

Jurisprudence a guide through the subject

WELCOME TO our unique *syndicate* lecture series designed to guide you through some of the central issues of Jurisprudence as it is studied at undergraduate (FHS) level. We call it a ‘syndicate’ lecture series because it represents a collaboration of six jurisprudence teachers, who will each take a share of the lecturing duties. There will be sixteen lectures in the series, taking place twice weekly during Hilary Term 2009.

The lecturers have planned the series together to provide you with a strong intellectual backbone for your tutorial work. We have chosen to focus on a series of interlocking issues that we think will concern anyone who is looking at the law philosophically. No doubt you will have gathered by now that there is no agreed core tutorial reading list in Jurisprudence. This is because the subject is concerned with *how* to think rather than with *what* to think. In eight tutorials your tutor’s main job is to help you learn how to think philosophically about law *for yourself*, and different tutors will naturally approach this challenge in different ways. Not all will find the same topics or the same types of readings equally profitable.

Correspondingly, there is not one single thing that you *have to know* for the exam. Nevertheless you may want to see the big picture of what is going on in the subject, so that you have something into which to slot the particular themes that your tutor emphasises and something to give you confidence in the face of a very diverse exam paper. This lecture series is supposed to help you see that big picture. It is also supposed to relieve the pressure on your

tutor to spend time conveying information about other people’s debates that could better be spent having a debate of your own.

If the idea is to present the big picture, wouldn’t it have been better to have one lecturer’s big picture rather than a mixture of six? We don’t think so. In jurisprudence, a major part of the big picture consists of disagreements about how to approach law philosophically. We are not only going to tell you about these disagreements. We are actually going to *have* these disagreements right before your eyes. In the pages that follow you will find that we have each sketched out what we are going to talk about in ways that take sides, and sometimes take sides against each other. That is what it is all about. You need to learn how to take sides and to give good reasons for doing so. As well as telling you about some of the sides you might take, we are going to try to show you – by our own example – how to go about taking sides for reasons. You are going to be the judge of whether our reasons are good enough.

Who belongs to the 2009 syndicate? Julie Dickson, Timothy Endicott, John Gardner, Michelle Dempsey, Leslie Green, Dori Kimel and Grant Lamond.

You can find out more about the subject, the lectures, the exam, and the teachers by visiting the jurisprudence group’s award-winning website, where copies of all handouts (including this one) are posted:

<http://www.law.ox.ac.uk/jurisprudence>

An important note on our reading lists

THIS HANDOUT includes a page for each lecture in our series. Each page includes a brief note of what the lecture will cover plus a reading list. The reading lists include 'basic reading' and sometimes 'further reading' as well.

Please don't misunderstand these lists ...

1. We are not competing with your tutor to set your reading. Our list is not a tutorial list. We are not claiming that unless you read our basic reading every week, you are ill-equipped for the exam or ill-educated in jurisprudence. All we are saying is that the basic reading is the minimum *for those who want to be on top of the issues covered in the*

lecture. Many FHS jurisprudence students have said that they feel insecure on the discovery that others have been set basic tutorial readings different from theirs. Well here is the answer to your insecurity: a common list from which you can choose topics in a well-informed way and bring yourself reliably up to speed in each.

2. We are also not saying that you need to read the basic reading *for the lecture*. You should be able to follow each lecture without specific preparation. But nor is the lecture a substitute for the reading. The lecture introduces some issues, for an adequate command of which you will need to read at least the basic reading.

The lecture schedule

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1. Introduction Julie Dickson

WHICH QUESTIONS do legal theorists want to answer, and why?

On the first page of *The Concept of Law*, H.L.A. Hart notes that those studying medicine or chemistry do not devote much time to theoretical questions about the nature of their discipline. There is, he says, no vast literature dedicated to answering the questions, “What is medicine?” or “What is chemistry?”. Things are different, however, for those studying law, because questions about the nature, purposes, limits and value of law have puzzled those trying to understand human society for thousands of years, and many legal theorists have written extensively to try to sort those puzzles out. Is there something peculiar about the focus on these “what is...?” questions in the case of law? Another legal theorist, Neil MacCormick, once asked whether there is any greater need for a philosophy of law than a philosophy of bus driving. Both law and bus driving are practical activities: lawyers convey houses; bus drivers convey buses. Why do we ask philosophical questions about the former and not (usually) about the latter?

If we can find good reasons to ask philosophical questions in the case of law, are there any particular questions which all legal theorists should ask and attempt to answer? Is there, or should there be, a “top ten” of the most important jurisprudential questions? In asking jurisprudential questions, do legal theorists seek *universal* answers, which would apply to law in all times and places? Or should (and must?) legal theory be a more local discipline, explaining (for example) law as we understand it in the UK at the beginning of

the twenty first century? Should legal theorists seek to:

- describe law as it is?
- evaluate law, bearing in mind what it ought to be like?
- legitimate law, and explain when and why we have an obligation to obey it?
- criticise law, and try to bring about its reform?

What is the point of jurisprudence?

Basic reading

H.L.A. Hart, *The Concept of Law* (2nd ed, Oxford 1994), Preface, ch 1, and 239–244 of the ‘Postscript’

H.L.A. Hart, ‘Definition and Theory in Jurisprudence’ in Hart, *Essays in Jurisprudence and Philosophy* (Oxford 1983), ch 1, ss I–III.

H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford 1983) 1–6.

J. Finnis, *Natural Law and Natural Rights* (Oxford 1980) ch 1

R. Dworkin, *Law’s Empire* (London 1986), 31–48; 46–53; 65–72; 90–96; 114–117

Further reading

N. MacCormick, ‘Contemporary Legal Philosophy: The Rediscovery of Practical Reason’ *Journal of Law and Society* 10 (1983), 1.

J. Raz, ‘The Problem About the Nature of Law’ in J. Raz, *Ethics in the Public Domain* (Oxford 1994).

N. MacCormick & W. Twining, ‘Theory in the Law Curriculum’ in Twining (ed.), *Legal Theory and Common Law* (Oxford 1986).

2. Legal positivism: laws and legal systems Julie Dickson

LEGAL POSITIVISM is a doctrine about the nature of law according to which (a) all laws are laid down or *posited* by a certain person or procedure, and (b) something counts as a *valid* law of a certain system in virtue of being laid down by a certain someone or according to a certain procedure. In other words, the legal validity of a rule or decision depends on its sources (e.g. where it has come from, and how, and when), rather than its merits (e.g. whether or not it is a *good* rule or decision). This way of understanding law was made famous during the nineteenth century by the ‘command’ theories of law espoused by Jeremy Bentham and John Austin. According to these theories, something is law if it has been commanded by a Sovereign, and is backed up by the threat of a sanction in case of non-compliance.

Command theories help us to understand the posited nature of law, allow us to identify and understand what law is before considering whether it is morally good or bad, and foreground the role which coercion plays in the law, and so furnishes us with a legal theory which attempts to tell citizens subject to the law exactly the sort of thing they are dealing with.

Unfortunately, however, the command theory makes it difficult to understand how legal systems work *as a system*. Each law is a law because it is posited by an act of the Sovereign, and so each law appears to be self-contained and self-sufficient, unified only in that all laws have in fact been commanded by the present Sovereign in the way explained by the command theory. This, however, fails to explain the way in which legal systems seem to have a life of their own, independently of the lives of the Sovereigns, or legislatures, which posit their laws. Legal systems remain in force, and are capable of altering the laws which

comprise them, and of creating new laws, across time, and they retain these characteristics even when one Sovereign dies or one legislature dissolves and a new one ascends to the throne or is reconvened. Twentieth century legal theorists H.L.A. Hart and Hans Kelsen both criticised these weaknesses in Austin’s command theory of law, and, in their own separate ways, set out to explain what it is that unifies laws into legal systems, and which allows legal systems to regulate their own creation: to determine which laws belong to the system, alter existing laws, and make new ones, according to their own internal procedures for so doing.

How can legal systems pull off this amazing trick of regulating their own composition and creation?

Basic reading

H.L.A. Hart, *The Concept of Law* (2nd ed, Oxford 1994). Read chs 4 and 5 *carefully*. See also the note at 292-4 of the 2nd ed.

Hans Kelsen, ‘The Function of a Constitution’ in R. Tur and W. Twining (eds) *Essays on Kelsen* (Oxford 1986).

Kelsen, *General Theory of Law and State* (New York 1945), 58-64 and 123-136 or Kelsen, *Pure Theory of Law*, (2nd ed, trans M. Knight, Berkeley 1967), 114-119 and 221-236.

Further reading

Hart, ‘Bentham’s *Of Laws in General*’ in Hart, *Essays on Bentham* (Oxford 1982)

P.M.S. Hacker, ‘Hart’s Philosophy of Law’ in Hacker & Raz (eds.), *Law, Morality and Society* (Oxford 1977)

J. Raz, *The Concept of a Legal System* (Oxford 1970), ch 5

3. Legal positivism: the internal aspect of law Julie Dickson

ANOTHER IMPORTANT way in which both Kelsen and Hart tried to improve upon Austin's legal positivism was to give a better account of law's "internal aspect". Austin presented those who were subject to the law as being passive in the face of an external force: law was the command of a Sovereign backed up by sanctions in the face of which the population had a habit of obedience. In Hart's view, this account of law only explained how law looked on the surface, and from the 'outside' and was akin to an account of cars stopping at traffic lights such as a Martian sociologist might offer. A Martian sociologist could state that cars have a habit of stopping in the face of traffic lights turning red. This way of looking at the situation, however, fails to tell us how things appear 'from the inside' to those who use legal rules to guide their conduct in their daily lives. Cars do not merely happen to have a habit of stopping at red lights. Rather, those people in the cars understand that there is a rule requiring them to stop which they are using to guide their conduct, and which they take as a reason for stopping when the traffic light turns red. The point which Hart wanted to make was that legal theorists will miss some of the most important things about the nature of law unless they understand law as it is understood by those who are subject to it and use it as a guide to conduct. Hart dubbed this insiders perspective the internal aspect of law, and insisted that law had to be understood taking into account this internal point of view if it was to be understood adequately.

Hart and Kelsen gave different accounts of this internal aspect of law, but both wanted to stop short of turning it into an intrinsically moral aspect, which would cast doubt on their legal positivism. According to Hart and Kelsen, then, legal theorists must understand law from the internal

point of view, but that point of view must not be so internal as to entail a moral endorsement of the law. For Hartian and Kelsenian legal theorists, having an internal attitude toward the law, then, does not entail accepting the law as a morally good thing which creates moral reasons to do as it says because it says so. Does either Hart or Kelsen succeed in explaining the internal aspect of law without losing their grip on the legal positivist doctrine? Or is John Finnis correct in saying that the internal point of view from which law must be understood is a moral point of view, the point of view from which a legal obligation to do something presumptively entails a moral obligation to do it as well?

Basic reading

H. Kelsen, *Pure Theory of Law* (2nd ed. 1960, trans. M. Knight, Berkeley 1967, 193-214 or Kelsen, *General Theory of Law and State*, (New York 1945), 115-122 and 162-178, or Kelsen, *Introduction to the Problems of Legal Theory*, (1934, trans Paulson, Oxford 1992), 1-19.

H.L.A. Hart, *The Concept of Law* (2nd ed Oxford 1994), 55-61; chs 5 (esp. 88-91) and 6; also page 203.

J. Raz, *The Authority of Law* (Oxford 1979), chs, 7 & 8. Raz explains the differences between Hart and Kelsen's approach to the internal aspect of law, and attempts to explain how both stop short of abandoning legal positivism.

J.M. Finnis, *Natural Law and Natural Rights*, ch.1 – provides a bridge to later lectures.

Further reading

N. MacCormick, *Legal Reasoning and Legal Theory*, (2nd ed, Oxford 1994) appendix on the internal aspect of law, 275-292 and most especially 288-292. This exposes an important ambiguity in Hart's account.

Hart, 'Kelsen Visited' in Hart, *Essays in Jurisprudence and Philosophy* (Oxford 1983).

4. Legal realism: the external aspect of law? John Gardner

IN A colloquial sense of the word, every legal theory hopes to be ‘realistic’: it aims to explain the nature of law. But the theories we classify as ‘legal realist’ pursue that aim through a particular *means*: expelling from the ‘science of law’ all but empirically verifiable propositions. Realists condemn as idealistic (unscientific) any categories of legal thought that cannot be reduced to empirical facts – Kelsen and the natural lawyers are primary targets.

It is sometimes assumed that, since realists focus on empirical facts, they only account for law’s ‘external aspect’. Consequently – the assumption goes – they miss out on law’s ‘internal aspect’ as accounted for by Hart. But is this assumption correct?

Most American legal realists, inspired by Holmes, think that law is predictable judicial behaviour – ‘what the courts will do in fact, and nothing more pretentious’. For some American legal realists it would be too pretentious to count the rules which judges cite as the bases of their decisions as part of the law. Decisions are ‘moulded’ by ‘social forces’, says Cohen. Llewellyn, however, believes that rules can and sometimes *do guide* judges; he is also interested in the laymen’s *attitudes* to the law. We are gradually moving from the ‘outside’ to the ‘inside’. (Are we better off for doing so?)

Scandinavian legal realism looks even further ‘inside’. ‘Law in force’ is, for Ross, the set of rules that are applied *and felt to be socially obligatory* by judges. Though Ross regards his theory as compatible with Hart’s, Hart objects that Ross misrepresents the ‘internal aspect’ of rules as a mere psychological experience.

Does Ross really misrepresent Hart? Or is Hart misrepresenting himself? Should Hart

be worried if his explanation of ‘having an obligation’ turned out to resemble that of a legal realist? Natural lawyers (just wait for next week) answer with a resounding ‘yes’.

Basic reading

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).

H.L.A. Hart, ‘Scandinavian Realism’, *Cambridge LJ* (1959) 233, reprinted in H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford 1983), essay 6 – a critique of Ross partly triggered by the above translation error

A. Ross, ‘Review of “The Concept of Law”’, 71 *Yale LJ* (1961–2), 1185 – stressing the similarities between his theory and Hart’s

F. Cohen, ‘Transcendental Nonsense and the Functional Approach’, 35 *Columbia LR* (1935) 809 – legal rules and concepts are meaningless unless they predict patterns of judicial behaviour

K. Llewellyn, ‘A Realistic Jurisprudence – The Next Step’, 30 *Columbia LR* (1930) 431 – actual behaviour and attitudes can falsify the content of a ‘paper rule’

Further reading

K. Olivecrona, *Law as Fact* (London 1971), ch 4 last section (‘Actual Formation and Validity’) & ch 5 – the other major Scandinavian legal realist

O.W. Holmes, ‘The Path of the Law’, 10 *Harvard LR* (1897) 457 – an influential text by a founding father of American legal realism

5. The natural law tradition Grant Lamond

IN PREVIOUS lectures we have taken the crucial thesis of positivist theories to be that the validity of individual laws depends upon their sources and not their merits. But there is another thesis which has characterised positivist theories of law, namely that the nature of legal *systems* can be properly understood without reference to their having any *moral* purpose, function or point. This thesis has been endorsed by positivists such as Bentham, Kelsen, Hart and Raz.

Historically the major rival to positivist accounts of law has been 'natural law'. Natural law is famously identified with the slogan '*lex injusta non est lex*' [an unjust law is not a law], which appears to be a claim about the validity of individual laws. This is the way that some natural lawyers understand their critique of positivism. Those who do may be regarded as anti-positivists.

But there is a different way of understanding the concerns of natural law. Indeed, one of the leading contemporary exponents of natural law, John Finnis, argues that this conception, rather than an anti-positivistic one, is truer to the natural law tradition stretching back to Aristotle, Cicero and Aquinas. The argument here is that legal systems can only be properly understood if we grasp that the *point* or *function* of legal systems is a moral function.

This natural law critique argues that a positivist conception of legal systems is radically incomplete, and hence distorts our understanding of the nature of law. We will consider two lines of analysis which build upon Hart's argument that to

understand law we need to adopt the 'internal perspective' and claim that this leads to the view that the internal perspective is ultimately a moral perspective on law. The twist in this type of natural law is that it can be agnostic on positivism's source-based account of legal validity. Indeed it may even be that the moral function of law depends upon a source-based account of legal validity, so that rather than being complete rivals, natural law is compatible with one of positivism's crucial tenets.

Basic reading

R.A. Duff, 'Legal Obligation and the Moral Nature of Law', (1980) 25 *Juridical Review* 61; revised version published as ch 3 of Duff, *Trials and Punishments* (Cambridge 1986).

J.M. Finnis, *Natural Law and Natural Rights* (Oxford 1980), chs 1 and 10.

N. MacCormick, 'Natural Law and the Separation of Law and Morals' in George (ed.), *Natural Law Theory* (Oxford 1992).

Further reading

Finnis, 'Natural Law and Legal Reasoning', in George (ed.) *Natural Law Theory*, (Oxford 1992), ch 6. This includes a riposte to Dworkin's anti-positivism.

H.L.A. Hart, *The Concept of Law* (2nd ed, Oxford 1994), ch 9. Finnis calls this 'a great work of natural law theory'. Is he right to see in it anticipations of his own arguments?

Also worth returning to J. Raz, *The Authority of Law* (Oxford 1979) ch 9 (esp. the last couple of pages), showing that Raz too (a hard positivist) believes that the gap between positivism and natural law theory need not be unbridgeable.

6. Legal anti-positivism: the critique of positivism Grant Lamond

IN PREVIOUS lectures positivism has been identified with the thesis that the validity of individual laws depends upon their sources and not their merits. A particularly powerful model for this approach is provided by Hart's conception of every legal system having a 'rule of recognition', establishing criteria by which standards can be identified as *legal* standards. The rule of recognition of a particular legal system identifies the sources of law which are valid in that system (legislation, precedent, ...), and laws are valid because they either belong to one of those sources or are validated by other laws which do (e.g. delegated legislation).

The idea that the validity of a legal standard depends upon its sources rather than its merits is not uncontroversial, since many legal standards in both private and public law seem to derive at least part of their force from their intrinsic merits (e.g. no one is to profit from their own wrong, no one is to be a judge in their own cause). How is positivism to account for the status of such standards, often described as 'legal principles'? Dworkin claims that positivism cannot, and that principles show that law is not necessarily source-based.

Many positivists, on the other hand, think they can, since laws can specify moral conditions for the validity of other legal standards (e.g. inhuman and degrading treatment, unconscionable conduct). But does this deal adequately with the problem raised by the existence of principles?

Basic reading

R.M. Dworkin, 'The Model of Rules: I' *Taking Rights Seriously* (revised ed, London 1978), reprinted as 'Is Law a System of Rules?' in Dworkin (ed), *The Philosophy of Law* (Oxford 1977)

J. Raz, 'Legal Principles and the Limits of the Law' in Cohen (ed) *Ronald Dworkin & Contemporary Jurisprudence* (London 1984)

H.L.A. Hart, 'Postscript' to *The Concept of Law* (2nd ed, Oxford 1994), pp.263–8

Further reading

P. Soper, 'Legal theory and the Obligation of a Judge: The Hart/Dworkin Debate' in Marshall Cohen (ed), *Ronald Dworkin and Contemporary Jurisprudence* (London 1984) – a good survey.

7. Legal anti-positivism: hard cases Grant Lamond

IN THE previous lecture we considered Dworkin's critique of positivist accounts of validity. So far as it goes, the original argument merely claims that the positivist account is inadequate. Which leaves the question, what alternative account of legal validity is there? This is the challenge to which Dworkin responded in his work on 'hard cases'.

Dworkin argues for a much more liberal conception of the scope of legal considerations than positivists. For Dworkin law encompasses not only court decisions and legislation considered discretely, but the totality of law seen as an internally coherent and consistent set of individual rights and duties. Law has to be seen as an enterprise with underlying values which inform its content and interpretation.

But does this work, or does it make any type of consideration which a court relies upon in reaching its decision a 'legal' consideration? Does it obliterate the idea that courts rely on both legal and non-legal considerations in deciding cases?

Basic reading

R.M. Dworkin, 'Hard Cases' in *Taking Rights Seriously* (rev ed, London 1978) (plus 338–45 in his 'Reply to Critics')

J. Raz, 'The Problem about the Nature of Law' in his *Ethics in the Public Domain* (Oxford 1994)

Raz, 'Dworkin: A New Link in the Chain', (1986) 74 *California Law Review* 1103

Further reading

H.L.A. Hart, Postscript to *The Concept of Law* (2nd ed., Oxford 1994). In this (posthumously published and unfinished) essay Hart confronts Dworkin on various issues and signs up explicitly to 'soft positivism' – see esp. pp 250–254.

Raz, *The Authority of Law* (Oxford 1979), ch 3; or Raz, *Ethics in the Public Domain* (Oxford 1994), chs 9–10 (chs 10–11 in the paperback version): an attempt to remain a *hard* positivist in the face of anti-positivists.

8. Law and interpretation Timothy Endicott

TO RESOLVE legal disputes, courts often need to interpret sources of law such as constitutions and statutes and precedents, and they need to interpret the communications by which parties try to order their own and others' legal rights and duties (such as leases and wills). Is interpretation a technique for dealing with uncertainties and controversies as to the effect of such legal instruments? Or does it take interpretation to answer *any* question of law? Is legal reasoning a form of interpretation, or is it a form of reasoning that often requires interpretation?

This lecture will introduce Ronald Dworkin's argument that law is an 'interpretive concept', by which he means that any true statement of law is true because it follows from the best interpretation of the legal practice of the community. We will consider Dworkin's claim that all questions of legal rights and obligations (in what he calls 'easy cases' as well as what he calls 'hard cases') are to be answered by interpreting the community's legal practice in a way that shows that practice (as well as it can be shown) to respect the rights of the members of the community.

Basic reading

Dworkin, *Law's Empire* (London 1986), chs 2, 3 and 5

'Hart's Postscript and the Character of Political Philosophy' (2004) 24 *OJLS* 1-37

Further reading

Finnis, 'On Reason and Authority in Law's Empire' (1987), 6 *Law and Philosophy* 357

Hart *The Concept of Law* (2nd ed. 1994), Postscript

9. Justice Leslie Green

IT IS often said that justice requires that like cases should be treated alike. Most people agree, but many have disagreed fundamentally over what makes cases like, and what counts as treating them alike. And underlying those debates among moral philosophers is a potential objection to the whole idea: that justice does not require that you be treated the same as someone else; but that you be treated rightly.

Is there a notion of equality that will give a good understanding of the requirements of justice? John Stuart Mill offered a utilitarian theory of justice according to which, in taking any action, each person's happiness ought to be counted equally with each other person's happiness. We will consider that theory, and an argument that it is no theory of justice at all, but a theory that rejects justice. Then we will discuss the forms of equality that theorists since Mill have offered. That discussion will survey two classic works of twentieth-century political philosophy: John Rawls' theory of justice as fairness, and Robert Nozick's *Anarchy, State and Utopia*.

Finally we will confront those equality-based theories of justice with a view much older than utilitarianism, recently defended by John Finnis-- that "the objective of justice is not equality but the common good".

Basic reading

J. Rawls, *A Theory of Justice* (Oxford 1971), ss 1-4, 7-9, 11-17, 20-30

S. Mulhall and A. Swift, *Liberals and Communitarians* (2nd ed, Oxford 1996), 3-7

R.M. Dworkin *Taking Rights Seriously* (London 1977) ch 6

R. Nozick, *Anarchy, State and Utopia* (Oxford 1974) chs 1, 7

J.M. Finnis, *Natural Law and Natural Rights* (Oxford 1980) ss VII.1, VII.2, VII.7

Further reading

T. Nagel, 'Justice and Nature' *Oxford Journal of Legal Studies* 17 (1997), 303

W. Kymlicka, *Contemporary Political Philosophy* (Oxford 1990)

10. The rule of law Dori Kimel

THE 'RULE of law' – primarily understood as a set of procedural rules governing the manner in which a legal system operates – has generated a wide spectrum of views in legal theory, ranging from its endorsement as the ultimate virtue of a legal order, to its denunciation as a tool of political manipulation, relied upon to give an appearance of legitimacy to repression and abuse of power.

In a book tellingly entitled *The Morality of Law*, Lon Fuller offered an intriguing thesis – one according to which not only is it the case that significant adherence to the rule of law is inevitable in anything that purports to be a legal system, but that such adherence also provides the law with its own structuring logic and, significantly, guarantees it a (certain) moral quality – a fact which, he argued, had been lamentably lost on legal positivists.

Is that so? In this lecture we will engage in a critical evaluation of the 'rule of law' model, and, with some luck, work our way towards an alternative thesis concerning the normative foundations of the concept – one according to which it is correct to understand the rule of law as a virtue of legal systems, but a virtue which need not entail moral excellence.

Basic reading

L. Fuller, *The Morality of Law* (revised ed. 1969) Chapters II, V

J. Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195 (also in Raz, *The Authority of Law* (1983) ch 11)

J.M. Finnis, *Natural Law and Natural Rights* 270-276

Raz, 'The Politics of the Rule of Law' in Raz, *Ethics in the Public Domain* (Oxford 1994)

Further reading

J. Rawls, *A Theory of Justice* (Oxford 1971) 235-243

T.A.O. Endicott, *Vagueness in Law* (Oxford 2000), chapter 9

11. The moral limits of the law Dori Kimel

ARE THERE aspects of our lives into which the law must not intrude? Can the intrinsic immorality alone of certain activities constitute sufficient ground for their prohibition? In the first of two lectures on the subject, we will familiarise ourselves with the debate over the moral limits of the law and with some of the controversial cases and intricate concepts it involves, and consider the weaknesses of some classical attempt to address it.

We will start by looking at a recent, highly controversial case that illustrates the significance and the complexity of this always-topical subject. While reading, try to focus on the following points:

- Is *Brown* really a case of enforcement of morality by the court? Could the decision be explained or justified otherwise?
- Are special considerations required in order to justify the legal enforcement of morality, or is it the case that special considerations are required in order to show that the law must *not* be used for this purpose?
- Can you think of reasons why the law should not be used to enforce morality? Consider, in this context, the views of Mill, Devlin and Hart: Has Mill succeeded in establishing the case for the ‘harm principle’? Are Devlin’s arguments in support of enforcing morality convincing? Does Hart manage to show that the law must never be used in this way?

Basic reading

Brown [1993] 2 All E.R. 75

J. S. Mill, *On Liberty* (1859), chs 1, 4, 5 (Introduction by John Gray in the Oxford World’s Classics edition, 1998, and Roger Crisp, *Mill on Utilitarianism* (1997) Ch. 8 are helpful)

H.L.A. Hart, *Law, Liberty, and Morality* (Oxford 1963)

P. Devlin, *The Enforcement of Morals* (Oxford 1965) ch. 1 (chs 5 and 7 also recommended)

Further reading

Wilson [1996] 3 WLR 125 (for an illustration of the repercussions of the *Brown* decision)

J.F. Stephen, *Liberty Equality and Fraternity* (2nd ed, 1874; reprinted Cambridge 1967), ch. 4

12. More on the moral limits of the law Dori Kimel

HAVING FAMILIARISED ourselves in the previous lecture with the nature of the problem as well as with the inadequacies of various attempts to provide it with a simple solution, in this lecture we will continue our search for a principled approach to delineating the moral limits of the law, this time focusing mostly on contemporary literature and concepts.

Is there a legitimate scope for paternalism in the law? Is there a significant difference between paternalism in general and moral paternalism? Is paternalism compatible with personal autonomy? Can the law promote morality without enforcing it? In addressing such questions it may be helpful to ask what kind of considerations can justify the authority that the law claims to have in general. While reading, try to focus on the following points:

- What, according to Raz, are the main functions and characteristics of practical authority? What is the 'normal justification' of authority?
- Do you think that authority is justified *whenever* it is the case that acceptance of its requirements would improve people's chances of following the right reasons? Can you think of counter-examples?

Basic reading

J. Raz, *Ethics in the Public Domain* (Oxford 1994) pp. 211-15 (where you will find a useful summary of Raz's view on legitimate authority. For a more detailed account follow the references there; note that Raz's view of authority will be discussed in greater depth and detail in subsequent lectures)

Raz, *The Morality of Freedom* (Oxford 1986) chs 1, 14, 15 (especially ss 15.3, 15.4)

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

J. Feinberg, *Harm to Others* (Oxford 1984), chs 1-3

Further reading

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

D. Kimel, 'Neutrality, Autonomy, and Freedom of Contract' *Ox J Leg Stud* 21 (2001), 473, at 482-88 and 493-94.

D. Kimel, 'Remedial Rights and Substantive Rights in Contract Law' *Legal Theory* 8 (2002), 313, at 330-35.

J.M. Finnis, 'Legal Enforcement of "Duties to Oneself" ...' *Columbia LR* 87 (1987), 433, at 434-8 and 452-6

13. Anarchism and the radical critique of law John Gardner

IN THE final four lectures we will look at the law's claim to our allegiance. The law always makes a claim to our allegiance: it always claims unrestricted authority over us. But is this a legitimate claim? Does the law really have the authority it claims? Always? Sometimes? Never? Anarchists are those who answer 'never', and philosophical anarchists are those who have a decent argument for that answer.

We will be looking at two contrasting families of philosophical anarchists. Some regard law as the *enemy* of personal autonomy, and bad for that reason. Others regard law as the *friend* of personal autonomy, and bad for that reason. In this lecture we will begin with the latter view, which laces its radical critique of law into a radical critique of modern liberal (or 'bourgeois') morality. Law by its nature reflects and reinforces a decadent ideology – the ideology of liberalism – and to get rid of the ideology we need to get rid of law. The view is most closely associated with Marx and his followers but it has also influenced many otherwise non-Marxian writers and thinkers. For example a great deal of recent feminist jurisprudence and 'critical legal studies' writing associates law with a decadent (and secretly oppressive) liberal ideology of personal autonomy that needs to be exposed and challenged. Contempt for 'the legal establishment' among today's centre-left politicians also reflects the continuing political influence of Marx's philosophical anarchism – one respect in which 'New Labour' really does keep faith with its radical roots!

Basic reading

D. Miller, *Anarchism* (London 1984), chs 1–4, provides a good explanation of how different anarchist traditions fit together, including the relationship between philosophical anarchism and various activist forms of anarchism.

E.B. Pashukanis, *Law and Marxism: A General Theory* (London 1989), chs 2–4

R.M. Unger, *The Critical Legal Studies Movement* (Cambridge, Mass 1986), chs 1 & 2

14. Anarchism and law's moral authority John Gardner

WE LOOKED at some anti-liberal strands of philosophical anarchism in the previous lecture. Now we move on to consider a strand of philosophical anarchism which is, in a way, more alarming to liberal-minded people, because it challenges them on their own ideological terrain. Robert Paul Wolff argues that one should reject law's claim to authority on liberal grounds: since one should always maintain one's personal autonomy, one should never submit to the directives of any authority. Wolff's simple and plausible argument is a serious challenge to those, like Mill, Hart and Raz, who are committed to the value of personal autonomy but still believe in the possibility of at least some legitimate state authority wielded through law. Not surprising, then, that we also consider Raz's responses to Wolff, in which he argues that one need not surrender one's personal autonomy in order to submit to an authority.

Basic reading

R.P. Wolff, 'The Conflict between Authority and Autonomy' in Raz (ed.), *Authority* (Oxford 1990), or Wolff, *In Defense of Anarchism*, (New York 1970), ch 1.

J. Raz, *The Authority of Law*, (Oxford 1979), ch 1, a critique of one aspect of Wolff's view

Raz 'Government by Consent' in his *Ethics in the Public Domain* (Oxford 1994) a critique of the rest of Wolff's view.

Further reading

R. Nozick, *Anarchy, State and Utopia*, (New York 1974), chs 1-3. This illustrates how a philosophical anarchist starting-point informs some non-anarchist views of the state in the broadly liberal tradition.

15. The supposed obligation to obey the law Michelle Madden Dempsey

IN THIS lecture, we will move on to consider the alternative positions if the anarchists' comprehensive challenges to authority fail. These alternative positions divide into (1) those who consider that the law generally has prima facie legitimate authority over us (so that we all have a general prima facie moral obligation to obey the law), and (2) those who claim that whether the law has prima facie legitimate authority over us depends on what the law is telling us to do (so that we sometimes do and sometimes do not have a prima facie moral obligation to obey the law). Note that those who subscribe to (2) sometimes allow that we may *voluntarily* put ourselves into the position of having a more general prima facie obligation to obey by swearing oaths of allegiance, taking on certain roles, adopting certain attitudes etc. Occasionally those who subscribe to (1) exploit this possibility by basing their defences of (1) on the claim that we all went through the relevant voluntary process, e.g. by some 'social contract'.

Basic reading

Prominent defences of view (1): J. Rawls, *A Theory of Justice* (Oxford 1971), 333-362; J.M. Finnis, *Natural Law and Natural Rights* (Oxford 1980), ch 11; A.M. Honoré, 'Must we Obey? Necessity as a Ground of Obligation', *Virginia Law Review* 67 (1981) 39, also in Honoré, *Making Law Bind* (Oxford 1987) under the title 'Nécessité Oblige'.

L. Green 'Law and Obligations', in J. Coleman and S. Shapiro (eds), *Oxford Handbook of Jurisprudence and Legal Philosophy* (Oxford: Clarendon Press, 2002), pp.514-547. A critical survey of the leading contemporary accounts of the obligation to obey, and account of the place of the problem in general jurisprudence

J. Raz, *The Authority of Law* (Oxford 1979), chs 12 and 13. Ch 12 attacks view (1), including Rawls' defence of it. Ch 13 explains one way in which people may nevertheless acquire a more or less general prima facie obligation to obey by entering into a semi-voluntary relationship with law. Thus a compromise position between (1) and (2) emerges.

Further reading

K. Greenawalt, *Conflicts of Law and Morality* (Oxford 1987), ch 4 - an interesting alternative view which tries to show (contrary to the working assumption of our lecture!) how there could be legitimate authority without a moral obligation to obey the law.

A.J. Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1979), esp. chapters II, IV, V. The leading comprehensive treatment; a bit dated by still important for its characterization of problem and its assessment of what (does not) follow from 'philosophical anarchism'.

16. The supposed right to disobey the law Michelle Madden Dempsey

TO SAY that our obligation to obey the law is 'prima facie' is to say that it can be defeated by countervailing considerations. But what are those considerations? A number of special cases are often carved out in which, although one has a prima facie obligation to obey, it may be better, all things considered, to violate that obligation. Cases of civil disobedience and conscientious objection are the classic examples. Note that the prima facie obligation is presupposed in dealing with such cases. When we have no prima facie obligation, we have no need to mount special moral defences when we violate the law. Thus an anarchist would say to a civil disobedient: 'Why all this fuss about civil disobedience? We don't even owe the law *that* much allegiance. We certainly don't have to *justify* ourselves in the face of its wrongful claims to authority. We should just ignore those claims.' (Of course this might ring hollow to someone who is about to be arrested, locked up etc. But the anarchist is not saying we should ignore the risks of law breaking; only that we should ignore its claim to authority. We should treat it like a blackmailer. His objection to the civil disobedient/conscientious objector is that that person is not treating the law like a blackmailer, but is giving it moral credence by meeting it with special pleading.)

On the assumption that one can sometimes justify breaking one's obligation to obey the law as a civil disobedient or conscientious objector, does it follow that we have a right to engage in such acts of disobedience and objection?

Basic reading

J. Rawls, *A Theory of Justice* (Cambridge, Mass. 1971), 350-391.

J. Raz, *The Authority of Law*, (Oxford 1979), chs 14 and 15.

J.M. Finnis, *Natural Law and Natural Rights*, (Oxford 1980), ch 12

R.M. Dworkin, *A Matter of Principle*, (Oxford 1984), 104-116

Further reading

T. Allen, 'Citizenship and Obligation: Civil Disobedience and Civil Dissent', [1996] *Cambridge Law Journal* 89.

A.M. Honoré, 'The Right to Rebel', *Oxford Journal of Legal Studies* 8 (1988), 34, going beyond acts of civil disobedience to acts of revolution