it successful?
- e. Can Raz's theory of authority explain the relations *amongst* legal officials in a legal system?
- f. Does it follow from Raz's theory of authority that statutes must always be construed according to the actual intentions of their makers?
- g. What, if any, is the difference between Raz's and Finnis's understanding of law's authority?
- h. 'On Raz's account, only a person can have authority. Hence Raz cannot explain how a legal system is authoritative.' Do you agree?

Past exam questions:

- i. Is it true that the law may provide authoritative guidance only if it can be identified by non-moral tests? Can it be so identified?
- j. Does accepting law's authority necessarily violate one's autonomy?
- k. Does authority entail obligation?
- l. Is authority central to an understanding of the nature of law?
- m. Is there an important connection between law and legitimate authority?
- n. Is it irrational to perform an action solely because it is required by law?
- o. Should legal systems be understood as having authority? Should they be understood as claiming authority?

6(1). The Rule of Law

Is the law's form intrinsically moral?

The seminal text: L. Fuller, The Morality of Law (rev. ed., 1969), chs. 2-4

Hart's reply: 'Book review – The Morality of Law', *Harvard Law Review* 78 (1965), 1281-1296

Fuller's rejoinder: L. Fuller, The Morality of Law (rev. ed., 1969), ch. 5

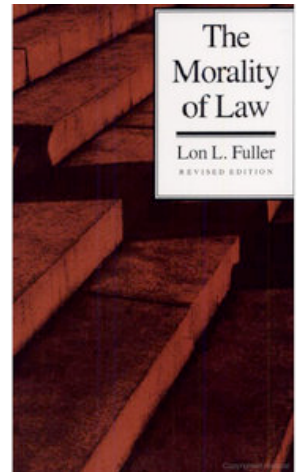
RL is like a knife's sharpness: J. Raz, The Authority of Law (1979), ch. 11

RL is part of the law's moral purpose: recall from Topic 3, J. Finnis, Natural Law and Natural Rights (1980), ch. 10, sections 4-6

RL is valuable and a matter of degree: recall from Topic 4, T. Endicott, 'Adjudication and the Law', 27 *Oxford Journal of Legal Studies* (2007), 311ff

Against Fuller and his defenders: M. Kramer, In Defence of Legal Positivism: Law Without Trimmings, ch. 3

In defence of Fuller: N.E. Simmonds, Law as a Moral Idea (2007), ch. 3



Optional reading:

More Kramer-Simmonds debate:

M. Kramer, 'On the Moral Status of the Rule of Law,' *Cambridge Law Journal* 63 (2004), 65

Simmonds, 'Straightforwardly False: The Collapse of Kramer's Positivism', *Cambridge Law Journal* 63 (2004), 98

An interesting, partly biographical perspective on the Hart-Fuller debate:

N. Lacey, 'Out of the Witches' Cauldron?: Reinterpreting the Context and Re-assessing the Significance of the Hart-Fuller Debate', in Peter Cane (ed), The Hart-Fuller Debate Fifty Years On (2010)

Questions:

- What is at stake between 'procedural' (or 'formal') and 'substantive' (or 'material') conceptions of the rule of law? Is it a helpful classification?
- Is it always better for a community to have a legal than not to have it?
- Which debate on the rule of law has been more fruitful: Hart-Fuller or Kramer-Simmonds? What are the main similarities and differences between the two debates?

Past exam questions:

- Have theorists you encountered said anything helpful about wicked legal systems?
- Why should there be a separation of governmental powers?
- 'It is a mistake to think that the rule of law is merely instrumentally valuable'. Discuss.
- Is it possible to conceive of a society without law?
- Is legal change by statute to be preferred to judicial development of law?

- i. 'The rule of law is unattainable' (Endicott). Is this true in such a sense as to cast doubt on the ideal of the rule of law?
- j. Is the rule of law a genuine ideal?
- k. Is law structured by an inner morality?
- l. Is there a formal sense of the rule of law?
- m. Would greater compliance with rule of law principles necessarily make a given legal system better?
- n. Are there specifically legal virtues that law ought to exhibit?
- o. 'The "rule of law" is an idea which belongs in politics, not in legal theory.' Do you agree?

7(1). Kelsen

'Any kind of content might be law'...

The classical Kelsen:

H. Kelsen, General Theory of Law and State (1945), Part One: Section I, D ('The Legal Norm'), Section II ('The Sanction'), Section IV ('The Legal Duty' - up to and including 'The secondary norm'), Section X ('The Legal Order')

H. Kelsen, Pure Theory of Law (2nd ed. 1967), Section I, 1 ('The "Pure" Theory') and 6 ('The Legal Order', only d) and e) – on dependent norms); Section V, 34 e) (no conflicts) and i)-j) (on natural law theory)

On the late Kelsen: J. Harris, 'Kelsen and Normative Consistency', in Essays on Kelsen (1986), Tur & Twining (eds.)

Hart on Kelsen: H. Hart, Essays in Jurisprudence and Philosophy (1983), ch. 14 and 15

Raz's interpretation of Kelsen: J. Raz, The Authority of Law (1979), ch. 7



Optional reading:

Kelsen on the connection between character and philosophical outlook:

H. Kelsen, 'Natural Law Doctrine and Legal Positivism', published as Appendix to H. Kelsen, General Theory of Law and the State (1945), especially part IV of the Appendix

Shortcomings of Hart's and Kelsen's theories in explaining revolutions:

Finnis, 'Revolutions and Continuity of Law', in Simpson (ed.), Oxford Essays in Jurisprudence, Second Series (1973)

Questions:

- a. What role does the fact that most laws are complied with in a community play in Austin's and Kelsen's theories?
- b. Are there similarities between Hart's critique of Austin and Hart's critique of Kelsen?
- c. What role do sanctions play in Kelsen and Austin's theories?
- d. 'The basic norm is just another command.' Discuss
- e. Kelsen was a moral relativist; Austin was a utilitarian. Is there any connection between the thinkers' respective moral outlooks and their theories of law?
- f. How does Kelsen resemble theorists you have studied? How does he differ from them?
- g. 'The failure of Kelsen's "pure" theory to explain the foundation of law's normativity shows that value-neutral legal theory is a misguided enterprise'. Discuss.
- h. Does Kelsen succeed in explaining legal obligation as independent of moral obligation? Do other theorists you have studied succeed? Do they try to?
- i. Is Kelsen's theory of the basic norm helpful?
- j. Has any theorist you have studied explained the law's systemic character better than Kelsen?
- k. 'If "coercion" in the sense here defined is an essential element of law, then the norms which form a legal order must be norm stipulating a coercive act, i.e. a sanction' (Kelsen). Do you agree?

Past exam questions:

- l. Do legal systems each have a basic norm?
- m. Is the 'purity' of Kelsen's theory of law a strength or a weakness?
- n. What relationship is there, if any, between Hart's "secondary rule of recognition" and Kelsen's "basic norm"?
- o. Is coercion essential to law? Does this depend on whether a sanction is essential to every law?

8(1). What Makes a Theory of Law Successful?

Is it possible to do legal theory without relying on moral evaluations? Is it desirable?

The seminal text: J. Finnis, Natural Law and Natural Rights (1980), ch.1, and corresponding section of the Postscript to the 2011 edition [will be provided]

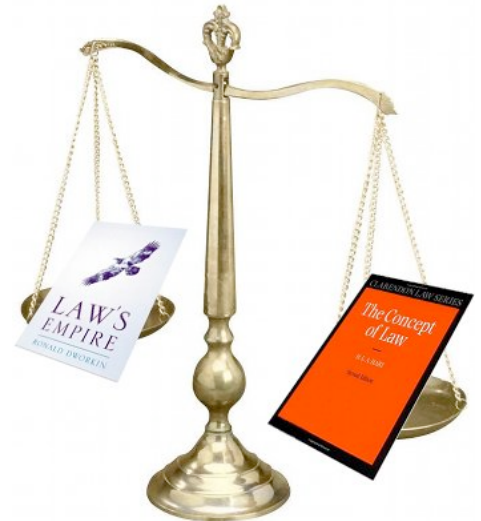
'Indirect evaluation': J. Dickson, Evaluation and Legal Theory (2001), chs. 3 and 4

Title says it all: A. Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral', Oxford Journal of Legal Studies, Vol. 26, Issue 4, 683 (2006)

Dworkin's reply to Hart's Postscript: Dworkin, Justice in Robes (2006), ch. 6

Hart's impossible middle way?: N. Simmonds, Law as a Moral Idea (2007), ch.4

Does the late Hart admit that his theory collapses due to his refusal to engage with moral reasoning? Don't miss the startling ending of...: H. Hart, Essays on Bentham (1982), ch. 10



Optional reading:

The classical methodology (contemporary elaborations)

J. Finnis, 'Law and What I Truly Should Decide', American Journal of Jurisprudence 48 (2003)

J. Finnis, Aquinas (1998), ch. 2

R. Unger, Law in Modern Society (1976), chs. 1 and 4

M. Weber, Economy and Society (originally 1922), Vol. I Part I ('Conceptual Exposition')

The early Hart (1953) on definition (=pointless) v theory (=fruitful) in jurisprudence:

H. Hart, Essays in Jurisprudence and Philosophy (1983), ch. 1 (note that in The Concept of Law he lays far less emphasis on the benefits of studying the way people talk)

Raz on 'Can there be a theory of law?'

J. Raz, Between Authority and Interpretation (2009), ch.1

Finnis on the shortcomings of Hart's theory due to Hart's refusal to engage with (moral) reasons:

J. Finnis, 'On Hart's Ways: Law as Reason and as Fact', American Journal of Jurisprudence 52 (2007), 25ff (also available through SSRN)

Questions:

- Is Dickson's critique of Finnis successful?
- Whose and which evaluations matter in legal theory?
- Is legal philosophy part of political philosophy? If so, what implications does this have for the way legal philosophy is done?
- If it were true that legal theory inevitably had to rely the theorist's moral evaluations, would that be a strength or a weakness of legal theory?

- e. Must a theory of law rely on evaluations?

Past exam questions:

- f. Should a theory of law concentrate on the central case? If so, why? If not, why not?
- g. Can law and legal concepts adequately be described without taking a view about their justifiability?
- h. Is the search for a general and descriptive theory of law a misguided enterprise?
- i. 'Any good theory of society is based on evaluative considerations in that its success is in highlighting important social structures and processes, and every judgement of importance is evaluative' (Raz, *Ethics in the Public Domain*). Assess this claim with particular reference to law.
- j. Can we explain the nature of law without relying on any evaluations?
- k. Would a definition of 'law' or 'legal system' help us understand their nature?
- l. Must any adequate theory of law address the role of coercion in law?
- m. What makes a theory of law successful?
- n. (a) 'A morally neutral theory of law is impossible;'
(b) 'A theory of law which aims to be morally neutral would invariably be less capable of explaining the nature of law than one which does not aim to be morally neutral;'
(c) 'Moral neutrality is not just possible in legal theory - it is indispensable.'

Do you agree with any of these claims?

6(2). A Moral Obligation to Obey the Law?

Always, sometimes, never?

A presumptive and defeasible general obligation: J. Finnis, 'The Authority of Law in the Predicament of Contemporary Social Theory', 1 Notre Dame Journal of Law Ethics and Public Policy (1984), 1ff; J. Finnis, Natural Law and Natural Rights (1980), ch.12 (reread)



No general obligation: M.B.E. Smith, 'Is there a prima facie obligation to obey the law?', 82 Yale L. J. 950 (1973)

No general obligation: **either** J. Raz, The Authority of Law (1979), ch. 12 ('The obligation to obey the law') **or** J. Raz, Ethics in the Public Domain (1994), ch. 15 ('The obligation to obey: revision and tradition')

Raz on respect for law: J. Raz, The Authority of Law (1979), ch. 13

Green on the duty of civility: L. Green, The Authority of the State (1988), ch. 9

Raz on civil disobedience and conscientious objection (at least get an understanding of what they are, and why Raz thinks one is more easily justified than the other): J. Raz, The Authority of Law (1979), chs. 14 and 15

Dworkin on fraternity: R. Dworkin, Law's Empire (1986), ch. 6 (from 'The Puzzle of Legitimacy')

Optional reading:

On the consent argument:

Raz on the consent argument (against): J. Raz, Ethics in the Public Domain (1994), ch. 16 ('Government by Consent')

Green on the consent argument (for): L. Green, The Authority of the State (1988), ch. 6

On civil disobedience:

J. Rawls, A Theory of Justice (1971), sections 53-59

R. Dworkin, Taking Rights Seriously (1977), ch. 8

K. Brownlee, 'Civil Disobedience' (2007), Stanford Encyclopaedia of Philosophy [online at <http://plato.stanford.edu/entries/civil-disobedience/>]



Why Socrates accepts his unjust death sentence:

Plato, Crito

Questions:

- Is there any relevant difference between obeying the law and conforming to it?
- What, if any, is the difference between legal obligation and moral obligation?
- What does it mean that an obligation to obey the law is (i) general, (ii) prima facie?
- Do Raz and Finnis use the term 'obey' in the same sense? Can this shed some light on their disagreement?
- 'Finnis says that the better a law is, the stronger is one's moral obligation to obey it. Raz says the opposite. They must be talking at cross-purposes'. Do you agree?

- f. 'What Raz says about respect for law, and what Green says about the duty of civility, is tantamount to what Finnis says about the moral obligation to obey. They just call it differently.' Discuss.

Past exam questions:

- g. Could there ever be a moral obligation to obey an unjust law?
- h. Does the obligatoriness of promises and/or contracts help explain the obligatoriness of law?
- i. Is it reasonable to believe in both a general obligation to obey the law and a general right to civil disobedience?
- j. Can there be an obligation to comply with law where the law is unsettled?
- k. Is it consistent to believe that we have neither an obligation to obey the law nor a right to disobey it?
- l. 'The possibility of evil laws shows that there could not be a general moral obligation to obey the law'. Discuss.
- m. When (if ever) is civil disobedience justifiable in a democratic state?
- n. Are there any conditions under which the law gives rise to moral obligations?
- o. 'The right to disobey the law is not a separate right, having to do with conscience, additional to other rights against the Government. It is simply a feature of these rights against the Government, and it cannot be denied in principle without denying that any such rights exist'. Discuss.
- p. Answer EITHER (a) OR (b):
- (a) When, if ever, does legal obligation entail moral obligation?
- OR
- (b) Is it ever justified for citizens to break the law as part of a campaign to try to change it?
- q. 'When it comes to the question of the existence or scope of a moral obligation to obey the law, there need be no difference of opinion between legal positivists and natural lawyers.' Do you agree?
- r. Is conscientious objection more defensible than other forms of disobeying the law?

7(2). Justice

Treating equals alike...?

Seminal text in contemporary political philosophy: Rawls, A Theory of Justice (1971), ch. 1

Libertarian challenge to Rawls: Nozick, Anarchy, State and Utopia (1974), ch. 7

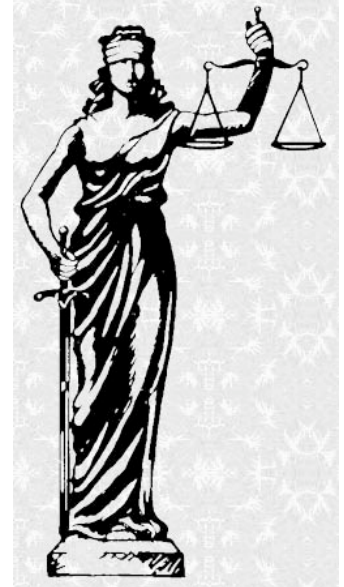
Dworkin on Rawls: Dworkin, Taking Rights Seriously (1977), ch. 6

Communitarian challenge to liberalism: M. Sandel, Liberalism and the Limits of Justice (1982), ch 4

Finnis on justice: J. Finnis, Natural Law and Natural Rights (1980), ch. 7

Hart on justice: Hart, The Concept of Law (1961), ch. 8

Should law strive towards justice only?: J. Gardner, 'The Virtue of Justice and the Character of Law', *Current Legal Problems* 53 (2000), 1



Optional reading:

Helpful critical overview of the main schools of thought in political philosophy

Kymlicka, Contemporary Political Philosophy (1990)

Dworkin on 'liberalism based on equality':

R. Dworkin, A Matter of Principle (1985), ch. 9

Questions:

- a. Are people equals? Can they be made so? Should they be made so?
- b. 'Justice is the first virtue of social institutions' (Rawls). Discuss.
- c. What are the resources which the State, through its law and law-enforcing mechanisms, can distribute?
- d. Is law necessary to promote justice? Is it sufficient?

Past exam questions:

- e. Is justice a matter of treating like cases alike and different cases differently?
- f. What significance, if any, do theories of justice have for theories of law?
- g. Is equality the objective of justice?
- h. What is the best account of justice?
- i. Does justice require that a society eliminate differences in opportunity that are the result of differences in people's abilities, talents, or other forms of natural endowment?
- j. Does any theory of justice help answer the question whether punishment is justifiable?
- k. Is criminal punishment a question of justice?
- l. Do we have duties of justice towards everyone in the world?
- m. Does justice deserve a prominent place relative to other virtues towards which legal systems can strive?
- n. Is law uniquely well placed to secure justice?

8(2). The 'Moral Limits of Law'

'The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'...

Paternalism, 'moralism' and the harm principle in action (but very disorganized): Brown [1993] 2 All E.R. 75

The harm principle: J.S. Mill, On Liberty (1859), chs. 1, 4 and 5

Classic debate, though no longer state of the art: P. Devlin, The Enforcement of Morals (1965) chs. 1, 5, 6 and 7; H.L.A. Hart, Law, Liberty and Morality (1963)

A modern version of the harm principle and paternalism: J. Raz, The Morality of Freedom (1986), chs. 14 and 15

A modern version of the harm principle, plus the 'offense principle': J. Feinberg, Harm to Others (1984), ch.1; J. Feinberg, Offense to Others (1985), chs. 1 [7] and 2 [8] (regarding ch. 2 [8] it's enough if you focus on the standards that determine a) the seriousness of the offense, and b) the reasonableness of conduct) [note: both these Feinberg books are available on www.oxfordscholarship.com]

'Do We Have a Right to Pornography?': in R. Dworkin, A Matter of Principle (1985), ch. 17 (also as: 1 Oxford Journal of Legal Studies (1981), 177ff)

Can Mill be both a liberal and a utilitarian, or are they incompatible?: R. Crisp, Mill on Utilitarianism (1997), ch. 8



Optional reading:

An overview of the different positions

J. Stanton-Ife, 'Limits of Law' (2006), in Stanford Encyclopaedia of Philosophy [online at <http://plato.stanford.edu/entries/law-limits/>]

On paternalism

G. Dworkin, 'Paternalism', 56 The Monist (1972), 64ff, reprinted in R. Sartorius (ed), Paternalism (Minneapolis 1983)

Dworkin's liberalism

R. Dworkin, Taking Rights Seriously (1977), chs. 10, 11 and pp. 272-7

R. Dworkin, 'Liberal Community' (1989) 77 Calif.L.R., 479ff

On Feinberg's offence principle

A.P. Simester & A. von Hirsch, 'Rethinking the Offence Principle', 8 Legal Theory (2002), 269ff

Is it the state's purpose to make us perfect?

Yes: R. George, Making Men Moral (1993), ch. 2

No: J. Finnis, Aquinas (1998), ch. 7

Questions:

- a. What is the difference between positive and critical morality? What is the relation between positive and critical morality?

- b. 'Law should not enforce morality.' Is this possible?
- c. When (if ever) is it morally legitimate to prohibit conduct that is offensive?
- d. Is Brown really a case of enforcement of morality by the court? Could the decision be explained or justified otherwise?
- e. Was the Hart-Devlin debate fruitful, or was it misconceived?
- f. What is paternalism, and under what conditions, if any, is it justified?
- g. Can you harm yourself without harming others? If so, can it be wrong to do so?
- h. What is harm?
- i. 'The following principles or doctrines all set limits to the state's regulation of conduct: harm principle, rule of law, effectiveness, respect for rights, authority'. Do you agree? Can you think of others? Can they all be unified under a single umbrella principle or doctrine?
- j. 'One can bring the horse to the water but one cannot make it drink' (Raz). Is Raz's conception of autonomy sound?
- k. Raz's 'harm principle' is compatible with paternalism. Feinberg's 'harm principle' isn't. Which one is sounder?

Past exam questions:

- l. Should immorality be both the only reason for and the only limit to the legal prohibition of conduct?
- m. Should we be intolerant of the intolerant?
- n. Is there some single principle which defines the proper limits of law's regulation of conduct?
- o. 'It is simply not the law's business to pass moral judgement on people's private conduct'. Discuss.
- p. Is it ever justified to prohibit or discourage conduct which is not harmful?
- q. Is government entitled to prohibit or otherwise limit behaviour for the reason that it degrades the lives of those who engage in it?
- r. 'Given the multiplicity of aims that the criminalisation of conduct can serve, it is impossible to establish that it would never be legitimate to criminalise harmless conduct.'
- s. Should law be used to ensure that people lead autonomous and valuable lives?