JURISPRUDENCE READING LISTS
2020-2021

Plan of reading lists
Introductory essay
(1) Questions and method
(2) Law and force
(3) The rule of recognition
(4) Judging
(5) Legal systems
(6) Natural law
(7) Justice and John Rawls
(8) Rights and Robert Nozick

Books
The 'textbook' we will be using for this course is McBride and Steel, *Great Debates in Jurisprudence*, 2nd ed (Palgrave Macmillan, 2017) ('McBride and Steel' on the reading list). You should definitely buy a copy of that. You might also like to consult Simmonds, *Central Issues in Jurisprudence*, 5th ed ('Simmonds' on the reading list). We will also be referring quite a lot to Hart, *The Concept of Law* ('Hart' on the reading list) and Dworkin, *Law's Empire* ('Dworkin' on the reading list). You should buy copies of both of those books – a third edition of Hart has come out, but the second edition will serve just as well. So you will need to get a copy of that as well. We will be referring to a number of other books:
Finnis, *Natural Law and Natural Rights*
Hart, *Essays in Jurisprudence and Philosophy*
Fuller, *The Morality of Law*
Dworkin, *Taking Rights Seriously*
but you can rely on the copies in the law libraries available to you for those books.

Getting through the reading list
The reading for each supervision is split into 'Essential Reading' and 'Further Reading'. The 'Further Reading' tends to be more interesting and enjoyable than the 'Essential Reading'. Unfortunately, if you have not done the 'Essential Reading', you will find it difficult to get much out of the 'Further Reading'. As a general rule, if you are aiming for a 2.1, it is enough just to do the 'Essential Reading'. If you want to get a First, it is important that you do the 'Further Reading' at some stage. ***You should aim to do some reading on Jurisprudence every day***. Jurisprudence is not a subject that can be mastered in short bursts – it requires continual exposure to the key texts and ideas, and continual thought about them. It should not be necessary to make notes while doing your reading on Jurisprudence – the ideas that you will come across in your reading should go into your mind without your having to make notes of those ideas. If you are going to make notes, don't just copy what you are reading – that is the surest way of killing what you are reading. Try and come up with new and creative ways of presenting the information that you are being supplied with in your reading. For each reading list, I have supplied you with some 'Questions to Consider'. I want you to bear those questions in mind in doing your reading, and come to each supervision prepared to discuss those questions.

Introductory essay
In order to get you going with your reading, I have written an introductory essay for you (included in these reading lists). ***Make sure you have read this before you start your Jurisprudence reading or attend your first Jurisprudence lecture*** – it will save you a huge amount of time and confusion if you get this under your belt first before attempting anything else.

Written work
You will be required to do written work for the second and fourth supervisions in Michaelmas and Lent Term. The reading lists for those supervisions will specify the written work you will have to do.

The exam – ***IMPORTANT***
NOTE that the format of the Jurisprudence exam changed in 2020 (and not because of covid-19). The 2020 paper consisted of ten questions split into two parts – six questions on legal theory in Section A (covering, roughly, the first five supervisions), and four questions on political theory in Section B (covering, roughly, the last three supervisions). Students were required to do at least one question from each Section. This was designed to force students to put as much effort into the last three supervisions as they did to the first five. The format of the 2021 exam can be expected to be the same (though not necessarily as to how many questions will appear in each section).

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INTRODUCTORY ESSAY

In studying Jurisprudence, you will be basically looking at the work of three different generations of thinkers about law. The purpose of this introductory essay is to take you through these three different generations, and give you some idea of how they connect with each other.

First generation: Hart and Fuller

It has been said that all philosophy just amounts to 'footnotes to Plato'. It could also be said that all modern jurisprudence just amounts to footnotes to the work of HLA Hart, Professor of Jurisprudence at Oxford University from 1952 to 1969. His 1961 book *The Concept of Law* (which was actually written for the general, intelligent reader, to introduce him or her to some fundamental ideas about the nature of law, and was not intended to be a specialist work on jurisprudence) revolutionised the field of jurisprudence. In that book, and associated articles, Hart made a number of claims:

(1) The traditional understanding of legal rules as commands backed by threats of sanctions if the commands were not obeyed was too simplistic: lots of legal rules are empowering, rather than commanding, and even those legal rules which require a subject to act in a particular way claim that the subject 'ought' to act in that way.

(2) A modern, sophisticated legal system is not only made up of a set of primary rules that apply to the subjects of the legal system, but also a set of secondary rules that regulate the creation and application of those primary rules. The primary rules owe their validity to the secondary rules which recognise those primary rules as being valid. The secondary rules owe their validity to the fact that they are generally accepted and followed by those working for and within the legal system.

(3) There is no reason to think that the validity of a primary rule in a modern, sophisticated legal system will necessarily depend on whether the rule is moral or immoral. Moreover, there is no reason to think that we are morally obliged to act in a particular way just because we are required to act in that way by the legal system of which we are subjects. In that sense, there is no necessary connection between the legal question, 'What am I legally required to do?' and 'What would be the right thing to do?' In taking this view, Hart identified himself as a *legal positivist*.

(4) There is no reason to think that, at any given time, a particular legal system will, viewed as a whole, serve some morally worthwhile purpose. Some legal systems do; some legal systems don't. Over time, only those legal systems which pursue certain morally important goals – such as protecting people's lives and bodies from being harmed by others – will tend to survive, because a society which is governed by a legal system that is indifferent to whether people are unjustly killed or injured by others will tend to self-destruct. However, this is simply because of the way the world works, and has nothing to do with the nature of legal systems.

Most of Hart's major ideas about law were developed in debate with an American academic, Lon Fuller, whose major works were written in the 1950s and 1960s. Fuller contested Hart's claims (2), (3), and (4). Fuller attacked claims (2) and (4) by arguing that understanding law and legal systems required one to understand the purpose of law and the purpose of legal systems; in the same way that we simply cannot claim to understand what a clock is unless we understand what the purpose of a clock is. The purpose of law and the purpose of legal systems, Fuller claimed, is to *guide behaviour*. Once we understand that, we understand that the idea of law contains within it an 'inner morality' – a set of precepts that

law makers will seek to live up to, if they are going to operate effectively as law makers. Such precepts include: don't pass laws that are radically uncertain, or self-contradictory, or are not publicised, or apply retrospectively. A law-maker who creates such rules may be creating rules that are 'legal' in name, but he or she is fundamentally failing in the task which he or she has set him or herself – which is to create a set of rules that are capable of guiding people's behaviour. Hart responded that while these precepts might indicate to a law maker what he 'should' do if he/she wants to be an effective lawmaker, that 'should' bears no more relation with genuine morality than a set of precepts supplied to a would-be poisoner, indicating to him or her what he/she has to do in order to poison people effectively.

Fuller attacked (3) by arguing that a rule, any rule, could not be interpreted or understood against a background understanding of what the point or purpose of that rule was. As a result, interpreting and applying that rule required one to address moral issues about the worth or desirability of the rule. So the interpretation of rules cannot be divorced from arguments about what is morally good and what is morally bad. This may not seem such a blow to Hart's theory until one realises that the rule determining what does, and does not, count as a valid primary rule of a legal system is also in need of interpretation – so the question of 'What am I legally required to do?' cannot be divorced from questions of 'What is the moral point or purpose that is served by the rule determining what counts as a valid rule of law and what does not?'

Second generation: Dworkin, Finnis and Raz

Ronald Dworkin, John Finnis, and Joseph Raz were all students of Hart's at Oxford and went on to dominate the field of jurisprudence in the 1970s and 1980s. But each went their separate ways in terms of the positions they adopted on the kinds of issues that Hart was addressing.

Dworkin (who succeeded Hart as Professor of Jurisprudence at Oxford) took up Fuller's mantle as Hart's principal opponent. (Dworkin was also taught by Fuller when he went to Harvard Law School.) Dworkin's work can be divided up into two phases. Early Dworkin (1970s) closely examined the way courts in the UK and USA decided cases and argued that in fact, those courts did draw on moral considerations in determining what English law or American law said. In particular, in determining whether a given *principle* was part of English/American law, they would ask whether that principle provided a *morally appealing explanation* of the way previous cases had been decided. Dworkin contended that this exposed a flaw in Hart's legal positivism. It is generally accepted that early Dworkin's attack on Hart was a flop, in that Hart could easily accept Dworkin's claims about the way UK and USA courts determined what the law said in those jurisdictions, while still maintaining that there was no *necessary* connection between law and morality. So you could have other jurisdictions where the courts could determine what the law said on a particular issue without engaging in any kinds of moral arguments at all.

Later Dworkin (1980s, and in particular his book *Law's Empire* (1986)) sought to assault the lofty heights on which Hart had chosen to settle. Dworkin began to argue that inquiries into the nature of law were destined to go wrong if they thought that law was something that was 'out there' and merely needed to be described accurately to be understood. Instead, the concept of law only exists *within* a particular practice or conversation which is centred on a debate about what law is. To understand the concept of law, you need to become part of that practice or conversation, see where the debate has got to so far and then contribute to the continuation of that debate by offering better, more refined, definitions of what law that transcend and improve on earlier contributions to the debate.

Dworkin argued that once you get inside *our* debate over the concept of law, you *have* to accept that there is a connection between law and morality because the starting point of *our* debate is that law is something that *morally justifies* the use of force by the State against the individual; our debate is over what concept of law would best make sense of that fundamental understanding of what law is. And in *Law's Empire* Dworkin went on to offer a concept of law – *law as integrity* – which he claimed made most sense of our understanding that law is something that can be appealed to by the State to justify its use of force against the individual. In his unfinished Postscript to the second edition of *The Concept of Law*, Hart dismissed these arguments of later Dworkin, arguing that *he* – Hart – certainly did not accept that law is something that morally justifies the use of force by the State against the individual. And neither did anyone else he knew – so what basis did Dworkin have for claiming that *our* debate over the concept of law is based on the premise that law is something that *morally justifies* the use of force against the individual?

John Finnis and Joseph Raz did not seek – as Dworkin did – to challenge legal positivism. Finnis sought to go beyond the debates over how one determines what the law says on a particular issue, and explored the issue raised by Fuller as to what the purpose of law and legal systems are. Hart had very little interest in this issue – in his Postscript he said that, if pushed, he would agree with Fuller that the purpose of law is to guide behaviour, but thought that that did not really help understand how a legal system works – but for Finnis, like Fuller, a purpose-free understanding of law and legal systems was radically defective. But Finnis went beyond Fuller in arguing that the purpose of law was not *just* to guide behaviour but to guide behaviour in order to promote *human flourishing*. Law does this by co-ordinating our activities in society to enable each of us to participate in various fundamental human goods, such as friendship, play and knowledge. Of course, there are many legal regimes (Nazi, Soviet) which positively damage people's capacities to flourish as human beings – but those are degraded, attenuated, watered down versions of what a legal system is, in the same way that a broken clock is still a clock but is not really a 'central case' of what a clock is. In taking the view that law exists to promote human flourishing, Finnis stuck the label on himself of being a '*natural lawyer*' and his principal work is called *Natural Law and Natural Rights*. (A title supplied by Hart himself when he commissioned Finnis to write the book; the '*Natural Rights*' part of the title is redundant and in fact the book says very little on that issue.) But the label '*natural lawyer*' caused Finnis to be ghettoised for a long time as someone who wasn't playing the same game as serious jurisprudes like Hart. Nowadays, though, Finnis is recognised as someone who created a very powerful, serious account of the nature and significance of law – and an account which, by combining Hart's positivism with an account of the purpose of law, was far more complete than anything Hart ever achieved.

Joseph Raz is Hart's true successor in the sense that he has not sought to break any fundamentally new ground in thinking about law, but has instead simply produced much more sophisticated treatments of ideas and concepts that Hart first addressed. In particular, Raz explained why law is positivist in nature (that is, you can determine what the law says without engaging in moral argument) as being based on the fact that the law claims *authority* over us to determine what we should do. If you accept me as an authority on how you should dress, then if I am going to perform that role effectively, my guidance to you must be more specific than saying 'Wear something nice': it's to avoid thinking about what is nice and what is not that you have adopted me as an authority figure on the issue of how you should dress. My guidance must be so specific that you can follow it without having to think for yourself about what you should wear. In the same way, the law cannot function effectively as a moral authority – an authority on how we should behave – if its instructions are so general

that we still have to think about what is the right thing to do in order to work out what we are being instructed to do.

Third generation

The third generation of thinkers about law has no leading, or representative, figure. Three figures who belong to this third generation and whose work you will be coming across are: (1) John Gardner (who succeeded Ronald Dworkin as Professor of Jurisprudence at Oxford); (2) Nigel Simmonds (who is now retired, but was based here in Cambridge); and (3) Scott Shapiro (who is based at Yale Law School). Each of these thinkers demonstrates how difficult members of this third generation have found it to break free of the influences of their predecessors and say anything genuinely new.

John Gardner's work tended (past tense as he, tragically, died in July 2019) to focus on definitional issues – What does it mean to be a legal positivist? What claims does the law make for itself? What must be true about law? It is elegantly argued stuff, and can be useful in clarifying certain issues, but one wishes that such a brilliant brain had dealt with more controversial issues where the argument cannot be won by definitional fiat. (But then again he once joked that 'Many philosophers want to be architects, but I have made a perfectly good living as a philosophical plumber.') In *Law as a Moral Idea*, Nigel Simmonds has sought to build on Lon Fuller's claims that there is an intrinsic connection between rule by law and morality by arguing that: (1) a government that attempts to rule its subjects through law (rather than, for example, terror) will, of necessity, allow its subjects a degree of independence to decide for themselves how they will act and that degree of independence is of moral value; and (2) a government bent on evil ends will eventually throw off the shackles that governing its subjects through law imposes on it – in particular, the principle that someone should not be subjected to force unless there is some legal warrant for it – with the result that in the long run, only governments that seek to pursue benevolent goals will want to govern their subjects through law. But both connections between law and morality seem pretty thin; so thin, in fact, that even HLA Hart would have been happy to accept them. In his book *Legality*, Scott Shapiro has sought to advance a radical new 'planning' theory of law, where the function of law is seen as being to settle issues about what justice requires, in the same way that a plan settles the issue of what we should do or how we should go about achieving a particular goal. But it is hard to see much distinction between this theory and Finnis' theory of law.

SUPERVISION 1. QUESTIONS AND METHOD

Reading

(1) Essential reading

McBride and Steel, chapters 1 (don't get too bogged down in this chapter – just read it through and see what sticks) and 11

Hart, chapter 1

Dworkin, 'Hart's Postscript and the character of political philosophy' (2004) 24 *Oxford Journal of Legal Studies* 1

(2) Further reading

Simmonds, 1-8, 145-239 (read through without attempting to take notes – just try to get a general idea without worrying too much about the details; pages that are particularly relevant to the past paper questions for this supervision are 170-197, 216-221)

Finnis, chapter 1 (take it very slowly)

Madden Dempsey, 'On Finnis' way in' (2012) 57 *Villanova LR* 925 (available on SSRN)

Green, 'Law as a means' (available on SSRN)

Hart, 'Definition and theory in jurisprudence' (1954) 70 *Law Quarterly Review* 37 (reprinted in Hart, *Essays in Jurisprudence and Philosophy*, chapter 1)

Questions to consider

1. What questions are you looking for answers to when you study jurisprudence?

2. In what ways is law like, and not like: (a) a triangle; (b) a house; (c) a game; (d) an instruction manual?

Past paper questions

1. Is Dworkin right to insist that legal theory must be an interpretation of legal practice? Does it follow that legal theory cannot shed any light on legal systems that possess a very different ideological character from our own? (2017)

2. 'Whereas justice is an abstract standard by reference to which we evaluate social institutions, law is itself a social institution, open to empirical study. For that reason the nature of justice is a philosophical problem but the nature of law is not.' Discuss. (2016)

3. 'The debates between Hart, Dworkin and Finnis are principally about the methodological question of how to construct a theory of law. Their disagreements about what law is are almost all a function of prior disagreements about how to do legal theory.' Discuss. (2012)

4. Should legal theorists attend to, or even adopt, the perspectives of participants in the legal system? Are all these perspectives equally important when constructing a theory of law, or should some be placed at the heart of that theory and others at the margins? (2012)

5. Explain and evaluate Finnis' view that even a descriptive theory of law must be grounded in an account of practical reasonableness and the common good. (2011)

6. ‘There is no philosophical problem as to the nature of law: inquiry into the nature of law calls for observation and description, not for philosophical argument.’ Discuss. (2010)

7. ‘Hart’s concept of law is descriptively inadequate. Although it gives explanatory priority to the concerns and evaluations of people with an “internal point of view”, it fails to distinguish the central from peripheral cases of that internal point of view.’ Discuss. (2009)

8. ‘Before we can address law’s possible moral claims upon us, we must clarify the general nature of law as a distinctive type of observable human institution. It is here that modern legal positivism makes an indispensable contribution.’ Discuss. (2009)

9. ‘Justice is an abstract standard by which human institutions are judged, whereas law is an observable human institution. For that reason there are genuine philosophical questions concerning the nature of justice, but only historical and empirical questions concerning the nature of law.’ Discuss. (2008)

10. ‘Every philosophy of law needs to draw upon a theory of morality. Finnis does this explicitly, while other theorists leave their assumptions about morality unexamined and unexplained.’ Discuss. (2007)

11. ‘The evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order.’ (FINNIS) Discuss. (2006)

12. ‘Though human law is artefact and artifice, and not a conclusion from moral premises, both its positing and the recognition of its positivity (by judges, professionals, citizens, and thence by descriptive and critical scholars) cannot be understood without reference to the moral principles that ground and confirm its authority or challenge its pretension.’ (FINNIS) Discuss. (2006)

13. ‘Every theory of the nature of law must be grounded in a set of assumptions concerning human nature and moral value.’ Discuss. (2002)

SUPERVISION 2. LAW AND FORCE

Reading

(1) Essential reading

McBride and Steel, chapter 2

Hart, chapters 2-5

(2) Further reading

Simmonds, 145-160, 167-170, 187-189

Hart, 'Legal duty and obligation' in Hart, *Essays on Bentham*, ch 6

Marmor, 'The nature of law' in the Stanford Encyclopedia of Philosophy (available online – Google it), section 2 ('The Normativity of Law')

Endicott, 'Law and language' in the Stanford Encyclopedia of Philosophy, section 3.2. ('Language and the Normativity of Law')

Gardner, 'How law claims, what law claims' (available on SSRN)

Kramer, 'Requirements, reasons, and Raz' (available on JStor – Google it)

(3) Further-further reading

This bit of strictly optional further reading covers Frederick Schauer's book *The Force of Law* (Harvard UP, 2015), in which he argues that while there may be (as Hart argued) no necessary and essential connection between the use of force and the concept of law, there is enough of a connection that we can say that the whole *significance* of law lies in the fact that it coercively binds its subjects.

Schauer, *The Force of Law*, chapters 1 and 3

Green, 'The forces of law – duty, coercion, and power' (2016) 29 Ratio Juris 164

Morrison, 'Law is the command of the sovereign: HLA Hart reconsidered' (2016) 29 Ratio Juris 364

Morrison, 'The "authority" of law: Joseph Raz reconsidered' (available on SSRN at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3550861)

Written work

Write an essay in response to one of the past paper questions relevant to either this supervision or the previous supervision.

Questions to consider

1. When section 1(1) of the Protection from Harassment Act 1997 says that 'A person must not pursue a course of conduct...which amounts to harassment of another...' what is it actually saying?

2. Joseph Raz argues that law claims to provide us with an authoritative guide as to what we should (morally) do (but he is still a positivist as: (i) even if law *claims* to provide us with an authoritative guide as to what we should do, it might still be a rubbish guide as to what we should do, and (ii) if law is to provide us with an *authoritative* guide as to what we should do then it is crucial that we able to tell what the law tells us to do without engaging in moral argument ourselves). But does his theory work to explain what the law is doing when it: (i) tells drivers to drive on the left hand side of the road; (ii) tells businesses to ensure that the goods they sell are of satisfactory quality; (iii) tells innkeepers to accommodate all travellers who seek lodgings with them (unless they have a reasonable excuse for not doing so)?

3. There is a class of 'should' statements that are impliedly conditional, such as – to someone of the Jewish faith – 'You should not eat that sandwich' (where the sandwich contains pork). What is really being said here is: 'You should not eat that sandwich *if* you wish to observe the tenets of the Jewish faith'. If a judge or some other lawyer says, 'You should not refuse to employ someone on grounds of their race or sex' is it really the case that *all* they are saying is 'You should not refuse to employ someone on grounds of their race or sex *if* you wish to obey the law as it currently stands in the UK'?

4. Can we really say that someone has a legal duty to do *x* if their failure to do *x* will not attract any legal sanction at all?

Past paper questions

1. 'The differences between Hart and Austin are less significant than the resemblances. Both theorists reduce law to the facts of power, obscuring its basis in moral reason.' Discuss. (2017)

2. 'Hart successfully explains the normative character of law by relying on his analysis of rules. But he acknowledges that a system of rules constitutes a body of law only if the bulk of the population obey, and he concedes that only the officials need to adopt an "internal point of view". In the end, therefore, Hart reduces law to the governance of force.' Discuss. (2015)

3. 'Hart rejected Austin's analysis for its neglect of law's normative character. But, in making this move, Hart's theory set jurisprudence upon a path that leads away from legal positivism. If we wish to view law in a morally neutral light we should view it, as Austin did, as a structure of power and obedience.' Discuss. (2014)

4. 'Explaining the nature of law is an enterprise that is wholly distinct from explaining the basis of law's moral authority (if it has any).' Discuss. (2013)

5. Is it sufficient for a legal theorist to accommodate the internal aspect of rules, as Hart explains that idea, or should he adopt that internal perspective himself? (2013)

6. What role does the 'internal point of view' play in Hart's theory? Does it provide an enlightening basis for understanding law's normative character? (2010)

7. 'Legal systems are often "gunman situations writ large". Hart was quite mistaken in thinking otherwise, and this mistake vitiates his analysis of the concept of law.' Discuss. (2009)

8. 'Hart tries to reveal a middle path between theories that reduce law to organised threats, and theories that view law as grounded in morality. In this project he fails.' Discuss. (2008)

9. 'Either law's claim upon us is grounded in morality or law is simply a matter of organised threats. Since we contrast governance by law with governance by threats, we must conclude that law derives its validity from morality.' Discuss. (2007)

10. 'Reflection upon the nature of law might lead one to conclude that we are faced with two options: either we must conceive of law as a body of orders backed by threats, or we must

conceive of law as a body of moral obligations grounded in justice and the common good. Hart shows us that there is a viable middle way between these unacceptable alternatives, and demonstrates that the middle way is best.' Discuss. (2002)

SUPERVISION 3. THE RULE OF RECOGNITION

Reading

(1) Essential reading

McBride and Steel, chapter 3
Hart, chapter 6
Dworkin, *Taking Rights Seriously*, chapter 2
Dworkin, chapters 1, 3-6
Hart, 239-272

(2) Further reading

Simmonds, 154-160, 189-197, chapter 6
Gardner, 'Legal positivism: 5½ myths' (2001) 46 *American Journal of Jurisprudence* 199
Green, 'Legal positivism' in the Stanford Encyclopedia of Philosophy
Marmor, 'The nature of law' in the Stanford Encyclopedia of Philosophy, section 1 ('The conditions of legal validity')
Shapiro, 'The Hart-Dworkin debate: a guide for the perplexed' in Ripstein (ed), *Ronald Dworkin*

(3) Further-further reading

This bit of strictly optional further reading covers an argument made in Dworkin's last book (at least the last one published while he was alive) – *Justice for Hedgehogs* (Harvard UP, 2011) – where he departed from the position that he had taken up until then, which was that law was one thing and morality was another, though moral considerations were relevant to debates about what the law said. Instead, Dworkin completely identified law with morality, arguing that our legal obligations simply *are* the *moral* obligations that we have by virtue of the history of the political institutions under which we live. This is such a breathtaking move to make – one that subsumes law within morality – that it has taken some time for the penny to drop (with me, as much as anyone) that Dworkin made it, and even longer to consider what to make of this move. Some American academics have applauded this move, but there has been little reaction from the legal positivists – who may regard this position as to be so implausible as to be not worth responding to.

Dworkin, *Justice for Hedgehogs*, chapter 19
Waldron, 'Jurisprudence for hedgehogs' (2013) (available on SSRN at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290309)

Questions to consider

1. Can you have a functioning legal system where the officials of the legal system disagree over what its rule of recognition says?

2. If you can, does that satisfactorily account for the existence of disagreement between judges over what the law says?

3. What is the difference between 'soft' positivism and 'hard' positivism? Which position is preferable, and why?

4. If you had to set out the rule of recognition that currently underlies UK law, could you do it? And if so, what would it look like?

Past paper questions

1. Explain and evaluate the significance of Hart's idea of the rule of recognition. (2016)

2. Is there a difference between saying (with Hart) that laws are to be identified by reference to a basic rule of recognition, and saying (with Dworkin) that laws are to be identified by reference to an interpretive theory of law? If so, where precisely does the difference lie? Which view is preferable? (2015)

3. 'Hart's theory simply tells us that law is whatever is identified as law by the criteria of legal validity that the officials accept. This is scarcely very helpful or informative.' Discuss. (2013)

4. 'Hart claimed to have found the key to the science of jurisprudence in the union of primary and secondary rules. As he put it in *The Concept of Law*: "most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rules and the interplay between them are understood."' Was Hart correct? (2012)

5. What is theoretical disagreement in law? Is Dworkin right that positivist theories of law cannot satisfactorily explain such disagreement? Does Dworkin's own theory provide a satisfactory explanation? (2012)

6. 'Dworkin's theory of law describes some possible features of some possible legal systems. It does not identify necessary features of law, and therefore fails to engage directly with the claims of legal positivism.' Discuss. (2011)

7. 'Hart's idea of the basic rule of recognition provides us with a satisfactory solution to the central problems of jurisprudence.' (2010)

8. 'Dworkin never succeeds in demonstrating that there is a necessary connection between law and morality.' Discuss. (2008)

9. 'Dworkin's theory of law is confused. On the one hand, he thinks, like Hart, that it is sometimes right to disobey an iniquitous rule of law. On the other hand, he thinks that the content of law is given by integrity, in which considerations of morality and justice play a prominent role. These thoughts conflict.' Do you agree? (2008)

10. 'Even if Hart's theory of law can explain the distinction between law and morality in the case of formally enacted statutes, it is inapplicable to the common law, which makes morality the prime determinant of the content of legal principle.' Discuss. (2007)

11. 'We all know that laws can sometimes be unjust. Legal validity therefore does not entail justice. That simple fact is enough in itself to establish the truth of legal positivism.' Discuss. (2006)

12. 'Dworkin and Fuller both take the view that judges are not, and should not be, guided by a basic rule of recognition, but by an ideal aspiration that amounts to the purpose of law. In this view they are substantially correct.' Discuss. (2002)

SUPERVISION 4. JUDGING

Reading

(1) Essential reading

McBride and Steel, chapter 6
Hart, chapter 7
Dworkin, *Taking Rights Seriously*, chapter 4
Dworkin, chapter 7
Hart, 272-6

(2) Further reading

Simmonds, 160-167, 199-239, 266-274
Hart, 'American jurisprudence through English eyes: the nightmare and the noble dream' (1977) 11 *Georgia Law Review* 969 (reprinted in Hart, *Essays in Jurisprudence and Philosophy*, ch 4)
Dworkin, chapters 9-10

Video

You may be interested in watching the debate between Justices Scalia and Breyer over how the US Constitution should be interpreted at:
https://www.youtube.com/watch?v=_4n8gOUzZ8I

Written work

Write an essay in response to one of the past paper questions relevant to either this supervision or the previous supervision.

Questions to consider

1. In reading the above materials, it will be helpful to compare them with some concrete cases with which you are familiar, so as to see whether the claims the above authors make as to how judges decide cases are borne out on the ground. Virtually any set of cases would do for the purposes of this comparison, but if you have time you might like to look at:

(1) *R* v *Bow Street Metropolitan Stipendiary Magistrate*, ex p *Pinochet Uguarte (No 2)* [2000] 1 AC 119

(2) *Mareva Compania Naviera* v *International Bulkcarriers*, *The Mareva* [1980] 1 All ER 213

(3) *Elliott* v *C* [1983] 1 WLR 939

(4) *R* v *R* [1992] 1 AC 599

(5) *Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha* [1962] 2 QB 26

(6) *Knuller* v *DPP* [1973] 1 AC 435

(7) *Incorporated Council of Law Reporting* v *Att-Gen* [1971] 3 WLR 853

In relation to each case, think – Why is this case being decided the way it was? Why didn't it go the other way? Was this a decision made by applying the law to the facts, or did the judges allow the facts (and their views as to how the law should respond to those facts) to influence their findings of law?

2. In deciding cases, should judges: (a) just apply the law as they understand it to be to the facts of the case; (b) ignore the law and decide the case according to what they think is the 'right' outcome; (c) sometimes do (a) and sometimes do (b); (d) apply the law to the facts of the case unless the law has absolutely nothing to say about that case, or it is uncertain what the law says about that case – in which case, decide the case according to what they think is the 'right' outcome?

3. Do you seriously think any judge is ever constrained by the law in terms of what decision he or she reaches in a given case? If not, what is the point of law?

4. Was Lord Denning a good judge?

5. Is it possible to adopt interpret: (a) a case; (b) a statute, without adopting and endorsing a certain set of values?

Past paper questions

1. 'Judges have a duty to apply the law. They cannot properly perform that duty without addressing the question of law's nature. Jurisprudential reflection must therefore lie at the heart of adjudication.' Discuss. (2017)

2. How helpful is Dworkin's comparison of law and literature? Can judges usefully be compared to the joint authors of a chain novel? (2016)

3. Does Dworkin provide a theory of law that rivals Hart's legal positivism, or only a theory of adjudication focused on hard cases arising within liberal-democratic legal orders? (2015)

4. 'In its emphasis on purpose and context by contrast with the strict letter of the legal rules, Dworkin's critique of legal positivism has a good deal in common with Fuller's earlier arguments concerning interpretation and "penumbral cases".' Discuss. (2015)

5. 'Dworkin's writings provide a compelling account of common law method, showing the deep interconnection of legal and moral principle. His account of statutory interpretation, correctly performed, neatly complements his analysis of precedent.' Discuss. (2014)

6. Is Dworkin right to suggest that we should value law's 'integrity', in addition to its justice? (2011)

7. 'Dworkin's theory of adjudication is unacceptable in so far as it invites judges to rely upon controversial moral judgments that may reasonably be rejected by the citizen.' Discuss. (2010)

8. 'Hart's theory of law has no concrete implications for judges deciding cases: Dworkin is wrong to treat Hartian judges as necessarily committed to any particular judicial approach.' Discuss. (2009)

9. Does a legal rule have a core meaning that is distinguishable from the considerations of policy or principle that explain its adoption or enactment? If not, can legal rules impose any binding constraint on legal reasoning? (2008)

10. On the one hand, Dworkin instructs his ideal judge, Hercules, to adopt a 'constructive' approach to the interpretation of statutes, emphasising the important role of Hercules's own moral judgment. On the other hand, Dworkin thinks that Hercules will sometimes acknowledge that gravely unjust statutes are valid law. How far do you think that these elements of Dworkin's theory are consistent? (2007)

11. Should a theory of adjudication be the central component of a good theory of law? (2006)

12. 'Like the "intent of the framers" in constitutional adjudication, the idea of "legislative intention" in statutory interpretation is incoherent; judges should acknowledge more openly the creative nature of their function.' Do you agree? (2006)

13. 'It is a great weakness in Hart's theory that he can say nothing about hard (penumbral) cases except that they must be decided by considerations drawn from outside the system of legal rules. Dworkin's theory offers an enlightening account of hard cases, but is unable to explain how judges can reach convergent conclusions most of the time.' Discuss. (2002)

14. 'Dworkin and Fuller both take the view that judges are not, and should not be, guided by a basic rule of recognition, but by an ideal aspiration that amounts to the purpose of law. In this view they are substantially correct.' Discuss. (2002)

15. Dworkin is often charged with presenting a theory that gives free rein to judges to decide cases in accordance with their moral and political values. At least as often, he is charged with woefully underestimating the leeway enjoyed by judges in hard cases. Is either of these accusations justified? Are both of them justified? (2001)

16. 'Disagreements about the way in which judges do and should decide cases are inextricably linked with rival definitions of law. Meaningful debate about the proper role of the judge will not be possible until we achieved an agreed account of law's nature.' Discuss. (1998)

SUPERVISION 5. LEGAL SYSTEMS

Reading

(1) Essential reading

McBride and Steel, chapter 4
Simmonds, chapter 7
Fuller, 'Positivism and fidelity to law – a reply to Professor Hart' (1958) 71 *Harvard Law Review* 630
Fuller, *The Morality of Law*, chapters 2-4
Hart, Review of *The Morality of Law*, (1964) 78 *Harvard Law Review* 1281 (reprinted in Hart, *Essays in Jurisprudence and Philosophy*, chapter 16)

(2) Further reading

Simmonds, 'Law as a moral idea' (2005) 55 *University of Toronto Law Journal* 61
Gardner, 'Hart on legality, justice and morality' (available on SSRN)
Simmonds, 'Freedom, law and naked violence: a reply to Kramer' (2009) 59 *University of Toronto Law Journal* 381
Kramer, 'For the record: a final reply to N.E. Simmonds' (available on SSRN at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934740)

Questions to consider

1. Can we imagine a legal system where the law makers deliberately set out to make laws that are: (i) secret; (ii) unclear; (iii) retroactive; (iv) contradictory; (v) impossible to fulfil; (vi) constantly changing; (vii) not adhered to by the officials of the legal system. Would such a legal system deserve the title of a 'legal system'?

2. Is a sharp knife of no positive moral value, of and in itself? Does its value depend completely on for what purposes it is used?

3. Hart remarks, in the 'Postscript' to his *Concept of Law*, that 'my theory makes no claim to identify the point or purpose of law and legal practices as such; so there is nothing in my theory to support Dworkin's view, which I certainly do not share, that the purpose of law is to justify the use of coercion. In fact I think it is quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism of such conduct' (at 248-249). Should someone seeking to discuss 'the concept of law' be so indifferent to the purpose or point of law?

4. Is it possible to say that there are 'central cases' or 'archetypal examples' of legal systems? If so, how do we identify them?

Past paper questions

1. What is the significance of the debate between Hart and Fuller? How far does it illuminate our understanding of law? (2017)

2. Explain Fuller's idea of formal or procedural legality. Was he entitled to claim that it amounted to an internal morality of law? (2016)

3. Does law have a distinct purpose, or is it instead an instrument that serves many diverse purposes? (2016)

4. ‘Hart’s theory of law gives insufficient attention to the importance of legality as a moral value internal to legal practice and adjudication.’ Discuss. (2015)

5. Are there necessary connections between law and morality? Does this matter? (2014)

6. ‘Fuller’s account of the “inner morality of law” is a deep insight of enduring importance.’ Discuss. (2014)

7. Does Lon Fuller succeed in establishing a necessary connection between law and morality? (2013)

8. ‘Fuller is wrong to describe his eight principles as the “inner morality of law”. In doing so he blurs the distinction between efficiency for a purpose and those final judgments about activities and purposes with which morality is truly concerned.’ Discuss. (2012)

9. Is Fuller right to claim that there is an ‘inner morality of law’ (2011)

10. ‘The identification of the central meaning of law with what is morally legitimate, because oriented towards the common good, seems to me – in view of the hideous record of the evil use of law for oppression – to be an unbalanced perspective, and as great a distortion as the opposite Marxist identification of the central case of law with the pursuit of the interests of a dominant economic class.’ (HART) Discuss. (2010)

11. ‘To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system.’ (FULLER) Discuss. (2008)

12. ‘The rule of law is an essentially formal and procedural idea. It has no intrinsic moral significance.’ Discuss. (2007)

13. ‘There is no morality intrinsic to the nature of law.’ Discuss. (2006)

14. How does Fuller’s theory of law seek to demonstrate the existence of a necessary connection between law and morals? How far is Fuller successful in this enterprise? (2002)

15. In *The Morality of Law*, Fuller contends that Hart’s positivist theory of law is profoundly inadequate. Can Hart respond effectively to Fuller’s attack? If so, how? If not, why not? (2000)

16. ‘Despite Fuller’s own view, there is nothing in his account of law with which legal positivists would or must disagree.’ Discuss. (1999)

17. Should Fuller’s contribution to jurisprudence be regarded merely as a valuable supplement to Hart’s analysis of law, or rather as a fundamental critique that serves to undermine it? (1998)

SUPERVISION 6. NATURAL LAW

Reading

(1) Essential reading

McBride and Steel, chapters 5 and 7
Finnis, *Natural Law and Natural Rights*, chapters 4-5, 9-10
Finnis, 'Natural law theories' in the Stanford Encyclopedia of Philosophy (available online)
Finnis, 'Law and what I truly should decide' (2003) 48 *American Journal of Jurisprudence* 107

(2) Further reading

Simmonds, chapter 4
Hart, chapter 9, 250-54
Finnis, *Natural Law and Natural Rights*, chapter 2
Gardner, 'Nearly natural law' (2007) 52 *American Journal of Jurisprudence* 1
Alexy, 'A defence of Radbruch's formula' in Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order*

Written work

Write an essay in response to one of the past paper questions relevant to either this supervision or the previous supervision.

Questions to consider

1. What do 'natural lawyers' believe? Some possibilities:

(1) The validity of a legal rule depends, in part, on its merits.

(2) One cannot determine whether, and if so how, a legal rule applies in a particular case without making a moral judgment.

(3) All legal systems promote or protect the existence of some kind of good, or set of goods.

(4) All legal systems seek to promote or protect the existence of some kind of good, or set of goods.

(5) Not all legal systems promote or protect – or even seek to promote or protect – the existence of some kind of good, or set of goods, but those which do not are corrupt and perverted instances of legal systems.

How many of the above claims could a legal positivist agree with? How many of these claims do the legal positivists you know about actually agree with?

2. Do Gustav Radbruch's criticisms of legal positivism have any merit?

3. Would it be so bad if our judges said, as Sir Edward Coke did in *Dr Bonham's Case* (1610), that, 'the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void'?

4. Are there such things as objective, intrinsic goods? If so, what are they?

Past paper questions

1. Is there such a thing as the 'common good'? What part, if any, should that idea play in a theory of law's nature? (2017)

2. 'The idea that even grossly unjust state decrees must nevertheless be regarded as laws is an unhelpful and confusing legacy of legal positivism.' (2017)

3. 'Natural law theories show us the need for positive law. Legal positivism is a theory about the character of positive law. So there is no real conflict between natural law and legal positivism.' (2016)

4. '(T)here is no possibility of understanding the classical tradition of natural law theorizing...without first appropriating the analysis of friendship in its full sense.' Explain, in light of the quotation above, the role played by the idea of 'friendship' within Finnis's theory of law and the common good. Are the ideas of 'friendship' and 'the common good' helpful for jurisprudence?' (2015)

5. 'The insistence that grossly unjust rules cannot be regarded as law is conducive neither to clear thought nor to any sound practical purpose.' Discuss. (2015)

6. 'We can understand the nature of law only when we have properly understood the nature of the common good.' Discuss. (2014)

7. Should grossly unjust enactments be regarded as laws? Does anything of importance turn on the answer to that question? (2014)

8. 'In *The Concept of Law*, Hart describes "the classical theories of Natural Law" as claiming that "there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid." However, when we compare this statement with the account of natural law theory offered by Finnis, we must conclude that it is both inaccurate and misleading.' Discuss. (2014)

9. 'According to Dworkin's theory of law as integrity, considerations of justice are relevant to a correct determination of the content of law. Yet Dworkin also thinks that a valid law may be too wicked for judges to apply or citizens to follow. His theory is therefore marred by contradiction.' Discuss. (2013)

10. What do you take Finnis to mean by the 'common good'? Is the idea of the common good helpful in enabling us to grasp the nature of law and of justice? (2013)

11. Can there be any genuine reconciliation between legal positivism and natural law theory, or are these philosophies inescapably opposed? (2013!)

12. 'The work of John Finnis demonstrates that there is no conflict between natural law theory and legal positivism.' (2012)

13. What (if any) role does a theory of justice play in a theory of law? (2012)

14. Should we regard grossly unjust enactments as laws? (2011)

15. Is the notion of 'human flourishing' at all helpful in enabling us to understand the nature of law, or is its potential value negated by our disagreements concerning the character of a flourishing human life? (2011)

16. 'Finnis argues that the function of law is to help us lead flourishing lives. But his argument founders upon the fact of disagreement: we are unable to agree on what constitutes a flourishing life.' Discuss. (2010)

17. 'However charitably one interprets Finnis's natural law theory, it is clearly designed to defend a series of controversial and illiberal political positions: this renders his natural law theory philosophically worthless.' Discuss. (2009)

18. '[The] stress on an ideal form of law which satisfies the requirements of practical reason as the "central case" or "focal meaning" of law, and the treatment of morally bad law as "less legal", will revive old confusions between law and the standards appropriate for the criticism of law.' (HART) Discuss. (2008)

19. 'A theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of good and proper order among men and in individual conduct. Unless some such claim is justified, analytical jurisprudence […] must be content to be no more than manifestations of the various concepts peculiar to particular peoples and/or to the particular theorists who concern themselves with those people.' (FINNIS) Discuss. (2008)

20. 'Natural law theories set a premium on moral agreement and social cohesion and […] these ends are not compatible in practice with freedom in a diversified society nor agreeable ideologically to those who wish to promote diversity and tolerance.' (SHKLAR) Discuss. (2006)

21. 'We should abandon the outdated idea that there is a dispute between natural law and legal positivism. Reflection upon the views of Finnis reveals that one can be both a natural lawyer and a legal positivist.' Discuss. (2002)

22. 'Although John Finnis is the most prominent contemporary natural law theorist, there is virtually nothing in *Natural Law and Natural Rights* that is incompatible with legal positivism. However, Finnis does powerfully attack the liberal belief in the priority of the right over the good.' Discuss. (2000)

23. 'In Chapter 8 of the *Concept of Law*, HLA Hart argued that procedural justice consists in the implementation of legal norms in strict accordance with their terms. In Chapter 9, Hart maintained that any sustainable legal system will include among its mandates a number of basic prohibitions which coincide in content with fundamental precepts of morality. Thus, although Hart is usually perceived as a legal positivist, he in fact went a long way toward exposing the untenability of positivism's insistence on the separability of law and morality.' Discuss. (2000)

SUPERVISION 7. JUSTICE and JOHN RAWLS

Reading

(1) Essential reading

McBride and Steel, chapter 9 and pp 245-47

Kukathas & Pettit, *Rawls: A Theory of Justice and its Critics* (read the whole thing – 151 pages long – and be extremely grateful I haven't asked you to read Rawls, *A Theory of Justice*, or any part of it)

(2) Further reading

Simmonds, chapters 1-2

Finnis, chapters 6-7

Gardner, 'Finnis on justice' (available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081900)

Cohen, 'Where the action is: on the site of distributive justice' (1997) 26 *Philosophy and Public Affairs* 3 (available within the Cambridge site on JSTOR at: https://www.jstor.org/stable/2961909?seq=1#metadata_info_tab_contents)

Questions to consider

1. What are we talking about when we talk about 'justice'? Some possibilities:

(1) How to distribute fairly between the members of a community goods that are initially held in common by those members.

(2) How to distribute fairly between the members of a community goods that are either initially held in common by those members or are initially owned by individual members of the community.

(3) The rules that govern what the government may and may not do to us (what is otherwise known as 'political morality' – to be distinguished from 'personal morality', which is concerned with the rules that govern what we ordinary individuals may and may not do to other people).

What is Rawls' theory of justice concerned to do?

2. Are there any goods that could not justifiably be (re)distributed by applying Rawls' principles of justice? Body parts? Sexual pleasure? Beauty? Money earned through acts of genius? On sexual pleasure, you might want to look at the complaints of the group that has given itself the name 'incel'. On beauty, you might want to read Ted Chiang's short story 'Liking what you see' in his collection *Stories of Your Life and Others* (Picador, 2015).

3. Warren Buffett – the richest man in the world – is on record as saying that "I personally think that society is responsible for a very significant percentage of what I've earned...when you're treated enormously well by this market system...society has a big claim on that.' For criticisms of his views, go to: http://www.standpointmag.co.uk/no-need-to-spread-it-around-december. What do you think?

4. The two principal enemies of justice are luck and self-interest. Rawls' 'original position' thought experiment is designed to eliminate these two enemies of justice from deliberations about what sort of community we should live in, thus – supposedly – guaranteeing that the outcome of those deliberations will be 'just'. Does the experiment work?

5. People in the 'original position' are prevented from knowing what they want to do in life ('their' conceptions of 'the good'), to stop them skewing the distribution of goods in favour of their life plans. But why does Rawls also prevent them from knowing what *is* good?

6. I said above that the two principal enemies of justice are luck and self-interest. But is luck always unjust? Are fair lotteries unjust?

7. The philosopher Michael Walzer, in his book *Spheres of Justice*, suggests that how a good should be distributed will depend on what kind of good it is. So political liberties are distributed equally to everyone. Political offices go to those who can get the most votes from everyone else. Other positions of responsibility go to those who are best equipped to do the job. Money goes to those who have the most to offer other people by way of skills, goods and services. Sex goes to those who are most attractive. And so on. What do you think?

Past paper questions

1. 'Any adequate theory of justice must be founded on an understanding of human flourishing. Justice can never be neutral between conceptions of the good.' Discuss. (2017)

2. 'No one is bound by principles that might have been accepted in the original position, because that position has never existed. So Rawls's approach to justice is quite implausible.' Discuss. (2017)

3. Why does Rawls emphasise that his theory is a theory of justice for the 'basic structure'? Is the idea of the basic structure helpful? (2016)

4. 'Rawls fails to see that hypothetical contracts bind no one. Since none of us has ever been in the original position, none of us is bound by the principles that we might have agreed to in that situation.' (2015)

5. 'A society's basic structure is the outcome of millions of individual actions. Consequently, there are no special principles for the justice of the basic structure (as Rawls imagines). There are only principles of justice for individuals. A just basic structure is one that results from individuals acting with justice.' Discuss. (2015)

6. 'The principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances. These two kinds of principles apply to different subjects and must be discussed separately.' (RAWLS) Discuss. (2014)

7. Can a theory of justice be neutral between 'conceptions of the good', or must any account of justice be grounded in a rich understanding of human well-being? (2014)

8. Is it possible for a theory of justice to remain neutral between diverse ideas about well-being and the nature of a good life? (2013)

9. 'Differences in people's abilities, talents, or other forms of natural endowment are morally arbitrary. Justice demands that no-one be worse off than others as a result of such differences.' Do you agree? Does Rawls? (2012)

10. ‘Rawls’ ides of choice behind a veil of ignorance is valuable in so far as it excludes knowledge of factors that would be widely considered irrelevant to the question of justice, e.g. differences in natural talents. But it is absurd to suggest that moral views concerning the good should be excluded on the same basis: they are not irrelevant to questions of justice but are of the most immediate and pressing relevance.’ Discuss. (2011)

11. How valuable is the idea of rational choice from behind a veil of ignorance? (2010)

12. ‘Rawls’s “original position” illustrates the best way to seek and articulate a compelling theory of justice.’ Discuss. (2009)

13. ‘Justice may well be constituted by the principles that a rational agent would choose from behind a veil of ignorance. But the veil of ignorance should not exclude knowledge of the good, for no theory of justice can succeed in being neutral between diverse ideas of the good. A theory of justice must begin with an account of human flourishing.’ Discuss. (2008)

14. ‘Justice is blind, in the sense that it takes no account of the identities of particular individuals; but it is not, or should not be, blind to the conditions of human well-being and flourishing. Rawls confuses the first sort of blindness with the second when he develops his idea of the veil of ignorance. The veil of ignorance excludes knowledge of the good, yet it is only on the basis of such knowledge that an adequate theory of justice can be constructed.’ Discuss. (2007)

15. Assess the strengths and weaknesses of the idea that a theory of justice can be developed by reference to the choices of hypothetical rational agents placed behind a veil of ignorance. (2006)

16. Evaluate the role played by the ideas of ‘the distinctness of persons’ and ‘the priority of the right over the good’ in Rawls’ theory of justice. (2002)

17. ‘Understood as an attempt to lay justificatory foundations for principles of justice, John Rawls’s theory is unconvincing. His theory is much more powerful if we understand it instead as an instance of the interpretive approach to legal and political institutions that is advocated by Dworkin.’ Discuss. (2001)

18. Although John Rawls endeavours to put forward a theory of justice that will duly respect the separateness of persons, Robert Nozick submits that the separateness of persons is systematically disregarded and violated by Rawls’s theory. To what extent is Nozick’s accusation justified? (2000)

19. ‘It is unclear why Rawls imagines that the notion of choice behind a veil of ignorance should be capable of casting light upon questions of justice.’ Discuss. (1999)

SUPERVISION 8. RIGHTS and ROBERT NOZICK

Reading

(1) Rights-talk: essential reading

McBride and Steel, pp 189-96

McBride, *The Humanity of Private Law, Part I*, 43-54

(2) Nozick: essential reading

Simmonds, chapter 3

Nozick, *Anarchy, State and Utopia*, chapters 3, 7

Kymlicka, *Contemporary Political Philosophy: An Introduction*, 2nd ed, 102-27

(3) Nozick: further reading

Wolff, *Robert Nozick: Property, Justice and the Minimal State*, chs 1, 4, 5, 2 (in that order of priority – you can skip ch 3 entirely; if you are going to do an essay on Nozick, you should aim at least to have read chapters 1 and 4)

Meadowcroft, 'Nozick's critique of Rawls' in *The Cambridge Companion to Nozick's Anarchy, State and Utopia* (available within the Cambridge library system at: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/4DB591C2AD1AF3C0FC721D5A3A557FCF/9781139005296c7_p168-196_CBO.pdf/nozicks_critique_of_rawls_distribution_entitlement_and_the_assumptive_world_of_a_theory_of_justice.pdf)

Summary of Cohen, *Why Not Socialism?* (available online at https://www.barrymaguire.com/uploads/2/3/2/7/23270406/cohen_-_why_not_socialism_-_for_website.pdf)

(4) Rights-talk: further reading

Simmonds, chapter 8

Written work

Write an essay in response to one of the past paper questions relevant to either this supervision or the previous supervision.

Questions to consider

1. What does it mean to say that you have a 'right to' X?

2. Do all historic injustices have to be rectified before we could accept Nozick's theory of justice?

3. The philosopher Alasdair MacIntyre observes that both Rawls' and Nozick's theories of justice have no room for the notion of *desert* – that is, that someone should have a particular good if he deserves to have it. Is this a flaw in their theories?

4. What does it mean to own yourself? Is it good to own yourself? Is the best life one that involves your owning lots of things, including yourself?

5. Can we derive rights over property from rights over yourself? If not, how else might we justify someone's acquiring rights over property that no one previously had rights over?

6. If the only state that can survive in the long-term is Nozick's minimal state, should we still prefer to live under some other state?

7. Why not socialism?

Past paper questions

1. 'Any adequate theory of justice must be founded on an understanding of human flourishing. Justice can never be neutral between conceptions of the good.' Discuss. (2017)

2. 'The bare idea that individuals have rights is far too thin and impoverished a starting point for a theory of justice. Nozick's theory was doomed to failure at the outset.' Discuss. (2017)

3. Can a theory of justice and right be independent of conflicting views regarding human flourishing? (2016)

4. In the absence of positive law, the requirements of natural law would be too lacking in determinacy to guide conduct. Nozick overlooks this point, assuming that our natural right of self-ownership will itself entail a detailed body of property rights.' Discuss. (2016)

5. 'Nozick's principal error is in thinking that conclusions about justice can be derived from a theory of individual rights. In fact, claims about rights can only be supported by a general theory of justice.' Discuss. (2015)

6. Is the good prior to the right, or the right prior to the good? Are there other possibilities? Explain. (2015)

7. 'Any patterned principle of justice deprives people of liberty, and violates rights to self-ownership. Rawls' principles of justice are patterned, so Rawls' theory must be rejected.' Discuss. (2014)

8. 'Nozick's criticisms of Rawls fail to grasp the fact that Rawls offers a theory for the basic structure, not for particular outcomes. Rawls respects the outcomes of the market just as much as Nozick does.' Discuss. (2013)

9. 'The strongest argument Rawls presents against utilitarianism is that it ignores the distinctiveness of persons. Yet that very distinctiveness should lead us to reject both utilitarianism *and* justice as fairness, in favour of the type of entitlement theory defended by Nozick.' Discuss. (2012)

10. 'No historical entitlement theory of justice (i.e. a theory that judges the justice of a distribution by the manner in which it came about) can possibly be adequate on its own. This is because all distributions presuppose a basic structure of rights and liberties that could have been arranged differently. Market transactions are fully just only if the basic structure within which they take place is itself just.' Discuss. (2011)

11. 'The justice of a state of affairs always depends upon how it came about. We must therefore conclude that Nozick's historical entitlement theory of justice is closer to the truth than the theory offered by Rawls.' Discuss. (2010)

12. ‘If we seek a theory of justice that is genuinely neutral towards conceptions of the good, we should turn to Nozick rather than to Rawls.’ Discuss. (2009)

13. ‘Nozick’s theory of justice takes the distinctness of persons seriously, while Rawls’s theory does not.’ Discuss. (2007)

14. ‘Nozick’s criticisms of patterned theories of justice are sound. But he is unable to develop an acceptable alternative, because the bare notion of a right of self-ownership is too lacking in content.’ Discuss. (2006)

15. Robert Nozick devotes much of the seventh chapter of *Anarchy, State, and Utopia* to a sustained attack on John Rawls’ theory of justice. How telling are Nozick’s criticisms? (2003)

16. Although John Rawls endeavours to put forward a theory of justice that will duly respect the separateness of persons, Robert Nozick submits that the separateness of persons is systematically disregarded and violated by Rawls’s theory. To what extent is Nozick’s accusation justified? (2000)