CHAPTER 1

The Role of Law: What Is the Relevance and Purpose of Our Legal System?

LEARNING OUTCOMES

By the end of this chapter, students should be able to:

- Understand and describe competing views of the role of law.
- Apply different theoretical positions to a range of statutes and case law.
- Differentiate among the theoretical positions advanced within this chapter (positivist, naturalist, realist, Marxist, critical legal, feminist, anarchist, libertarian, and Indigenous).
- Understand the social and political context in which law is produced and reproduced.
- Understand the concept of parliamentary supremacy and its relationship to perspectives on the role of law.

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What is the Law? The law affects nearly every aspect of our lives every day. We have laws to deal with crimes like robbery and murder. And we have laws that govern activities like driving a car, getting a job and getting married. Laws give us rules of conduct that protect everyone's rights.

The rule of law, freedom under the law, democratic principles, and respect for others form the foundations of Canada's legal heritage. Every Canadian should understand the law, and the ideas and principles behind it … . Laws also balance individual rights with our obligation as members of society. For example, when a law gives a person a legal right to drive, it also makes it a duty for a driver to know how to drive and to follow the rules of the road.[1]

(Government of Canada, 2021)

The life of the law has not been logic; it has been experience … . The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.[2]

(Oliver Wendell Holmes Jr., *The Common Law*, 1881)

So the conflict between natural law and positivism tends to become a dispute as to whether the authority of a legal system as a whole can only be understood and judged in relation to some specific moral purpose (such as promoting the common good) for which all legal systems exist. In general, the answer of natural lawyers is yes, and of positivists, no.[3]

(Roger Cotterrell, *The Politics of Jurisprudence*, 1989)

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1 Government of Canada, "About Canada's System of Justice" (2021), online: *Government of Canada* <https://www.justice.gc.ca/eng/csj-sjc/just/02.html>.

2 Oliver Wendell Holmes Jr., *The Common Law* (Boston: Little Brown, 1881).

3 R. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London: Butterworths, 1989).

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Does the opening statement of this chapter ring true? Does the law affect nearly every aspect of our lives every day? And what are we to make of these terms: positivism and natural law? What of Oliver Wendell Holmes's famous quotation above, introducing the notion of legal realism, a concept now described by the distinguished legal scholar Brian Leiter as "the correct descriptive account of appellate decision-making"?[4] Have the practical and reality-based advantages of a legal realist perspective simply eclipsed long-standing debates between positivist and natural law perspectives?

And, perhaps more important for you as a student, how do these apparently abstract notions allow you to understand the relevance and purpose of our legal system? In large measure, our task in this first chapter is to try to give meaning to these abstract terms and others to give you a sense of the intellectual excitement embedded within competing perspectives on law, and to explain to you why these apparently dry concepts are not only important but also, as the opening quotations note, highly relevant to everyday life.

During the past decade, Canadian courts and legislatures have had to respond to a number of morally and politically contentious issues. To illustrate how the law applies to our lives, we will examine two particularly notable instances of response. One is *Fraser v Canada (Attorney General)*, a decision of the Supreme Court of Canada in October of 2020, and the other is the federal legislation *An Act to the Criminal Code (medical assistance in dying)* (Bill C-7), passed into law in March of 2021.

In *Fraser v Canada*,[5] the Supreme Court was asked to rule on a claim of gender discrimination by three retired members of the Royal Canadian Mounted Police. The case focused on the right to equality under section 15 of the *Canadian Charter of Rights and Freedoms*.[6] The three women who initiated this case, Ms Fraser, Ms Pilgrim, and Ms Fox, each served as police officers in the RCMP for more than 25 years. During the early to mid-1990s, each woman took a maternity leave from work. When they returned to work within the RCMP, they found it very difficult to combine their full-time work obligations with the parenting responsibilities related to their children. At that time there was no part-time work available with the RCMP, as regular members were not permitted to work on a part-time basis. As a consequence, Ms Fox decided to retire from the RCMP and Ms Fraser decided to take an unpaid leave.

Their situations changed in December of 1997 when the RCMP introduced a job-sharing program as an alternative to taking leave without pay. This program allowed two or three members of the RCMP to split one full-time position, thereby working fewer hours than a full-time employee. This program was said to be mutually beneficial to those who were now able to work on a part-time basis and to the force, which could now address some staff shortages in small communities and have better coverage in circumstances of emergency. Between 1997 and 2011, 137 members of the RCMP enrolled in this program; they were mostly women with children who indicated that they were joining the program because of their childcare responsibilities.

4 B. Leiter, "What Is 'Legal Realism'?" (13 November 2003), online (blog): *Leiter Reports: A Philosophy Blog* <http://leiterreports.typepad.com/blog/2003/11/what_is_legal_r.html>.

5 2020 SCC 28.

6 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

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The Supreme Court of Canada in Ottawa. How might its 2020 decision in *Fraser v Canada* impact the lives of everyday Canadians?

Ms Fraser, Ms Fox, and Ms Pilgrim expected that their job-sharing arrangement would be treated like leave without pay in relation to their ability to "buy back" years of service, an arrangement found in most defined benefit pension plans. However, the acting commissioner of the RCMP determined that job sharing could not be legally defined as a combination of full-time work and leave without pay. He also argued that the classification of job sharing as part-time work was not discriminatory. Therefore, unlike those within the RCMP who had taken unpaid leave, those who had undertaken job sharing would not be able to buy back years of service, a decision that would have negative impacts on their pension incomes.

In response to this decision, the three appellants launched a Charter challenge, arguing that the pension plan violated section 15(1) of the Charter (equality rights), as it prevented women with children (who represented a strong majority of participants in the job-sharing program) from making pension contributions similar to those who take leave without pay.

The majority of the Supreme Court concluded that there was no justifiable reason for treating job sharing differently from leave without pay, and that the impact of the difference was one that perpetuated a gender bias within pension plans, creating economic disadvantages for women. They ruled that the appellants would now have the ability to buy back pension credits for their service.

A second example of the law's application to our lives is Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, passed into law in March of 2021. In June of 2016, the Trudeau government had passed Bill C-14, legislation that permits Canadians with terminal illnesses, where death is "reasonably foreseeable," to make a choice to die with a doctor's assistance. By December of that year, more than 700 Canadians who fit within this category had chosen to use a doctor's assistance to end their lives. But there were arguments that this was still too restrictive an approach to the issue of medical assistance in death. Consequently, the new law provides that Canadians no longer need to have a reasonably foreseeable death in order to access medical assistance in dying. Bill C-7 has created two sets of safeguards, one for those whose deaths are reasonably foreseeable, and one for those whose deaths are not reasonably foreseeable but who suffer from a serious and incurable physical illness, disease, or disability. For this category of person, the safeguards and protocols will be developed over a two-year period, with an exclusion of access to medical assistance in death until that time has elapsed. Bill C-7 also allows those with a foreseeable death who risk losing the capacity to consent to a medically assisted death to be able to sign a waiver of final consent.

In this chapter, we will examine various perspectives or theories—grand designs for the role of law in Canadian society. And we shall then see how these various perspectives can be linked to such pragmatic issues as those noted above: analysis of a

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Supreme Court decision about a pension plan that imposes disproportionately negative economic impacts on women and a law that will permit those suffering from incurable illnesses to obtain a medically assisted death.

Individual Perspectives on the Law

Law is a vitally important force; it is the skeleton that structures our economic, social, and political lives. It is also a barometer of the nation's view of human relations, whether in the realm of criminal law, taxation, or constitutional law. It is as difficult to conceive of complex societies without law as it is to conceive of human beings without communication. Our attitudes toward law—and the laws that we create—define us as citizens of our society, politically, economically, and morally.

If, for example, we turn to Canada's *Income Tax Act*,[7] the *Criminal Code*,[8] and the Charter, we find legal structures that have, over time, defined and redefined, among other things, the fair taxation of earned income, the moral legitimacy of physician-assisted suicide, and the political legitimacy of preferential treatment for people who are said to be disadvantaged.

Now let us consider three questions with roots in these economic, moral, and political realms: (1) Should high-income earners be more highly taxed than low-income earners? (2) Should physicians be able to provide an assisted death without criminal sanction? (3) Should individuals from historically disadvantaged groups be given preferential treatment in certain kinds of employment?

All of us will have opinions on these questions as well as justifications for our responses. For the law is a malleable human creation, which both reflects the movements of political actors and changing social mores and influences those actors and mores. Our individual perceptions of **justice** and **injustice** define our relationship as citizens to the state. We see ourselves as more and less oriented to the protection of individual liberty within each of these realms, and we may define what we mean by individual liberty quite differently in each circumstance.

justice
A term derived from the Roman term for law, *justicia*, which means "to give each man his due." In modern terms, it has come to represent an idea of legal fairness. It is often used to reflect the personal or societal understanding of the upholding of rights and the punishment of wrongs when undertaken by the law.

injustice
A word that refers to a situation in which the law or the legal system treats someone or something unfairly. The opposite of *justice*.

Theoretical Perspectives on the Law

Theoreticians of law have staked out territories according to their perceptions of the law; there are positivists, natural lawyers, legal realists, Marxists, critical legalists, feminists, anarchists, and libertarians, among others. We will examine the most dominant, or perhaps the more traditional, of these perspectives first, using the three questions about income taxation, assisted suicide, and preferential treatment in employment to highlight the central ideas of each perspective.

But, first, consider the following five definitions of the meaning of law within our culture. The perspectives that are outlined following these definitions—the positivist, natural law, legal realist, Marxist, critical legalist, feminist, anarchist, libertarian, and Indigenous points of view—go beyond this first task of description to make normative arguments about the moral, economic, and political objectives of the legal process. But note, as well, that the definitions that follow also have points of view embedded within them. Consider, for example, Cheffins and Tucker's point that law is simply a subdivision of a larger political process or Waddams's quite sensible suggestion that the law

7 RSC 1985, c 1 (5th Supp).
8 RSC 1985, c C-46.

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exists to maintain a delicate balance between the rights of the individual and the rights of the society. Is this a helpful way of understanding the dilemmas posed above in relation to either the legitimacy of an expansion of physician-assisted suicide or gender equal treatment within a pension plan?

> Law is a set of rules which are generally obeyed and enforced within a politically organized society.
>
> (Philip James, *Introduction to English Law*, 1985)

> Law is a rule established in a community by authority or custom; a body of such rules; the controlling influence of or obedience to this; the subject or study of such rules.
>
> (*The Oxford Reference Dictionary*)

> Law … is that part of the overall process of political decision making which has achieved somewhat more technical, more obvious, and more clearly defined ground rules than other aspects of politics. It is still, however, an integral subdivision of the overall political process.
>
> (R.I. Cheffins and R.N. Tucker, *The Constitutional Process in Canada*, 1986)

> Law in any society is the society's attempt to resolve the most basic of human tensions, that between the needs of the person as an individual, and her needs as a member of a community. The law is the knife edge on which the delicate balance is maintained between the individual on the one hand, and the society on the other.
>
> (S.M. Waddams, *Introduction to the Study of Law*, 1992)

> Law is one of the devices by means of which men can reconcile their actual activities and behaviour with the ideal principles that they have come to accept and can do it in a way that is not too painful or revolting to their sensibilities and in a way which allows ordered (which is to say predictable) social life to continue.
>
> (Paul Bohannan, "Law and Legal Institutions," in *The Sociology of Law*, edited by William Evan, 1980)

Traditional Theories of the Role of Law

Positivism

Positivism is defined by *The Oxford Reference Dictionary* as

> the theory that laws are to be understood as social rules, valid because they are enacted by "the **sovereign**" or derive logically from existing decisions, and that ideal or moral considerations (e.g., that a rule is unjust) should not limit the scope or operation of the law.[9]

Accordingly, positivism is a systematization of the law, seeking precision by what is apparently an almost mechanical analysis of law as a matter of logic and interpretation; the values that lie behind the law can only muddy a clear vision of the legal process. In studying the scope or operation of the law, positivists seek quantitative and qualitative facts—to explain how the "machine" works.

Hence, for legal positivists, the answers to the three questions above regarding taxation, assisted suicide, and preferential treatment in employment are straightforward: yes, supportable if this is the law; no, not supportable if this is not the law. The first question is, for example, defined by analyzing the *Income Tax Act*. As students and practitioners of the law, positivists are not concerned with its moral content. As citizens, they may have strong feelings about the direction that further amendments to

positivism
The theory that law can be understood as a valid set of rules whose content is to be determined through a logical system of precedents rather than through the application of moral considerations.

sovereign
The supreme authority in an independent political society. It is now considered to mean the absolute lawmaker. In Canada, the sovereign now refers to the legislative sovereign—Parliament, which can make or unmake any law, subject only to the limitations that Parliament has placed on itself, such as those emanating from the Constitution or the judiciary.

9 *The Oxford Reference Dictionary*, edited by Joyce M. Hawkins, Clarendon Press, Oxford, 1986.

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law should take, but these concerns do not—and, they would argue, should not—enter legal analysis or legal practice.

Positivism essentially states that adherence to a just legal process is more important than the specifics of law because these specifics will necessarily vary across time and space. The student of law should not be misled into thinking that those who espouse support for a positivist framework are inherently amoral or motivated by a desire to defer to the status quo. To the contrary, positivists argue passionately for a legal process that protects liberty and democratic institutions and prevents the abuse of political power. Consider, for example, the danger posed by those ideologues who would disband courts, legislatures, and burdens of proof without recourse to legal process, all in the name of their own version of social justice. Simply put, for positivists, the process of law is seen as more important than the specific content of law.

Positivists draw a firm line between the practice of law and the practice of politics. They regard the House of Commons and the legislative assemblies of the provinces as the proper places for debate—in the cases above, about appropriate levels of taxation, physician-assisted suicide, or differential treatment for those from historically disadvantaged groups. In this worldview, the task of lawyers, judges, or students of the law is technical and, accordingly, much more circumscribed. The advantage of creating this dichotomy between the content of law and the content of politics is said to be increased certainty, stability, and predictability. Law is the outcome of the political process, not a part of it. For example, if individual views of the morality of economic relations were to dominate, there would be no consistent application of the law, only an anarchic distribution of economic resources.

Positivism is rooted in the British doctrine of parliamentary supremacy. This doctrine, described by constitutional scholars A.V. Dicey and E.C.S. Wade, dictates that Parliament is supreme: Parliament can make or unmake any law, and no person or body shall override or set aside its legislation. Parliamentary supremacy originated as a response to the arbitrary edicts of Britain's monarchical system of government; it reserves the practice of lawmaking—and the resolution of disputes about the content of those laws—to the political process. The task of the legalist is, at its most expansive, to interpret the intentions of lawmakers, not to make moral choices. Law is a valid set of rules, enforced through a system of economic and social sanctions. It is vital that the rules be applied correctly, but the morality of the law need not be subjected to scrutiny; that is the role of the legislature. This is a good point to pause and ask about the Charter and its avowedly moral content. Is it not the point of the Charter to subject law to timeless moral values, hence subverting positivism?

social contract
A term usually attributed to Jean-Jacques Rousseau, who in 1762 wrote *Social Contract or Political Right*, in which he states, "The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."* This is the fundamental problem for which the social contract is said to provide the solution.

Positivism is also rooted in the notion of a **social contract**, that is, that law ties individuals to the collective through a binding, democratically constructed agreement. Democratic elections are expressions of the will of the people, and those who are successful in these elections are given the power to create laws. These laws then become binding and enforceable, because they flow from the will of the people. According to this view, the state, or the government of the day, is an expression of the sovereignty of the people who live within it.

* Jean Jacques Rousseau, *The Social Contract* (1762), chapter 6, "The Social Compact."

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For the nineteenth-century legal philosopher John Austin, all human laws had to conform to God-given laws, an assertion that twentieth-century legal philosopher H.L.A. Hart rejected as a "confusion." Hart suggested that this claim confuses law as it is and "law as morality would require it to be." "For him," Hart writes of Austin, "it must be remembered, the fundamental principles of morality were God's commands."[10]

Hart viewed law as a secular construction, although, like Austin, he believed that law and morality must be severed for purposes of legal practice and legal analysis. He was not, however, blind to its injustices:

> The step from the simple form of society, where primary rules of obligation are the only means of social control, into the legal world with its centrally organized legislature, courts, officials, and sanctions brings its solid gains at a certain cost. The gains are those of adaptability to change, certainty, and efficiency, and these are immense; the cost is the risk that the centrally organized power may well be used for the oppression of numbers with whose support it can dispense.[11]

In his best-known book, *The Concept of Law*, Hart argued that equating the validity of law with its morality will blind us to critical moral principles. For example, what of the law should now apply to German informers during the Nazi occupation? Hart conceded that the laws applying at the time were monstrous and immoral but argued that "morality may also demand that the state should punish only those who, in doing evil, did what the state at the time forbade. This is the principle of ***nulla poena sine lege***."[12]

nulla poela sine lege
According to *The Concept of Law* by H.L.A. Hart, "there shall be no penalty without a valid law."

The Latin maxim quoted by Hart dictates that "there shall be no penalty without a valid law," a principled limitation on the power of the state to punish. In Hart's view, should the law's validity be analytically synonymous with the law's morality, retroactive punishment will be disguised as ordinary punishment. For Hart, although in the simple positivist doctrine "morally iniquitous rules may still be law," positivism also "offers no disguise for the choice between evils which, in extreme circumstances, may have to be made."[13] The principle of "no penalty without a valid law" does not allow for repressive, retroactive law. However, this principle can comprehend retroactive law that benefits those touched by its imposition. For example, the Federal Constitutional Court in Germany ruled that Nazi law is not valid for those who suffered under its racist oppression. At the same time, however, those enforcing Nazi law in good faith (with a few exceptions) cannot be punished because of the principle "no penalty without a valid law."

Positivists are conservative in the sense that they view law as a valid set of rules. However, this does not mean that positivists adhere to conservative positions on economic, moral, or political issues for the content of the law may be premised on "radical," "liberal," or "conservative" moral values. For example, the positivist response to the question of the legitimacy of physician-assisted death posed at the start of this discussion has an answer that has changed. In 2015, the practice of physician-assisted death was not legally valid, but as of June 2016, the new legislation was validly enacted and a part of existing law, and hence part of a valid set of rules. Positivists answer the

10 H.L.A. Hart, "Positivism and the Separation of Law and Morals" in J. Feinberg and H. Gross, eds., *Philosophy of Law*, 2nd ed. (Belmont, CA: Wadsworth Publishing, 1980), 50. Reprinted from *Harvard Law Review* 71 (1958): 593H.

11 H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 197–98.

12 Ibid. at 207.

13 Ibid.

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question about persons with histories of disadvantage on the basis of existing law similarly: If an employer decides to give preference to such candidates in a hiring competition, this decision will be valid as long as the employer has, in terms of its process, the legal power to insist upon such a preference.

Natural Law and the Natural Law Response

The natural law perspective is diametrically opposed to positivism. Whereas positivists insist upon a strict separation of law and morality, the adherents of natural law insist on a clear link between law and morality. The essence of the natural law perspective is ***lex iniusta non est lex***: an unjust law is no law at all.

lex injusta non est lex
Latin for "an unjust law is no law at all," the principal tenet of the natural law perspective.

natural law
A theory that has its roots in Judeo-Christian conceptions of social life. This theory holds that law and morality must be synonymous.

Natural law has a longer history than positivism; it can be traced through more than 2,500 years of Western development, from Plato, Socrates, and Aristotle to Hobbes, Spinoza, and Rousseau. Until the twentieth century, natural law theory was generally conceived to be based upon Christian theology or Judeo-Christian values. Those who believed in this necessary coincidence of morality and law argued that there are God-given moral values that must inform the operation and study of law and legality. Unlike Austin and the positivists, however, the natural lawyers could not be sure that God-given moral values would always find expression in law. There are also many variations of this kind of natural law: Christian law, Islamic law, Sikh law, and so on.

Accordingly, today there are both theological streams of naturalism and secular streams of naturalism. Regardless of whether one finds their source of justice to derive from a theological belief system or a secular sense, the emphasis on determining moral values and principles remains. Philosopher David Lloyd explains, "We have a feeling of discontent with justice based on positive law alone, and strenuously desire to demonstrate that there are objective moral values which can be given a positive content."[14] However, the lack of clarity in such a perspective on law was well captured by the late law professor Gerald Gall: "The problem, of course, with natural law is defining the particular nature of the natural law to which [to] conform. The danger is that anyone can invoke his version of the natural law in order to suit his purposes."[15]

If law and morality are always to be coincident, which law and which morality are to prevail? In a largely secular society such as contemporary Canada, it is no answer to assert that "God's will must prevail." Even organized religions do not agree on important social issues. Muslims, Seventh-day Adventists, Jehovah's Witnesses, Hindus, Anglicans, Catholics, Jews, and Unitarians will provide different responses to the question of the morality of a given law, and there will often be additional differences of opinion, even within these categories of belief. And for those whose beliefs are based on foundations other than religion, or for non-religious citizens, the proper coincidence of law and morality is a purely secular matter.

Legal theorist Roger Cotterrell has suggested that, as a perspective on law, natural law is virtually dead, eclipsed first by positivism and later by realist and Marxist conceptions. His argument is that the utility of a natural law approach has been limited because legal doctrine has increasingly become a compromise among diverse interests within the population of a given nation-state. It is difficult to discern a moral

14 David Lloyd, *The Idea of Law* (Harmondsworth, U.K.: Penguin Books, 1973), 111.

15 G. Gall, *The Canadian Legal System*, 3rd ed. (Toronto: Carswell, 1990), 11.

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soul within such a product of conflict and compromise. Moreover, law is used, within specific geographic and temporal contexts, to create a certain kind of social order. Time-specific pragmatism guides the operation of the law, not timeless moral principles. The issue for lawmakers is less "what is moral" than "what works" in a specific time and place. According to Cotterrell,

> The problem is that even if there *are* universal principles of natural law, they may not offer a convincing guide or grounding for complex, highly technical and ever-changing modern law. After all, legal positivism does not deny that the substance of law can be subject to moral criticism. The issue is not whether law can be morally evaluated, but whether its essential character must be explained in moral terms.[16]

Nonetheless, there are many senses in which natural law remains very much alive. Both the U.S. Constitution and the Canadian Charter are statements of natural law ideals. In the latter, for instance, there is a guarantee of freedom from cruel and unusual punishment and freedoms of conscience, religion, expression, and association. These are essentially moral precepts, having their roots in "some higher system to which mere positive law should conform."[17]

The problem for natural lawyers is to identify how natural law will be determined. For example, is the 25-year minimum sentence for first degree murder cruel and unusual punishment? If we subscribe to the tenets of natural law, do we look to the deterrent impact of the penalty or to its inherent "justness" (i.e., the extent to which it adequately reflects community denunciation of such a crime)? Or do we seek answers in the often-contradictory writings of religious or moral thinkers? Since there is no single, clear morality to guide the operation of legality, an attempt to determine the specifics of natural law can be compared to the futile task of trying to nail Jell-O to the wall.

So, then, how would the adherent of the natural law perspective answer the questions on taxation, assisted death, and persons who have historical disadvantages, which are, after all, clearly moral questions? If resources are seen to be morally distributed, if assisted suicide is felt to be morally repugnant, if equality of treatment is considered a moral value to which all others should be subservient, then high-income earners should not be more highly taxed, physicians should never assist with the ending of life, and persons with disadvantages should not be given preferential treatment in matters of employment. On the other hand, if resources are seen to be unfairly distributed, if assistance with ending one's life is seen as sometimes fair and just, if persons of disadvantage are considered deserving of differential assistance, then high-income earners should be more highly taxed, an assisted death should not be criminally sanctioned, and persons from backgrounds of disadvantage should be given preferential treatment in employment.

In these opposing answers, we find the Achilles' heel of the natural law perspective. There is no doubt that morality is at the heart of the legal process. However, a perspective that demands a linkage between law and morality must specify the moral premises that will be operative at any specific time and place. Notably, with the issue

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16 R. Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (London, U.K.: Butterworths, 1989), 124.

17 D. Lloyd and M.D.A. Freeman, *Introduction to Jurisprudence*, 5th ed. (London, U.K.: Stevens, 1985), 92.

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of physician-assisted death, the law changed first in 2016, but a natural law perspective can offer us very little in the way of understanding the logic and appropriateness of this change.

Legal Realism

The legal realist movement began in the United States in the early twentieth century, primarily as a reaction to the ongoing failure of legal doctrine to predict legal outcomes in specific instances. Legal realists are often referred to as skeptics; they argue that, in order to understand the legal process, one must be aware of the political, economic, and social contexts in which law arises, changes, and persists.

Legal realists see the personality and political orientation of individual judges, community sentiments, specific economic realities, and political imperatives as all contributing to the growth of statutory law and judicial decisions. Karl Llewellyn, perhaps the most prominent of American legal realists, noted that realism is less a philosophy of law than a method or technology for achieving a more grounded understanding of law and legal process. "There is no school of realists," Llewellyn declared in 1931. "There is no group with an official or accepted, or even with an emerging creed … . There is, however, a movement in thought and work about law."[18]

The essence of this "movement in thought and work about law" is its rejection of the idea that a specific "correct" solution will inevitably emerge from the application of formal legal doctrine and formal logic to a particular legal problem. Indeed, the realist argues that legal doctrine cannot be understood without a serious empirical study of the social, economic, and political context in which that doctrine takes shape. Legal realists may be conservative, liberal, or radical in political, economic, or moral orientation, but all advocate the view that legal doctrine alone cannot explain legal decision-making. There are many senses in which **legal realism** can be seen as the natural consequence of positivism. Legal realism provides the tools for a more nuanced interpretation of the content of law, one that positivism alone appears not to speak to or easily comprehend—or incorporate within its logic.

legal realism
An approach to law that takes account not only of doctrinal developments but also the social, political, and economic bases of specific law. It is an empirically based system of analysis that arguably has its roots in positivism.

In answering the question of whether higher-income earners should be more highly taxed, realists would respond that they would need to know more about the social environment before making any decision. What social circumstances led to different forms of taxation (e.g., income, sales, corporate, and capital gains) and, more specifically, to the most recent amendments to taxation law and regulation? What are the moral, political, and economic issues surrounding these amendments? In empirical terms, how are resources taxed, and why? Similarly, in responding to the questions on physician-assisted death and the treatment of persons who have experienced economic disadvantage, there will be empirical inquiry into the social, economic, and political conditions that gave rise to the current state of the law. That is, legal realists share an epistemology—a method or grounds for obtaining knowledge—but it does not follow that there is or need be a realist consensus on moral, economic, and political issues. Realists might ultimately be divided on all three questions but are likely to be better informed about the issues underlying the law than those who take either a positivist or

18 K.N. Llewellyn, "Some Realism about Realism" in *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962), 42–76.

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a natural law perspective. With physician-assisted death and the change in law in 2016, the realist perspective can provide more context and understanding than a natural law perspective, outlining reasons for change and a range of possible explanations for the current legislation.

At the heart of the realist enterprise is a skeptical empiricism that creates an understanding of the law that is arguably distinct from both positivism and natural law. Llewellyn described the realist style of legal decision making as "grand style judging." He contrasted it with "the orthodox ideology," in which judicial precedents are seen as binding. In grand style judging, precedents are persuasive, but much more is involved: the reputation and approach of the judge writing the opinion, the general conceptual sense of the argument, and, most important, the possible consequences of the law under consideration. By contrast, the orthodox ideology is essentially a more limited, positivist position. It holds that difficult cases are to be decided by the rules of law alone. Policy is something to be debated by legislatures, not courts. The job of the court, as Llewellyn notes, is "to prune away those 'anomalous' cases or rules which do not fit."[19] In this process of pruning anomalies, judges are not creating new law but discovering the meaning of existing law and clarifying the intent of the legislature.

At the time of its inception in the United States, legal realism presented a major challenge to established thinking and writing about law. Legal realists could point to the limits of the explanatory power of positivism and to the natural law perspective's poorly contoured and inherently contradictory definitions of morality. But critics of the realist school could, in turn, point to the lack of a coherent vision or morality within its regimen of skeptical empiricism. The Marxist view offered a new holy grail: a fusion of morality and science.

Marxism
The theory that espouses the notion that law is created from an irreconcilable conflict between labour and capital. The theory is based upon a view of social life that emphasizes the guiding role of material circumstances and the inherently contradictory nature of economic inequality.

dialectical materialism
The doctrine or theory of history espoused by Marxism. In ancient Greek, "dialectic" means "dialogue" or "conversation"; thus, the doctrine of dialectical materialism holds that history progresses in stages that are based solely on the supremacy of different economic classes: feudalism replaced aristocracy, capitalism replaced feudalism, and socialism or communism will replace capitalism.

A Marxist Theory of Law and the Marxist Response

The Oxford Reference Dictionary defines **Marxism** as "the political and economic theories of Karl Marx, especially that, as labour is basic to wealth, historical development, following scientific laws determined by **dialectical materialism**, must lead to the violent overthrow of the capitalist class … . Events would then progress toward the ideal of a classless society."[20]

It is almost absurd to speak of a Marxist analysis of law and legal order; Marxists have traditionally urged "the withering away of the state" (and hence of law and legal order). They have also typically urged what must now be seen as the hopelessly naive notion of the "dictatorship of the proletariat."

It is difficult to define a single Marxist approach to law. Are we referring to the writings and teachings of Karl Marx? Law as practised within self-described communist states? Indeed, is a Marxist approach ultimately reducible to a basic core? There appears to be no simple or universally agreed-upon answer to these questions.

Moreover, there are those who work within a Marxist tradition yet reject some of Marx's claims and analyses—his call for violence; the possibility or desirability of an end to contradiction; his omission of gender from his analysis; his insistence that economic power determines law; his failure to recognize the environmental need to limit

19 K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960), 510.

20 *The Oxford Reference Dictionary*, edited by Joyce M. Hawkins, Clarendon Press, Oxford, 1986.

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production; and his lack of insight into the flexibility that capitalism would have to change itself—to counter and, at least in some ways, surmount the challenges of Marxist claims.

Marx argued that the relationship between material circumstances and human beings is dialectical in form. The economic organization of capitalism carries the seeds of its destruction. Being inherently oppressive, the distributive character of capitalism will be resisted by those who labour; it will therefore change, producing new contradictions that will require further remedy. The final result of these struggles, Marx believed, would be the "withering away" of the law; human beings would live in equality and harmony in a utopian communist state.

Capitalism has changed since Marx wrote of the contradictions of economic life in Europe and czarist Russia. Although inequality in the distributive structure of economic relations is still very much with us in Western industrialized democracies, child labour laws, trade union legitimacy, universal social assistance, and universal health care have changed the social order in Europe and, to a more limited extent, in North America.

How, then, are we to assess the Marxist analysis of law? Obviously, a literal adherence to the writings of Karl Marx has limited appeal. The problems that an avowedly communist Soviet Union faced during its last years (and continues to face as the Russian state) were problems that Marx could not foresee: environmental limits to production; inefficiencies of state ownership; and the apparently ceaseless continuation of enormous inequality and privilege, despite 1917 and the violent overthrow of the capitalist class. Still, this does not mean that all elements of the Marxist view of law should be cast aside and the perspective rejected as irrelevant.

Marxism has continued relevance for contemporary social issues that are rooted in class and the uneven distribution of wealth. For example, American scholars such as David Garland suggest that high levels of violence and the penal control of racialized groups through incarceration is caused by deep socio-economic inequality in the United States. Outside the United States, other Western nations experience lower levels of violence and lower levels of incarceration of racialized groups because of government-funded social welfare programs (e.g., social housing, public transportation, universal health care, child care, properly funded public education, and income assistance programs).

How, then, would a Marxist perspective view our three questions? First, should high-income earners be more highly taxed than low-income earners? Absolutely: the labour of certain citizens is disproportionately rewarded; increased taxation of the wealthy is a mechanism to ensure that those who expend similar amounts of labour are similarly rewarded. From the Marxist perspective, the sheer magnitude of current discrepancies in financial rewards cannot be justified even if there are differences in time and effort typically expended in labour by the richer and poorer in American (or Canadian) society.

Critics of the Marxist insistence upon economic equality argue that there are substantive differences in individual contributions to society. In the lowest-income quintile of the population, one typically finds large numbers of people unable or unwilling to labour productively. Moreover, economic rewards have historically created incentives for inventive contributions to the common good, such as new medicines and vaccines, computers, mass transit, and global systems of communication and transportation.

laissez-faire capitalism The doctrine that the free market functions to the greatest good when left unfettered and unregulated by government. Some authors give different definitions based on notions of justice and human nature.

Perhaps the future of resource distribution is neither nineteenth-century **laissez-faire capitalism** nor Marxist economic equality. The New England ice cream

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corporation Ben & Jerry's initially set out a provocative five-to-one ratio for the salaries of its employees. No employee of this self-avowed socially and environmentally conscious company could make more than five times the salary of any other employee. Interestingly, that formula was ultimately abandoned, as it compromised the ability of the company to hire effectively at the upper levels of their organization. Among American families there was, in 2019, a ratio of more than 84 to 1 between the top 1 percent of earners and the lowest 20 percent.[21]

The second question, that of physician-assisted death, falls outside the Marxist perspective. (In fairness, Marx could not easily have contemplated such a dilemma.) Additionally, however, the validity of such legislation might ultimately turn, in the Marxist view, on whether physician assistance in dying was universally available to all individuals experiencing incurable physical conditions. Most important, this option must not be selectively used to benefit a privileged class of persons.

Finally, the question about preferential treatment in employment for those with histories of disadvantage would likely be answered positively given the Marxist emphasis on economic equality. Although this issue arose after the time of Marx, and it might be argued that Marxist theory would ultimately produce legal remedies that give preference to disadvantaged minorities, it is not clear that such programs are particularly Marxist in their derivation.

Contemporary Theories of the Role of Law

The Critical Legal Perspective

The critical legal studies movement arose in U.S. law schools during the late 1970s. Like the legal realist movement of the 1920s, it attracted law teachers and social scientists who had become increasingly disenchanted with current forms of legal analysis. Those first attracted to the so-called CLS movement

> were simply seeking to locate those people working either at law schools or in closely related academic settings with a certain vaguely perceived, general political or cultural predisposition … people on the left at least relatively sceptical of the State Socialist regimes … egalitarian, in a more far-reaching sense than those committed to tax-and-transfer-based income redistribution … those appalled by the routine Socratic discussions of appellate court decisions, repelled by their sterility, and thorough disconnection from actual social life … repelled by the supposition that neutral and apolitical legal reasoning could resolve charged controversies … put off by the hierarchical classroom style in which phony priests first crush and then bless each new group of initiates.[22]

The critical legal studies movement has not always been well received by the academic mainstream (and perhaps not surprisingly given this kind of rhetoric). The late law professor Gerald Gall suggested that critical legal studies are "an amalgam of traditional legal realism and modern cynicism." He argued that whereas realists are often content to examine extralegal factors influencing the operation of the law, critical theorists look to the purposes, values, and assumptions of the legal system, challenging

21 See P. Carlin, "Pure Profit," *Los Angeles Times* (5 February, 1995). For data from 2019, see "Income Inequality in the United States" (last visited 27 November 2023), online: *Inequality.org* <https://inequality.org/facts/income-inequality>.

22 M. Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1990), 294–95.

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their contemporary relevance, rationales, and validity. Gall asserted that critical legalists argue not from a sound philosophical basis but from personal and political values.[23]

Critical legal studies are clearly an assault on a positivist understanding of law and legal process, but their precise nature is not easy to discover. Law professor Mark Kelman argued that it is more than simply a continuation of the realist critique; more fundamentally, it seeks to strip away the illusory certainty upon which the language of the law is based:

> We think in prepackaged categories, clusters, reified systems. We forget the degree to which we invent the social world. We come to think that rules make us act impersonally; we often forget that we must continually choose to act impersonally… . [S]oon we think that the rules make us do good rather than that we sometimes collectively choose to do the good things we do when applying rules … . [L]egalist practice … makes us passive by making us confused.[24]

There are elements not only of legal realism within this critique of law but also of Marxist analysis. Kelman suggested that the aim of critical legal studies is to uncover illusion or delusion in the legal form, not to remedy simple ignorance. And although Kelman and other proponents of critical legal studies have recognized the limitations and weaknesses of the Marxist view of law, it is not clear that what these studies offer is either more than a combination of legal realism and Marxist analysis or a variation in kind rather than substance. The critical legal studies movement has, unlike legal realism, typically conceptualized matters in normative terms and, like Marxism, has pointed consistently to issues of social disadvantage.

Nonetheless, it is not clear how practitioners of critical legal studies would respond to our three questions. Most likely, they would view high-income earners as deserving of greater taxation, assisted suicide as a matter of personal choice and dignity, and preferential employment for those who have historically been economically disadvantaged as advantageous. Yet none of these conclusions flow unequivocally from the critical legal studies perspective. Like legal realists, the adherents of this perspective speak to method, but like Marxists and natural lawyers, they often champion an understanding of law premised upon a specific vision of the role of law or the nature of morality in a specific society.

suffragette
A woman in Britain, Canada, or the United States in the early twentieth century who was a member of a group that demanded voting rights for women and who increased awareness of the matter with a series of public protests. The suffragette Emily Davison threw herself under the king's horse at the Derby in 1913 to draw attention to the campaign.

feminist theory of law
A theory that places the subjugation of women and denial of the equality of women as central foci of centuries of law-making. This perspective views the oppression of women as the unexamined bedrock of the legal process.

Feminist Theories of Law

A feminist theory of jurisprudence did not really begin to emerge until the 1960s, although its origins are appropriately traced to the **suffragette** movement of the early twentieth century. Feminists argue that history—and hence law—has been written from a male point of view and, as such, cannot adequately reflect the contributions that women have made to the structure of social life. A **feminist theory of law** holds that both the language and the logic of law reinforce male values—that prevailing conceptions of law serve to perpetuate male power and female subordination. Feminist analysts of the legal system have worked to identify the "gendered" nature of law, pointing to laws affecting divorce, reproductive rights, domestic violence, and employment as areas of particular concern, as well as the inequitable effects of laws whose alleged

23 Gall, *supra* note 15 at 17.

24 Kelman, *supra* note 22 at 294–95.

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neutrality contributes to adverse differential impacts on women, as was argued in *Fraser v Canada*.

Feminist theories of jurisprudence have had a particularly significant effect on legal scholarship and legal practice within the past few decades. Contemporary law journals almost universally reflect this focus and interest. Many involved in feminist theory point to a number of waves of feminist thought: first-, second-, and third-wave feminism.

First-wave feminism was preoccupied with the social and legal inequalities inflicted on women in the late nineteenth and early twentieth centuries: the lack of access to educational opportunities, the subordination of women embodied in the laws of marriage, and the denial of the right to vote. First-wave feminists were, generally speaking, white, middle-class women whose challenge to certain exclusionary legal orders sprang from their own experiences of injustice.

U.K. suffragette Emmeline Pankhurst (left) and Canadian suffragette Nellie McClung (right). How is the feminist theory of law informed by, and how has it evolved since, the work of first-wave feminists?

Second-wave feminists emerged in the late 1960s and early 1970s in North America, Britain, and Europe. Multiple concerns were expressed with respect to the regulation and control of women: lack of access to birth control and the double standards of male and female sexual expression, the plight of working women, and discrimination against lesbians and women of colour. Unlike first-wave feminists, who voiced their displeasure with laws that reflected inequality via exclusion, second-wave feminists went further, challenging the system of patriarchal law and the culture that was driving the subordination of women and urging changes not only in law but in the lived experiences of women in their private and domestic lives. In second-wave feminism, the institution of law itself was seen as problematic and contributing to the subordination of women; this was a more profound critique than that offered by first-wave feminists, who strove largely to address their own concerns with respect to equality.

Third-wave feminism is explicit in its endorsement of social activism, and this third wave has spawned much recent feminist legal theory. The third wave of feminism emerged from the political consciousness of second-wave feminism, but with a more explicitly radical analysis of the role of law and a critique of long-established legal notions such as reasonableness, objectivity, and neutrality. The feminist legal theorist Catharine MacKinnon has argued, for example, that positivism or what might be called mainstream legal theory actually hides a very explicit partiality or point of view behind what she terms its "point-of-viewlessness."[25] In denouncing such notions as reasonableness, objectivity, and neutrality, this kind of radical feminism necessarily opens the door to alternative methods for constructing knowledge—to what theorists term an alternate epistemology. Feminist narratives—the storytelling of experiences of subordination by gender and their intersecting realms of class and race—are viewed as sound epistemology, more deserving of the mantle of legal scholarship than any dispassionate analysis of legal doctrine.

25 C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), 16.

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"Intersectionality" has become a critical focus for many modern feminist critiques of law. It is a concept first set out by Columbia Law Professor Kimberlé Crenshaw in 1989, when she published a paper titled, "Demarginalizing the Intersection of Race and Sex." In 2017, as part of an interview with her law school, Crenshaw neatly defined the term:

> Intersectionality is a lens through which you can see where power comes and collides, where it interlocks and intersects. It's not simply that there's a race problem here, a gender problem here, and a class or LBGTQ problem there. Many times that framework erases what happens to people who are subject to all of these things.[26]

Professor Crenshaw argues that intersectionality is not a grand theory of law and so, accordingly, is quite different from positivism, natural law, or Marxism. She conceives of intersectionality as an important tool for understanding how disadvantage can manifest itself through these linkages. She notes that you might be trying to explain to a court why they should not dismiss a claim of inequality made by a Black woman when the initial response is that there is no injustice: the employer did, after all, hire both Black men and white women. It is the linking of disadvantage—of race and gender (and other similar characteristics of disadvantage) that is often relevant—in this instance, being both Black and a woman. Intersectionality may seem to be a somewhat cumbersome word, but it is a very useful analytic tool for the understanding of law's operation, not unlike legal realism. Categories of disadvantage do intersect, and the consequences of these intersections are often profound.

In many ways, the feminist and intersectional theories of law represent a more substantial challenge to the role of law than other contemporary theoretical frameworks. There is, however, no uniform or singular feminist or intersectional analysis of law. Although they share a commitment to the moral, political, and social equality of people, beyond this vision, substantial disagreement exists, especially in the everyday practice of feminism. Pornography is seen by some radical feminists as worthy of censorship and criminalization—as the embodiment of the male abuse of women. Yet other feminists reject this criminalization or censorship of pornography, urging that protection of sex workers constitutes a more worthy struggle. Similarly, some feminists celebrate differences between men and women, asserting that women tend to emphasize different values and skill sets in their everyday lives; other feminists reject this kind of analysis, its empirical merits notwithstanding. A rejection of biological relevance leads some feminists to suggest that the only sex differences of any consequence are largely socially constructed—those that emanate from the realm of power.

A useful summary of the origins of a feminist theory of law and the range of definitions within it is offered by L.A. Obiora and R. Perry in the *International Encyclopedia of the Social Sciences*. Their analysis differs slightly from that set out above but can be seen as another lens through which to observe the continuing emergence of a feminist theory of law. It is perhaps most useful for documenting a lengthy history of the legal oppression of women. What is most striking about the Obiora and Perry analysis is the extent to which it pays tribute to the feminists of the mid-nineteenth century, noting that their contributions to establishing women as individuals with a legal identity paved

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26 Columbia Law School, "Kimberlé Crenshaw on Intersectionality, More than Two Decades Later" (8 June 2017), online: *News from Columbia Law* <https://www.law.columbia.edu/news/archive/kimberle-crenshaw-intersectionality-more-two-decades-later>.

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the way for the more expansive conceptions of feminism that we see today.[27] Similarly, and more specifically, the emergence of a very active feminism in the 1960s—and more recent widespread revelations of sexual assault and sexual harassment in a range of workplaces—owes its origins to these early struggles.

How would a feminist perspective view the issue of taxation? It would likely be in favour of a higher rate of taxation for high-income earners, given the history of unequal treatment of women within our legal system. With the issue of physician-assisted death, again many feminists would speak in its favour, emphasizing the need for a greater range of choice, but there are also many feminists who would take issue with this approach, arguing that vulnerable women could be the victims of this process rather than willing recipients of such "assistance." And with respect to preferential treatment for historically disadvantaged groups, again there is no clear answer to be found in feminist perspectives but some likelihood that it would be endorsed, given the vulnerability of women and the desire to improve their well-being.

The Anarchist and Libertarian Perspectives: Critical Differences

There have been many other grand designs for understanding law besides those examined to date. The **anarchist perspective on law** and society is suspicious of all forms of state control, but anarchists also endorse a communitarian ethic that is quite distinct from contemporary libertarian perspectives. In nineteenth-century Europe, libertarianism—freedom of the individual from state control—was generally thought of as synonymous with anarchism. Even today, anarchism of this kind holds that all forms of government are unnecessary and oppressive; the state is seen as the mechanism responsible for the murder of more than 100 million human beings, for concentration camps, and for widespread famine. In this view, the economic system would ideally be organized on the basis of cooperatives and communal ownership. Unlike twentieth-century libertarians, anarchists are committed to a principle of egalitarianism; they argue that inequalities of wealth and power are obstacles to overcome and will necessarily give rise to the abuse of power by the state.

anarchist perspective on law
A perspective that emphasizes the role of an oppressive and intrusive state as central to understanding social life. Anarchists typically endorse a non-state-based communitarian ethic, whereas libertarians view the rights of the individual as more deserving of support than the rights of the community.

Libertarians, in contrast, celebrate the rights of the individual and reject the notions of social security that are often at the heart of the anarchist tradition. David Friedman, in his book *The Machinery of Freedom*, summarizes libertarian beliefs about the role of the state and, hence, the role of law:

> The central idea of libertarianism is that people should be permitted to run their own lives as they wish. We totally reject the idea that people must be forcibly protected from themselves. A libertarian society would have no laws against drugs, gambling, pornography—and no compulsory seat belts in cars. We also reject the idea that people have an enforceable claim on others, for anything more than being left alone. A libertarian society would have no welfare, no social security system. People who wished to aid others would do so voluntarily through private charity, instead of using money collected by force from the taxpayers. People who wished to provide for their old age would do so through private insurance.[28]

Put differently, given the questions asked at the outset of this chapter, there would be no support for higher taxation and no preferential treatment for the historically

27 L.A. Obiara and R. Perry, "Feminist Legal Theory" in *International Encyclopedia of the Social Sciences*, Vol. 8 (Oxford: Elsevier, 2001), 5464–69.

28 D. Friedman, *The Machinery of Freedom*, 2nd ed. (LaSalle, IL: Open Court, 1989).

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marginalized. With respect to the issue of physician-assisted death, while there would be support from this perspective for individual choice at the end of one's life, they would reject state-imposed regulatory systems that exert excessive control.

Indigenous Perspectives on Law

As will be discussed in Chapter 2, much of the law contained in this textbook is derived from statutes and court decisions, reflecting the legal systems practised in England and France, the nations that colonized Canada and imported their ideas of legality with them. While we most often canvass perspectives with an emphasis on settler legal systems, this textbook also emphasizes a **colonial perspective of the law**.

colonial perspective of the law
Colonialism is defined as "control by one power over a dependent area or people." It occurs when one nation subjugates another, conquering its population and exploiting it, often while forcing its own language and values upon its people.* A colonial perspective is an approach to law and legal systems that takes into account the impact of settler politics and institutions on the development of settled lands and cultures.

Indigenous perspective of the law
A perspective that recognizes the traditional and original owners of a land, their cultural values and traditions, and their forms of governance.

Prior to European settlement, Indigenous groups organized themselves according to Indigenous legal orders and had a different conceptualization of the role and purpose of law from European settlers. As John Borrows, holder of the Chair in Indigenous Law at the University of Victoria, has noted,

> The earliest practitioners of law in North America were its original [I]ndigenous inhabitants. These people … include, among others, the ancient and contemporary nations of the Innu, Mi'kmaq, Maliseet, Cree, Montagnais, Anishinabek, Haudenosaunee, Dakota, Lakota, Nakota, Assinaboine, Saulteaux, Blackfoot, Secwepemec, Nlha'kapmx, Salish, Kwakwaka'wakw, Haida, Tsimshian, Gitksan, Tahltan, Gwich'in, Dene, Inuit, Metis, etc.[29]

As Borrows notes, there are 12 distinct language families that can be traced back through millennia to many different regions in what is now called Canada. An **Indigenous perspective of the law** emphasizes these Indigenous legal orders that continue to govern members of those groups in contemporary society.

Section 35 of Canada's *Constitution Act, 1982*[30] protects the existing culture and practices of Indigenous ("Aboriginal") Canadians. As has been noted, when peoples from other continents arrived in North America, many treaties were developed, arrangements that are now best understood as legal agreements. Perhaps most important, since 1982 and the passage of the *Constitution Act*, these treaty rights have been recognized and affirmed. As Borrows has noted, "The continuation of treaty rights and obligations entrenches the continued existence of Indigenous legal traditions in Canada."

In asserting the validity of Indigenous law, Borrows presciently noted in 2005:

> Recognizing and affirming [I]ndigenous legal traditions would facilitate the rule of law within Indigenous communities as they lived closer to their values and principles. It would enable the exercise of greater responsibility for their affairs and allow them to hold their governments and one another accountable for decisions made within their communities. If properly implemented and harmonized with Canada's other legal traditions, such an approach would be consistent with their human rights as peoples while ensuring that other's rights were not abrogated. Creating a national framework to facilitate the implementation of [I]ndigenous legal traditions would help to ensure that non-Indigenous rights and

29 J. Borrows, "Indigenous Legal Traditions in Canada" (January 2005) 19 *Washington University Journal of Law & Policy* 175.

30 Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Constitution].

* E. Blakemore, "What is Colonialism?" (6 October 2023), online: *National Geographic* <https://www.nationalgeographic.com/culture/article/colonialism#:~:text=Colonialism%20is%20defined%20as%20%E2%80%9Ccontrol,cultural%20values%20upon%20its%20people>.

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> interests are also respected. It is easier to envision fairer and more effective laws when rights are determined on more even playing fields, with greater [I]ndigenous influence and participation.[31]

In sum, this is the challenge that we continue to face. How would those employing an Indigenous perspective respond to the questions that we raised earlier in this chapter? Most likely, they would view high-income earners as deserving of greater taxation, as equality of wealth and opportunity has been a longstanding value. However, taxation systems are a form of colonial law, so Indigenous nations may have alternative systems in use in their respective governance structures. They would likely view physician-assisted death as a matter of personal choice and dignity, though given the range of harms that their communities have had imposed upon them via colonial health, education, and criminal law systems, many Indigenous leaders would likely be cautious, urging a domain of careful oversight over the Canadian government's system of regulation. And finally, they would likely view preferential employment for those who have been historically marginalized as advantageous, given the economic, social, and political inequality that they have experienced over time and that they view as inherent to colonial and capitalist institutions. Yet none of these conclusions flow unequivocally from an Indigenous perspective because these are colonial legal issues rather than issues that have arisen within Indigenous communities; further, there is significant diversity among Indigenous systems of law and approaches to legal orders. One commonality among many Indigenous perspectives on colonial law is to seek to diminish and eliminate inequalities that continue to find support within the Canadian legal system.

Fraser v Canada and Bill C-7: Testing Perspectives on Law

Let us now return to the issues raised at the beginning of this chapter: first, the Supreme Court decision focused on whether the three RCMP officers who could not "buy back years of service" were subject to violations of the right to equal protection and equal benefit of the law as guaranteed by section 15 of the Charter; and second, the passage of Bill C-7, and the mandate of this new law—extending the rights of Canadians to a medically assisted death.

The Positivist Perspective

The legal positivist might well be inclined to support the interpretation of the Supreme Court in *Fraser v Canada*. The Charter is part of Canada's Constitution and validly enacted law. The Supreme Court is simply doing what the law requires: testing legislation against the section 15 Charter provision—the right to equal protection of the law. But some positivists also might be skeptical of the role of the Charter in this case, arguing that judicial decisions that can override legislation are undemocratic, substituting the judgment of non-elected individuals for the democratic will of representative government. Ultimately, however, there is a positivist logic of support for the Charter. The Charter is, after all, part of the Constitution, validly enacted law, and, as such, deserving of support; the law mandates judicial overview to protect what are considered to be timeless human rights. The manner in which section 15 of the Charter was interpreted, however, would probably be applauded by most, but not all, positivists. Only those who

31 Borrows, *supra* note 29 at 221–22.

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view the Charter as an infringement upon the democratic will of government would be critical of the decision.

The legal positivist would have little to say about the introduction of Bill C-7 and the passage of changes to the laws governing medically assisted death. The law was validly introduced by the federal government, consistent with its powers under section 91 (27) of the Constitution. Irrespective of one's personal views on the utility or wisdom of legalizing and regulating this increased access to medically assisted death, the law is certainly within the purview of Parliament; more specifically, the law flows from the federal jurisdiction under section 91 of the Constitution: the federal government's exclusive right to legislate in relation to criminal law and procedure.

The Natural Law Perspective

The natural lawyer is as likely to applaud the decision in *Fraser v Canada* as to condemn it. It is difficult to know what particular morality would be supported: that which saw merit in ensuring that women are not economically discriminated against in relation to the rearing of children, or that which supports the notion that since the law did not specifically discriminate against women, it should be defended. In this view, the unintended impact of the law is regrettable, but its passage is not indicative of immoral conduct.

With Bill C-7, the advocate of natural law would fall into two camps: those who ascribe to a natural secularism and those who fall into a natural theological orientation. If permitting those with profound mental illness to obtain a medically assisted death is seen as morally repugnant, the natural lawyer would be likely to oppose the Act. If, on the other hand, the natural lawyer's view was that this extension of access to medically assisted death will allow the avoidance of unnecessary and painful human suffering, this recent legislation would likely be supported. For those whose naturalism reflects a theological orientation, there would likely be a resistance to allowing the Canadian state to engage in activities, such as assisting death, that are seen to be God's will—vested exclusively within a spiritual power.

The Legal Realist and Critical Legalist Perspectives

The legal realist and the critical legalist would want more information about the social and political context in which the *Fraser v Canada* decision was made—a better understanding of both the roles and the changing conditions of women within policing, the specific nature of the empirical evidence provided to the trial court, and the intentions and consequences of an ability to buy back past service for a future pension. As analysts of law, legal realists will, like positivists, be less concerned about the "justness" of the verdict than about the internal logic of the decisions. Legal realists will cast their analytic nets more widely than positivists, employing more than doctrinal analysis. But their task will ultimately be quite similar: to understand how and why this case takes issue with the section 15 Charter protection of equality before the law. Critical legalists, on the other hand, will be more inclined to fuse their analysis with moral judgment, and, consequently, more likely to be either critical or supportive of the judgment of the court. For most who identify themselves as critical legal scholars, the decision of the Supreme Court would likely be welcomed. Those who are critical of orthodoxy in law may be inclined to view this consequence of differential treatment as regressive, failing to uphold important rights of equality for women in Canada.

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With the passage of Bill C-7, both legal realists and critical legalists would want to understand the political, social, and historical backdrop to the legislation. And, again, critical legalists would be more likely than legal realists to either applaud or condemn its passage. In this particular instance, it seems likely that most critical legal scholars would be supportive of the legislation, noting that increased access to medically assisted death serves to reduce human suffering and expand freedom of choice. On the other hand, there are those within the disabled community who view this change in law as potentially threatening. Accordingly, there would likely be some of those who embrace a critical legal perspective who would regard this as a potential threat to vulnerable Canadians.

The Marxist Perspective

Those who work within a Marxist framework might well support the Supreme Court's decision by casting the plaintiffs in *Fraser v Canada* as victims of a form of unequal treatment—arguing that the policy itself was one that deepened economic inequality between individuals and therefore should be abolished. Beyond that, self-described Marxist regimes have, to date, simply supported all laws passed by a central government, or an organization that enjoys the support of that central government.

Similar sentiments arise with the passage of Bill C-7. Although increased access to a medically assisted death might be seen as a legislative change that should be welcomed, this is also an action that might be seen as diminishing economic productivity, serving to diminish possibilities for productive labour. An extension of physician-assisted suicide might therefore be seen as repugnant, irrespective of the utility or logic of such law.

The Feminist Perspective

With *Fraser v Canada*, the fact that the plaintiffs in this case were women taking issue with disadvantage suggests that there would likely be support of the Supreme Court's decision. The category that these women belonged to was treated very differently from the category of those who took leave without pay, a category overwhelmingly populated by men within the RCMP. This case recognized the existence of systemic forms of discrimination.

With the passage of Bill C-7, however, there is no singular feminist position. One might argue that the feminist perspective on law would likely be supportive of increased access to physician-assisted death, as this extends freedom of choice for women. On the other hand, it might be said that this legislation creates a vulnerability for women, not unlike the claims advanced by disability groups that expressed their opposition to this law prior to its passage.

The Anarchist and Libertarian Perspectives

With *Fraser v Canada*, both libertarians and anarchists likely would be supportive of the Supreme Court's decision—libertarians happy to confront the power of the state, and anarchists skeptical of the state but also specifically supportive of placing female employees within a similar legal framework to that enjoyed by men. Anarchists and libertarians, with their skeptical view of state power, might well view Bill C-7 as an important step away from criminalization—allowing more human freedom over one's life. This is especially true of laissez-faire libertarians, who are particularly suspicious of a potential tyranny of the collective. However, at least some anarchists who adopt

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a more communitarian ethic might well argue that we should be reluctant to provide physicians with the power to end lives upon request.

The Indigenous Perspectives

First and foremost, both *Fraser v Canada* and Bill C-7 would be seen as examples of colonial law, and as a consequence Indigenous nations may well see these changes as outside of their jurisdiction, and, therefore, would resist the application of these changes to their own structures of self-governance.

Those embracing an Indigenous perspective on Canadian law would likely see the plaintiffs in *Fraser v Canada* as victims of a form of unequal treatment, not unlike Indigenous peoples in Canada, who can certainly point to countless examples of unequal treatment, relative to all branches of the Canadian government—legislative, judicial, and executive. There have, for example, been many instances in which Indigenous women have been unfairly treated relative to Indigenous men, most notably in relation to their differing status under the *Indian Act*.[32]

Similar sentiments arise with the passage of Bill C-7. Although increased access to a medically assisted death might be seen as a legislative change that should be welcomed, this is also an action that might be seen as one that creates a vulnerability for Indigenous peoples, again similar to the claims advanced by disability groups who expressed their opposition to this law prior to its passage.

Conclusion: The Importance of Competing Perspectives

Our views of law can be somewhat simplistically condensed into two opposing camps: those who view law and its transactions as morally neutral exercises of logic and interpretation and those who view law and legal practice as a terrain for moral, political, and economic debate. The proponents of the first analysis embrace positivism, the dominant view among many legal practitioners and, to a lesser extent, among legal academics. Those who embrace natural law, realist, Marxist, critical legalist, feminist, anarchist, libertarian, or Indigenous perspectives argue that such a view is insufficient: to study and practise law is, they say, to engage the moral, political, and economic issues that infuse the legal process.

Yet we should be mindful of the limitations of these somewhat artificial categories. When Canadians speak of their views of law, these are not typically abstract but concrete. Canadians do not identify themselves as positivists, realists, or Marxists, but speak either in favour of or against specific statutes and judicial decisions. Canadians are for and against the passage of Bill C-7, for and against the decision in *Fraser v Canada*, for and against income surtax of the wealthy. The categories expressing positivist, natural law, realist, Marxist, critical legalist, anarchist, libertarian, and Indigenous views of law are more properly conceptualized as heuristic aids to understanding a range of perspectives or theories about law. It may also be that these categories are slowly being eclipsed by a more fundamental tension: the state's complex task of finding a workable middle ground between the interests of the individual (individualism) and the interests of the collective (collectivism).

32 RSC 1985, c I-5.

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Of course, there are other perspectives. One can claim, for example, that law is best understood as an instrument of social engineering; the will of a supreme being as revealed to human beings; or an implicit or explicit instrument of economic, gender, and racial oppression.

All of these definitions of law will have merit for some Canadians in some circumstances. There is a sense in which law is an instrument of social engineering. But is this definition all-encompassing and ultimately definitive of an understanding of law? Or is it another conception of positivism, restated in a different form? Then for those who believe in a deity ordering human affairs, law may well be formulated as the will of God. But can this perspective fully define the continuing amendment of law? Is it a conception of natural law, perhaps stated in its original form?

Finally, those who believe that law is an instrument of oppression distance themselves from both the natural law and the positivist perspectives and show interest in some amalgam of the Marxist, legal realist, anarchist, Indigenous, feminist, and critical legal studies perspectives. But, once again, can this definition fully inform an understanding of the law? The late British historian E.P. Thompson noted that although law can be an instrument of oppression, it can also be a tool for liberation.[33] Laws that serve to assist the disadvantaged—the granting of universal health care, compensation for disability, and the provision of a basic level of economic support—are not easily viewed as inherently oppressive.

For the typical Canadian citizen, however, the legal form may not be, as Thompson suggested, "an unqualified human good." Remarks and sentiments about law and legal process may be more likely to run in the direction of Shakespeare's exhortation (in *Henry VI, Part 2*): "The first thing we do, let's kill all the lawyers." Lawyers are often perceived as advocates for affluence and amorality, corrupted by privilege and motivated by material gain. Nevertheless, lawyers are also indispensable to the processes of dispute settlement in representative democracies, developing arguments, and creating effective advocacy. For how should disputes within societies be ordered if not by law and therefore by those who are expert in it? In its ideal form, law is the outcome of an informed verbal argument in which the interests of all relevant parties are adequately represented.

The various perspectives or theories about law suggest that the task of understanding cannot be too limited in focus. As the positivists assert, there is a need to understand the form and structure of specific statutes and attendant judicial decisions. But the student of law and legal process must also seek to understand the political, economic, and moral values represented in statute law and judicial decisions—the very issues that necessitate verbal argument and law.

33 See E.P. Thomson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon Books, 1975). Thompson writes, on page 265, of law as a "human good": "To deny or belittle this good," he suggests, is "a desperate error of intellectual abstraction. More than this, it is a self-fulfilling error, which encourages us to give up the struggle against bad laws and class-bound procedures, and to disarm ourselves before power. It is to throw away a whole inheritance of struggle about law, and within the forms of law, whose continuity can never be fractured without bringing men and women into immediate danger."

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QUESTIONS FOR DISCUSSION

1. The Supreme Court's judgment in *Fraser v Canada* and the introduction of Bill C-7 are closely related legal and moral issues. It is very difficult to support the Supreme Court's argument and at the same time oppose the logic of Bill C-7. Discuss.
2. The categories of positivism, natural law, Marxism, Indigenous, and critical legal studies are more properly conceptualized as categories that help us understand a range of perspectives or theories about law. It may also be that these categories are slowly being eclipsed by a more fundamental understanding: that legal realism best describes the processes of both legislative and judicial decision-making. Discuss.
3. The British historian E.P. Thompson observed that a system of law represents "an unqualified human good." Do you agree or disagree? Why?

KEY TERMS

anarchist perspective on law, 19
colonial perspective of the law, 20
dialectical materialism, 13
feminist theory of law, 16
Indigenous perspective of the law, 20
injustice, 6
justice, 6
laissez-faire capitalism, 14
legal realism, 12
lex injusta non est lex, 10
Marxism, 13
natural law, 10
nulla poela sine lege, 9
positivism, 7
social contract, 8
sovereign, 7
suffragette, 16

WEB LINKS

Internet Encyclopedia of Philosophy
<http://www.iep.utm.edu/law-phil>

This page, part of a larger site encompassing the encyclopedia, is devoted to the philosophy of law. The encyclopedia is prepared by two philosophy professors and maintained at the University of Tennessee at Martin. It is an excellent resource for background material and definitions on philosophy.

JURIST: The Legal Education Network
<http://jurist.law.pitt.edu>

This ambitious Internet project is designed to provide links to most legal resource materials available on the Internet. The main website is located at the University of Pittsburgh School of Law and has an international advisory board of legal academics. The Canadian link is <https://www.jurist.org/news/category/dispatches/canada/>. The website is jointly maintained in other common law jurisdictions, including Canada, Australia, and the United Kingdom. The links can be useful for accessing law journals and online legal publications.

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Judgments of the Supreme Court of Canada
<https://scc-csc.lexum.com/scc-csc/en/nav.do/>

This site posts Supreme Court of Canada decisions and news. Cases on the site date back to 1876 and are accessible without a subscription. A search engine is located at the top of the page, which makes searching for cases very simple.

***Criminal Code* of Canada**
<http://laws-lois.justice.gc.ca/eng/acts/C-46/>

This site is accessed through the Department of Justice's laws page and provides the entire *Criminal Code* with all amendments. Searches can be conducted for specific information in the Code from the first page of the site.

FURTHER READING

Baer, J.A. *Our Lives Before the Law: Constructing a Feminist Jurisprudence*. Princeton: Princeton University Press, 1999.

This book has been described by one reviewer as a "clear and broad-based introduction" to feminist theories of jurisprudence. Baer's writing is quite accessible and critical and allows students to understand a range of viewpoints within feminist scholarship.

Borrows, John. "Indigenous Legal Traditions in Canada" (January 2005) 19 *Washington University Journal of Law & Policy* 167.

This seminal article on Indigenous legal traditions in Canada helpfully compares and contrasts common and civil law legal traditions with Indigenous legal traditions and speaks to the nature of their relationships.

Crenshaw, Kimberlé. *On Intersectionality: Essential Writings*. New York: The New Press, 2017.

The term intersectionality has been in use by scholars, activists, and lawyers for more than 20 years, documenting the many forms in which disadvantage and vulnerability coalesce. This is a comprehensive introduction to the concept, focused most notably on racial justice and gender equity.

Donovan, J. *Feminist Theory: The Intellectual Traditions*. 3rd ed. New York: Continuum, 2000.

This book has a useful compilation of the history and range of the traditions of feminist theory, considering liberal, Marxist, existential, and radical conceptions of feminist thought.

Green, L., and B. Leiter. *Oxford Studies in Philosophy of Law, Volumes 1 and 2*. Oxford: Oxford University Press, 2011 and 2013.

These volumes provide a forum for much new philosophical work on law. As the editors note, the work ranges from issues in general jurisprudence to specific areas of law, the history of legal philosophy, and topics that illuminate problems in legal theory.

Hart, H.L.A. *The Concept of Law*. Oxford: Clarendon Press, 1961.

This book is a complex examination of positivist views of law. Hart's analysis allows the reader to see the moral judgments that underlie a positivist analysis.

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Heilbroner, R. *Marxism: For and Against*. New York: Norton and Company, 1980.

This is a relatively accessible analysis of a Marxist view of society, one that explains both the strengths and the weaknesses of this framework for analysis.

Woodcock, G. *Anarchism: A History of Libertarian Ideas and Movements*. London, U.K.: Penguin, 1986.

This history is a useful primer from a major scholar of anarchism. Often described as one of British Columbia's intellectual treasures, Woodcock was a theorist who managed to capture the interest of popular culture with his writings.

REFERENCES

Becker, H. *Outsiders*. New York: Free Press, 1973.

Boyd, N. *The Last Dance: Murder in Canada*. Scarborough: Prentice-Hall, 1988.

______. *The Social Dimensions of Law*. Scarborough: Prentice-Hall, 1986.

Cain, M., and A. Hunt. *Marx and Engels on Law*. London, U.K.: Academic Press, 1979.

Chambliss, W., and R. Seidman. *Law, Order and Power*. 2nd ed. Reading, MA: Addison-Wesley, 1982.

Cheffins, R., and R. Tucker. *The Constitutional Process in Canada*. Toronto: McGraw-Hill Ryerson, 1986.

Claydon, J., and D. Galloway. *Law and Legality*. Toronto: Butterworths, 1979.

Coral, S.C., and J.C. Smith. *Law and Its Presuppositions: Actions, Agents and Rules*. Boston: Routledge and Kegan Paul, 1986.

Cotterrell, R. *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*. London, U.K.: Butterworths, 1989.

Dicey, A.V., and E.C.S. Wade. *An Introduction to the Study of the Law of the Constitution*. 10th ed. London, U.K.: Palgrave Macmillan, 1985.

Dworkin, R.M. *Law's Empire*. Cambridge, MA: Harvard University Press, Belknap Press, 1986.

Evan, W., ed. *The Sociology of Law*. New York: Free Press, 1980.

Feinberg, J., and H. Gross. *Philosophy of Law*. 2nd ed. Belmont, CA: Wadsworth, 1980.

Gall, G. *The Canadian Legal System*. 3rd ed. Toronto: Carswell, 1990.

Hart, H.L.A. *The Concept of Law*. Oxford: Oxford University Press, 1961.

Heilbroner, R. *Marxism: For and Against*. New York: Norton and Company, 1980.

James, P.S. *Introduction to English Law*. 11th ed. London, U.K.: Butterworths, 1985.

Kelman, M. *A Guide to Critical Legal Studies*. Cambridge, MA: Harvard University Press, 1987.

Kolmar, W.K., and F. Bartkowski. *Feminist Theory, Second Edition: A Reader*. Boston: McGraw Hill, 2005.

Kramer, M. *In Defense of Legal Positivism*. Oxford: Oxford University Press, 1999.

Leiter, B. *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy*. Oxford: Oxford University Press, 2007.

Llewellyn, K. *The Common Law Tradition: Deciding Appeals*. Boston: Little, Brown, 1960.

______. *Jurisprudence: Realism in Theory and Practice*. Chicago: University of Chicago Press, 1962.

Lloyd, D. *The Idea of Law*. Harmondsworth, U.K.: Penguin Books, 1973.

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Lloyd, D., and M.D.A. Freeman. *Introduction to Jurisprudence*. 5th ed. London, U.K.: Stevens, 1985.

MacKinnon, C. *Feminism Unmodified: Discourses on Life and Law*. Cambridge, M.A.: Harvard University Press, 1987.

Pfohl, S.J. *Images of Deviance and Social Control*. New York: McGraw-Hill, 1985.

Phillips, O.H. *A First Book of English Law*. 8th ed. London, U.K.: Sweet and Maxwell, 1988.

Pound, R. *Social Control Through Law*. New Haven: Yale University Press, 1942.

Rawls, J. *A Theory of Justice*. Cambridge, MA: Harvard University Press, Belknap Press, 1971.

Salmond, Sir J.W. *Salmond on Jurisprudence*. 12th ed. London, U.K.: Sweet and Maxwell, 1966.

Thompson, E.P. *The Poverty of Theory and Other Essays*. London, U.K.: Monthly Review Press, 1978.

_______. *Whigs and Hunters: The Origin of the Black Act*. New York: Pantheon Books, 1975.

Twining, W.L. *Legal Theory and Common Law*. New York: Basil Blackwell, 1986.

Unger, R.M. *The Critical Legal Studies Movement*. Cambridge, MA: Harvard University Press, 1986.

Waddams, S.M. *Introduction to the Study of Law*. 4th ed. Scarborough: Carswell, 1992.

Walker, R.J., and M.G. Walker. *The English Legal System*. 6th ed. London, U.K.: Butterworths, 1985.

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