

Casey

JURISPRUDENCE

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taught in most jurisprudence courses. Inevitably, a number of subjects have had to be omitted; it is therefore neither comprehensive nor exhaustive. Nor is it intended to replace the books and essays to which reference is made throughout, and to which all serious students will want to turn. My objective is to point students of jurisprudence in the right direction. If my book is as helpful to students as I know the other books in the SWOT series to be, I shall be more than gratified. If it awakens in students an interest in this absorbing and important subject, or, better still, enables them to enjoy it, I shall be delighted.

For tolerating my long absences and short temper while I grappled with the manuscript, my wife, Penelope, deserves special praise and gratitude. She was, moreover, estopped from complaining: as a recent convert to the charms of law, and devotee of the SWOT books, it was her idea that I should write this one. She now knows the true meaning of *volenti non fit injuria*.

Raymond Wacks

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ONE

JURISPRUDENCE WITHOUT TEARS?

Impossible! A contradiction in terms! Fraudulent misrepresentation! For most law students jurisprudence is pain. Given the choice, they would not take the subject at all. And it is little consolation for them to be told that one day they will look back and recognise the value of their exposure to legal theory:

How then can this book live up to its promise? You are probably a student in your third year of study (the stage at which jurisprudence is taught at most universities and polytechnics). Having got this far, you have become hardened to the lecture/seminar/essay/examination ritual that remains the predominant mode of legal education in most countries. You have sussed out the system and learned to adapt to its demands. You know which lectures are worth attending, how to appear intelligent in seminars, and how to pass examinations with minimum effort. But jurisprudence comes as something of a shock. Unlike the 'black letter' courses you have taken (and miraculously passed) you are now expected to think, to read a great deal of often turgid — and even incomprehensible — literature which has little connection with 'the law' and frequently presumes an understanding of philosophy, sociology, economics and even anthropology. There is little security here: you long for the friendly reassurance of a statute or the simple pleasures of a Denning judgment. Suddenly you are plunged into the perilous depths of grand theory, a world inhabited by epistemology, teleology and metaphysics. And your apprehension is compounded by the fact that some of your peers actually seem to understand it all!

The first and most obvious point is that this book is not intended to be a substitute for your reading of the materials prescribed by your lecturer. No single text could ever achieve that objective. Nor should it. Jurisprudence is a rich and diverse subject which is in a constant state of growth; most textbooks (and, indeed, courses) cannot aspire to much more than an eclectic skimming of its vast depths. And the book in your hands is *not* a textbook. Secondly, and almost equally obviously, no two courses in jurisprudence are the same. There are a number of theorists and theories that are common to most university and polytechnic syllabuses (and it is this

'core' that is the subject-matter of this book), but beyond that, every teacher has his or her own preferences (conditioned by a wide range of factors) and you will inevitably be required to consult *several* books, essays and articles which pertain to these topics. This book is intended to develop your skills in getting to the heart of the matter and, though it deals only with the major strands of legal theory, it aims to equip you to apply similar techniques in respect of the more exotic issues covered in your particular course.

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

Fourthly, many students fall at the last fence: the examination. There are a number of dos and don'ts (discussed in chapter 2) which, if followed, will considerably improve your performance in the examination (as well as in essays you may be required to write). Some of the best and brightest students in seminar discussions turn out to be indifferent examinees as a result of their poor mode of expression, weak presentation of argument, superfluous discussion and other avoidable (or, at least, curable) defects.

In short, then, this book will help you to think more clearly about jurisprudence. It should encourage you to approach the literature with greater insight and understanding. And it may even enable you to *enjoy* the subject. To this extent, much of the pain will be relieved and any tears you shed will be crocodile ones.

Textbooks

Jurisprudence has a prodigious literature. You will have been prescribed or recommended one or more textbooks. The most frequently recommended books in British universities and polytechnics (according to a recent survey of 57 such institutions: Barnett and Yach (1985) 5 *Legal Stud* 151, 165) are (in order):

Hart's *The Concept of Law*.

J. W. Harris's *Legal Philosophies*.

Lloyd's *Introduction to Jurisprudence*.

There are a number of other texts which, though they are no longer particularly fashionable, may be consulted with profit (Friedmann's *Legal*

Theory, Dias's *Jurisprudence*, and Paton's *A Text-book of Jurisprudence*). Each has its strengths — Dias, for example, devotes the major part of his book to what he calls 'aspects of justice' (which includes discussion of, amongst other things, statutory interpretation, custom and values). Few teachers of jurisprudence have the time to deal, in any depth, with these questions (which is a pity), and spend an overwhelming proportion of their course grappling with legal theory, i.e., the views of leading jurists on the central problems of law and the legal system. If your course does consider in greater detail the application of theory to practice you will find Dias's book a useful friend.

My own preference is for Lloyd's *Introduction to Jurisprudence*. It contains not only a very large number of extracts from the most important writings (sensibly organised and well edited), but provides reliable accounts of the various theories themselves (richly footnoted) expressed in an admirably lucid and lively manner. Your acquiring a copy could save you many frustrating hours searching for texts that some law libraries may not hold at all. Make sure you obtain the latest edition (currently the fifth, by Lord Lloyd of Hampstead and M. D. A. Freeman).

There are, of course, a number of more specialist works (to which reference is made in the chapters below), and if you are a keen student (or simply an affluent one) it would be very useful to own copies of them. You will certainly be expected to read parts or all of them. A student (who was more affluent than keen) recently asked me to nominate no more than 10 such works in this category which would comprise the 'minimum content' of a serious student's library of books that would provide a sound basis for each of the major topics covered in my course. This was my list:

- H. L. A. Hart, *The Concept of Law*.
- J. Raz, *The Concept of a Legal System*.
- W. L. Morison, *John Austin*.
- N. MacCormick, *H. L. A. Hart*.
- J. M. Finnis, *Natural Law and Natural Rights*.
- R. Dworkin, *Taking Rights Seriously*.
- J. Rawls, *A Theory of Justice*.
- R. Cotterrell, *Sociology of Law: An Introduction*.
- H. Collins, *Marxism and Law*.
- W. Twining, *Karl Llewellyn and the Realist Movement*.

There are, of course, many other works that one would wish to include in a top 10 of this kind (e.g., Kelsen's *General Theory of Law and State* and Hart's *Essays on Bentham*), and I should now probably want to substitute Dworkin's recent *Law's Empire* for his *Taking Rights Seriously*. But these 10 books contain, I think, not only excellent discussions of their own particular

subjects, but also very useful accounts of the work of other theorists (e.g., Raz on Kelsen). What is more, they provide an admirable means of familiarising yourself with the manner in which jurists think and reason and argue: what might be called (slightly pretentiously perhaps) their 'mode of discourse'. This (as will emerge in chapter 2) is an aspect of the study of legal theory that is not to be lightly dismissed. It is very often this elusive skill that separates the sheep (who excel) from the goats (who don't).

Articles in journals and essays in collections are, of course, every bit as important as books. I shall resist the temptation to formulate a further top 10 of the most important or useful articles or essays (you might challenge your lecturer to do so!) but it is obviously important to read the works referred to by your lecturer, many of which you are likely to find extracted in *Lloyd's Introduction to Jurisprudence*. Apart from the leading law journals with which you are already familiar, there are a number of specialist journals of which you may be referred. These include the *American Journal of Jurisprudence*, the *Juridical Review*, *Philosophy and Public Affairs*, the *Philosophical Quarterly*, the *Journal of Law and Society*, the *Law and Society Review*, *Political Studies* and the *Proceedings of the Aristotelian Society*. It may be necessary to forage in the depths of the main library for these (and other) periodicals which are not, strictly speaking, legal.

Lectures

Why bother? So many lectures are so indifferent that it is hard to blame students for preferring another cup of coffee (or even something stronger) to an hour's misery at the hands of a wretched lecturer who succeeds only in alienating you from his or her subject for ever! Things are changing and there is a growing awareness of the self-evident proposition that unless students actually *gain* something from lectures, they might as well be dropped altogether. Certainly many students feel that their time would be more profitably spent (rather than in the refectory or common room) in the library reading the material 'covered' in the lecture.

The teaching of jurisprudence calls, if anything, for more inspired, imaginative and stimulating teaching methods than other subjects. A dreary lecturer can easily murder the subject and inflict grievous intellectual harm on his students. If you are among the minority who are in this unfortunate position (your complaints to the lecturer him/herself, the head of department, dean etc. having proved fruitless) you should nevertheless seriously consider *attending* these laborious sessions. This is because lectures should, in any event, *never* be regarded as note-taking exercises. However dynamic or dull your teacher may be, it is essential that you come to the lecture having done some preliminary preparation. Only by equipping yourself in advance to follow the general drift of the lecture can you really

expect to achieve very much by attending. And in this respect, therefore, it is not so important (though none the less disappointing) if your lecturer is below average (unless he or she is downright incompetent).

In other words, you ought to regard *all* lectures as an opportunity to listen to (and where appropriate to take notes of) your lecturer's discussion or explanation of the subject-matter under consideration. This may sound like a counsel of perfection, but unless you are willing to relegate yourself to the role of automaton (which too many students are) you are wasting valuable energy which could be far better spent in gaining a proper *understanding* of the subject. You may find the chapters in this book useful in this respect. So, for example, if the lectures are devoted to legal positivism, it might be a good idea to read chapters 3 and 4 to give you a general picture of the landscape that is likely to be traversed. You might follow this up with a closer reading of the specific topics being discussed. Thus if (as is fairly likely) your lecturer's first 'positivist' is Jeremy Bentham, you could read the section on Bentham in chapter 3 and then look at the essay by Hart referred to (or the readings recommended by your lecturer), jotting down a few essentials to be used as the basis of your preparatory 'lecture notes'. In simple terms, therefore, the normal procedure is reversed: lecture notes are actually written *before* the lecture! Naturally, you will supplement your outline by specific observations, references or criticism made in the course of the lecture. Your preparatory notes for the first lecture on Bentham might look something like this:

Bentham

Discovery of *Of Laws* in 1832. B more sophisticated positivist than Austin?

Def. of law. S. V. Seem. (See SWOT Ch. 3.)

Commands: Imperative & permissive laws. Penal & civil parts of law. (NB *Of Laws* 176-83.)

Sovereignty: May be limited and divided (advance on Austin). Refusal to obey = limitation on sov. (But see *Hart Essays* 228-39.) Judicial review? See const. law cases.

Sanctions: No necessity.

These very brief notes (which are likely to make sense only after you have read chapter 3) will serve as an extremely useful outline in the lecture. So, instead of furiously attempting to scrawl down the lecturer's words, (as most