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Understanding Jurisprudence

An introduction to legal theory

RAYMOND WACKS

FIFTH EDITION

What is law? Does it have a purpose? What is its relationship to justice? Do we have a moral duty to obey the law? These are the questions which lie at the heart of jurisprudence and the study of law in general, providing invaluable context for every branch of substantive law, from tort to criminal law.

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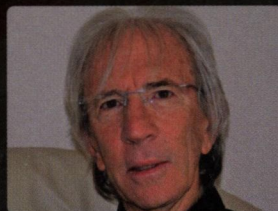


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- Multiple choice questions and a flashcard glossary give you a chance to test your comprehension of the subject and related terminology
- Further reading suggestions, including links to relevant journal articles provide a starting point for essay preparation
- Additional chapters provide advice on how to approach studying jurisprudence



Professor Raymond Wacks has taught jurisprudence around the world for over thirty years. He has published more than twenty books and numerous articles on legal philosophy, the right of privacy, and human and animal rights.

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RAYMOND WACKS

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UNDERSTANDING JURISPRUDENCE

New to this Edition

- Expanded chapters on rights, obedience to law, theories of justice, and feminist theories.
- Revised discussions of the rule of law, global justice, virtue ethics, human and animal rights, the economic analysis of law, and postmodernist theories.
- Updated suggested further reading lists and questions at the end of each chapter.

Preface

The role of law—its function, features, and future—is of increasing significance in these changing, challenging times. The Western legal tradition, and, in particular, the Anglo-American common law system, generally presumes the existence of a democratic order; the rule of law; independent, just institutions; and the protection of individual rights and liberties. These values are under increasing attack by those who seek to extinguish many of our most cherished ideals.

Careful, scrupulous analysis of the theoretical underpinnings of our legal system is therefore more urgent than ever. In revising the pages that follow I have been especially conscious of the responsibility we share to advance the understanding of the conceptual foundations of our law. We have an obligation to comprehend and sustain its central ideas; from understanding comes appreciation, and perhaps also admiration. I can only hope that this edition illuminates with even greater lucidity the principles that give life to our law.

My manuscript received the careful and comprehensive review of a squadron of distinguished jurists from a number of countries. I am extremely grateful to them; their recommendations and advice have improved the book in your hands.

I have also been ably assisted by members of Oxford University Press, particularly Felicity Boughton, copy-editor, Jeremy Langworthy, and project manager, Aishwarya Panday. My thanks to them.

Raymond Wacks
Lincolnshire, June 2017

Preface to First edition

In the course of writing this book, Lily and Willy would often peer through my study window. Though intelligent, these doves exhibited an extraordinary curiosity in the words flickering across my monitor. And in the garden, as I sat proofreading, my plucky hens displayed an equally remarkable interest in the fluttering pages I was correcting. One afternoon, Ruby leapt on to the table and pecked 'Dworkin' once and 'Coleman' twice. I have no idea what she was trying to tell me. This avian enthusiasm, I am bound to say, far exceeded that evinced by many of my pragmatic law students who may perhaps have been right: jurisprudence is strictly for the birds.

I hope not. The concept of law lies at the heart of our social and political life. Jurisprudence illuminates it and its relation to the universal questions of justice, rights, and morality. It analyses the nature and purpose of our legal system, and its practice by courts, lawyers, and judges. Or so I told them. Frequently, however, it is only after they have studied legal theory that even students of the strongest black-letter disposition come to recognize how rewarding it was. Or so they told me. Indeed, it may be the lone opportunity in a crowded curriculum for reflection upon, and critical analysis of, law and the legal system. Given proper guidance and encouragement, even the least compliant, most vocationally oriented student may develop a genuine interest in, and even affection for, jurisprudence.

But here lurks a significant difficulty. Much of the literature is an impenetrable thicket to all but the professional jurist, or wholly dedicated and gifted student. It is the chief object of this book, without avoiding the subtleties and complexities of legal theory, to provide such guidance and encouragement. The perplexed and occasionally bewildered faces of my long-suffering students over the years have been in my mind's eye throughout the writing of the pages that follow.

Jurisprudence teachers harbour few illusions about the place of the subject in students' hearts or in the pecking order of most law school curricula. What was once, in many common law jurisdictions, a compulsory course, has, in our anti-authoritarian age, become a forlorn elective. Nor, incomprehensibly, do many American students reap the rich rewards of a discipline in which so many of their professors excel. This is a crime against philosophy. If the approach adopted in this book can contribute even in small measure towards reversing this pernicious drift, my exertions may be justified.

Legal theory is, of course, a demanding discipline. Several dangers lie in wait for anyone injudicious enough to endeavour to condense or elucidate its primary concerns. In embarking upon this imprudent course, I have been alert to these perils. But I have been fortified by the guidance and encouragement I have received from friends and colleagues who have been charitable enough to suppress their misgivings about my attempts to identify and unravel some of the mysteries I have selected for analysis. This has sustained me during periods when I feared that the task I had undertaken was a hopelessly intractable one.

In writing this book I have inevitably drawn on both the earlier incarnation of this work and other published work (listed in the acknowledgements overleaf). In the case of the former, I was fortunate to have received comments, often painstaking, from Roger Cotterrell, Ronald Dworkin, John Finnis, the late Eugene Kamenka, Katherine O'Donovan, Joseph Raz, and the late Alice Tay. In respect of the latter, other debts have—feliculously—been incurred. Friends and colleagues have been humane enough to indulge my attempts to make sense of the questions I consider in my writings on legal theory and privacy that I have drawn on in this book. They have done so over the years by providing generous encouragement, assistance, or (most sensibly) by signalling my many errors. For these, and other, favours I am most grateful to Mick Belson, Colin Bennett, Peter Birks, Michael Bryan, Tom Campbell, Ann Cavoukian, Albert Chen, John Dugard, David Dyzenhaus, John Eekelaar, David Flaherty, Michael Freeman, Jim Harris, Michael Hayes, Alan Hunt, Ellison Kahn, Michael Kirby, Monnie Lee, Eddie Leung, Neil McCormick, Alistair MacQueen, David McQuoid-Mason, Roda Mushkat, Steve Nathanson, Charles Raab, Megan Richardson, Michael Robertson, Wojciech Sadurski, Heather Seward, Scott Shapiro, Jamie Smith, Nico Steytler, Peter Wesley-Smith, and David Wood. None, needless to say, should be indicted as a co-defendant for the transgressions I have committed.

My publishers prudently enlisted a detachment of distinguished legal scholars from both sides of the Atlantic to review my manuscript. I was, needless to say, quick to adopt many of their valuable suggestions. And, since their identity is unknown to me, I can, with complete insouciance, hold these anonymous individuals jointly and severally liable for what follows.

The questions that conclude each chapter serve a threefold purpose. First, they identify the central problems in each of the areas analysed. Secondly, they provide fodder for reflection and discussion in seminars or study groups, and, thirdly, they should, I hope, assist students in revising for the examination or other forms of assessment. Most are borrowed from the course materials, essay questions, and examination papers that my students at the University of Hong Kong were compelled to endure. I am grateful to the Faculty of Law for permission to use them here.

This book began life almost twenty years ago as a modest attempt to clarify some of the fundamental concerns of the philosophy of law. Though its ambitions remain modest, it, like many of us, has grown stouter. There are, nevertheless, vestiges of the book's earlier Blackstonian manifestation in these pages. But a great deal is new, for academic ingenuity endlessly slouches toward jurisprudence to be re-born.

I am grateful to those at Oxford University Press who helpfully steered this project from my mind, via my screen, to these pages. Especial thanks to Angela Griffin, Sarah Hyland, Melanie Jackson, Catherine Kernot, Sarah Nattrass, Nicola Rainbow, and Penelope Woolf (who twisted my arm to undertake this project).

This book could not have been written without the love, patience, and support of my wife, Penelope Wacks (who twisted my arm not to undertake this project). My gratitude to her for all she has given me cannot be expressed adequately in words.

This is unashamedly a book for students. It is not, however, a textbook. I have selected its subject-matter on the simple ground that it reflects what tends to be taught

in most jurisprudence courses in the common law world. 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 principal objective is to point students of jurisprudence in the right direction, soaring above needless deviation, mystification, and impediment—not unlike my discerning doves.

Raymond Wacks
October 2004

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Raymond Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013), pp 42–3.

Raymond Wacks, *Philosophy of Law: A Very Short Introduction*, 2nd edn (Oxford: Oxford University Press, 2014).

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Raymond Wacks, 'Do Animals Have Moral Rights?' in Raymond Wacks, *Law, Morality, and the Private Domain* (Hong Kong: Hong Kong University Press, 2000), pp 153–7.

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Raymond Wacks, Review of Michael Moore, *Objectivity in Ethics and Law* (Aldershot: Dartmouth, and Burlington, VT: Ashgate, 2004) in (2004) 34 *Hong Kong Law Journal* 429–32.

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Springer Nature

Alan Hunt, *The Sociological Movement in Law* (London: Macmillan, 1978). Tables 7.3 and 7.4 on pp 205 and 207 are adapted from diagrams on pages 107 and 119, respectively.

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