

Contents

What is Law?	3
Formalism	3
Legal Realism	3
Positivism	4
Natural Law Theory	5
Critical Legal Studies (CLS)	5
Critical Race Theory (CRT)	6
Feminist Jurisprudence	6
Marxism	6
Dictatorships / Authoritarian regimes and the 'rule of law'	7
I. The Rule of Law as a Protection Against Arbitrary Power	7
II. Authoritarianism and the Violation of the Rule of Law	7
III. The Problem of Legal Positivism and Dictatorship	8
Duty to Obey	9
Why do we obey the law?	11
Are we obligated to obey unjust laws?	11
Morals and Law	12
Sources and Nature of Morality	12
Separation of law from morals?	12
Morality and Legal Validity:	12
Morality in Everyday Legal Practice:	13
Morality in Justifying Legal Doctrines:	13
Law Moral Theories - Overview	14
Law Moral Theories - Detailed	15
International Law	21
Is it law?	21
War and Law	23
1. Right to go to War (jus ad bellum)	23
2. Rights in War (jus ad bello)	23
3. Rights after War (Jus post bellum)	23
Crime and Punishment	25
1. Why do we punish?	25
o Thinkers	25
o Moral luck and free will	26
o Punishment and time	26
o Punishment and memory loss	26
2. Justifications of Punishment	26
o Retribution	26
o Deterrence	27
o Rehabilitation	27
o Mix	27
Theories of Justice	29
1. Liberalism	30
2. Social Contract Theory - Contractarianism	30
a. John Locke	30
b. John Rawls	31

c. Nozick.....	32
i. Entitlement Theory.....	32
ii. Intuitive argument : Wilt Chamberlain.....	33
iii. Self Ownership Theory.....	33
3. Pluralist Theory - Walzer.....	34
Law and Probability.....	36
Law and Economics.....	37
Economic Efficiency.....	37
Market Failures.....	37
Corrective Justice.....	38
Materialisms.....	38
Law and Property.....	39
1. Moral Views.....	39
2. Utilitarianism.....	39
3. Consequentialism.....	39
4. Marx.....	40

What is Law?

- **Formalist:** Precedent / Stare decisis
- **Realist:** Made up, no meaning
- **Positivist:** command of a sovereign backed by a sovereign
- **HLA Hart:** 1ry and 2ry rules, made up when rules run out
- **Dworkin:** Hercules, hypothetical best answer

Formalism	
Definition	• Precedent / <i>Stare decisis</i> is king • Judges should decide cases solely by applying formal rules and principles of logic, without considering social context or policy implications.
Key Figures	Austin Law is a command backed by coercive power. Bentham Law is based on coercion and deterrence.
	• Argument For: Predictability and certainty - o How people should conduct themselves and how courts will behave in the future - o Aristotle: consistency, equality, and fairness. ▪ Equal treatment today as people in the past. But what if the construction is unfair/wrong? ▪ Changes in law a breach of natural justice, price we pay to protect accrued rights or benefits. • E.g. Free university / HECS; Retirement age; Medicare benefits; social security benefits... • Argument Against: Why do the same thing people did 5, 10- 50, 100 years ago? - o Hobbs: 'no man's error should be our law'. What matters is coming up with a just result. E.g. <i>Dobbs</i> overturning <i>Roe v Wade</i> (abortion rights in the US) after 50 years of <i>stare decisis</i> <i>Mabo (No 2)</i> recognising Native Title in Australia after centuries of <i>Terra Nullius</i> <i>NZYQ</i> overturning <i>Al-Kateb</i> and the constitutionality of indefinite detention of immigrants
Ratio Decidendi	• Binding component on lower courts • Key issue: what is the ratio determining a case? • No successful formal or logical scheme to extract ratio from past cases
Eugene Wambaugh's Method (doesn't work)	1. Formulate that proposition of law which you tentatively think may be the ratio 2. Take what would be called the negative of that proposition. 3. Would taking the negative of that proposition reverse the affect? 4. If it would have reversed the outcome then you have identified the ratio
Ex parte Emmerson (1898) XV WN (NSW) 101	Fact: Stoel oysters from farm in national park. Charged with larceny Issue: Pre 1988 animals were either domestic items or wild animals. Larceny only of property Held: Oysters are wild animals and not subject of property. Cannot be the subject of larceny despite being raised in a farm. Negative: Oysters not wild animals, case would be impacted.
Goodhart's theory:	• Ratio not determined by deciding judge(s), but by later judges determining the ratio
Logic:	• Deductive argument. • If you follow the same method, should get similar/same result • Only works if premise is true. E.g. All A's are B's, C is an A, therefore, C is a B. • Logic alone cannot guarantee a true conclusion • Law is not procedural / rote reasoning
Legal Realism	
Definition	Law is not just a set of abstract mechanical rules but is also influenced by social, economic, and political factors. Judges, consciously or unconsciously, consider these factors when making decisions.
Key Figures	
Christopher Langdell	Law is a science, all available material is printed, distilled rules can be identified, resulting in a consistent and predictable outcome.

- Realists argued law is radically indeterminate. This implies that legal rules don't dictate outcomes. Therefore, outcomes often depend on the judge's own values, biases, and sense of fairness (which are often moral or political). Some realists concluded that if law doesn't provide the answer, the judge should simply "do the right thing" morally. This contrasts with views like Hart's that separate legal validity from moral judgment.
- Critical Legal Studies (CLS): Building on Realism, CLS scholars argue that law is not just indeterminate but systematically reflects and reinforces the power structures and dominant ideologies (often including specific moral viewpoints) of society.
- Feminist Jurisprudence/Critical Race Theory: These perspectives analyse how dominant legal norms often reflect patriarchal or racially biased moral assumptions, leading to systemic injustice, even when laws appear neutral. They question whether the "morality" embedded in law is truly universal or serves specific groups.

Law Moral Theories - Overview

Theory	Summary	Key Figures
Virtue Ethics	Morality is about developing virtuous character traits, such as honesty, courage, justice, and compassion. A virtuous person will naturally make ethical decisions.	Aristotle, Alasdair MacIntyre
Consequentialism	The best action is the one that produces the greatest good for the greatest number of people. • E.g. punishment negative to criminal but deters others which benefits society	Jeremy Bentham, John Stuart Mill
Non-consequentialist Moral theories	Rights are trumps, moral entitlement to something non-negotiable. Thus, strong warrant for enforcing these. Each person's list of rights different (life, liberty, religion, speech, anti-discrimination, education, health...) e.g. see differences in AU bill of right legislations QLD/ACT/Vic/Cth	Dworkin
Utilitarianism	Maximizing happiness and minimizing suffering.	Jeremy Bentham, John Stuart Mill
Contractarianism	Morality arises from a social contract, an agreement among rational individuals to follow certain rules in order to live together peacefully.	Thomas Hobbes, John Rawls
Deontology	Morality is based on adherence to rules and duties, regardless of the consequences. Actions are inherently right or wrong.	Immanuel Kant
Ethics of Care	Morality is about relationships and responsibilities. We have a special obligation to care for those we are close to.	Carol Gilligan
Objectivist	Moral claims are objective, not preferences	Ayn Rand
Divine Command Theory	Morality is defined by the commands of God. Actions are right or wrong because God says they are.	Varies depending on religious tradition
Moral Truths		
Sceptical/Relativist	No moral Truth. Cannot prove any particular moral theory is right, thus no moral truth.	JL Mackie, R Rorty
Moral Truth	Moral truths can be demonstrated rationally. Some theories better than others. Some cultures may adhere to false moral views.	John Finnish
Morality as Rational Action	Attempts to violate moral norms may be irrational or self-defeating.	David Gauthier

Crime and Punishment

1. Why do we punish?

- No punishment for:
 - wicked intentions/thoughts, if not acted upon. Speech can be an action with consequences
 - causing harm through accident (excluding negligence) or without blameworthy mental state).
- *Mens rea* (intent / reckless indifference) for a criminal offence for action / consequences
- Civil vs Criminal
 - Civil - balance of probabilities - duty to compensate, put people back to where they would otherwise be.
 - compensate for losses incurred: torts, contract law, property...
 - Criminal: beyond reasonable doubt - liability for punishment
 - Removing advantage gained over community
 - Both: restoration of an upset equality
- Thinkers
 - **Hammurabi** 1755 BC -
 - Earliest codified law: civil and criminal
 - Prologue sets out context and rule of king as “protector of the weak and oppressed” and to “make justice visible in the land, to destroy the wicked person and the evil-doer, that the strong might not injure the weak”
 - Laws framed as “Should an individual do X, Z will happen to them.” Written in plain language to be understood by all.
 - Topics include: criminal, economic (salaries/prices), labour, family, agricultural, inheritance...
 - Some laws were brutal, others progressive. Upper class harsher punishment than commoners, gave women important rights.
 - **Draco** 7th century BC
 - Codified law removing discretion. Previously no standardized legal framework resulting in arbitrary rulings, favoritism, and a system that favored the powerful.
 - Codification progressive even if the laws codified brutal as being idle and stealing vegetables carried the death penalty.
 - **Aristotle** 354-322 BC
 - Virtues life: wouldn’t steal/murder etc`
 - Justice types
 - Distributive
 - Corrective: rectifies / remedies
 - **Kant** 1724-1804
 - Retribution favoured - restoring equanimity of a society
 - Scales of justice, maximise happiness for greatest number
 - Not escape justice due to utilitarianism, *lex talionis* (eye for an eye)
 - Individual responsibility, and society should enforce it. “Punishment counteracts domination by reducing the criminal to the position of the victim”, when done equally, then equilibrium re-established. Society expresses solidarity with the victim by punishing offender.
 - Test if something is wrong: universalise it
 - Person stole, all property amenable to theft. People couldn’t enjoy own property.
 - Society expresses solidarity with victim by punishing the offender.
 - Justice when criminal suffers equality as victim.
 - **Jeremy Bentham** 1748-1832
 - Utilitarian. Punishment would cause short term pain, but would result in long term good.
 - **Herbert Morris** 1928
 - Favoured retribution
 - Burdens and benefits of society be shared equally. Benefit of living in law abiding society with burden of obedience as personal responsibility.
 - Wrongdoers deserve punishment for enjoying benefits of society without accepting burden of obedience, gained unmerited advantage. Punishment restores equilibrium.