**Legal realism in British public law**

**Introduction**

This short essay outlines a novel metatheoretical justification in favour of a distinctively realistic public law research agenda and contrasts this agenda to other approaches currently dominating the field. As I shall argue, legal realism has deep affinities to the allegedly widely-endorsed analytical legal positivism of H.L.A. Hart. Still, explicit endorsements of realism are almost[[1]](#footnote-1) entirely absent from contemporary British public law scholarship. Instead, dominant approaches mostly fall within two broad categories.[[2]](#footnote-2) The first comprises work that relies on normative political theory to take sides on high-level debates regarding the justification of institutional arrangements,[[3]](#footnote-3) normative constitutional doctrines[[4]](#footnote-4) or specific outcomes in, usually heavily disputed, cases.[[5]](#footnote-5) The second involves empirical research that uses doctrinal and socio-legal tools to describe and explicate the legal workings of specific components of the state apparatus.[[6]](#footnote-6) These categories are sometimes considered independent of one another. At other times, the normative strand is taken to have priority because of a supposed “…connection between fact and value.”[[7]](#footnote-7) In this essay I propose a different way of viewing things. Once sceptical realist assumptions are made about the availability of rationally vindicated uniquely correct answers to the range of questions explored by normative approaches, descriptive-empirical methods emerge as the only reliable guides to the explanation of both public law structures and the actions that officials undertake within these structures. The value judgments involved in constructing theories using such methods are not moral, but strictly epistemic. I proceed as follows. The first section outlines two realist themes. The second section utilises these themes to cursorily examine selected examples of extant debates in public law scholarship. The essay then concludes.

**Legal Realism: an outline**

It is not the ambition of this essay to make an independent contribution to the best understanding of legal realism—if such a thing exists as a single theoretical object.[[8]](#footnote-8) Instead, I set out two themes that, first, have a recognizably realist historical pedigree, and second, are fruitful for the purposes of explaining public law. I take my lead from Brian Leiter, who has helpfully characterised realist theories of law as those that accept the following theses: (1) a commitment to a description of the legal system that eschews moralising and sentimentalist illusions; (2) a commitment to the idea that law is never adequate to explain how courts adjudicate all cases that come before them; and (3) an account of law and adjudication that is constrained by a naturalistic theory of the world.[[9]](#footnote-9) Leiter argues convincingly that H.L.A. Hart’s version of legal positivism fits these theses and thus counts as a realist theory of law *lato sensu*.[[10]](#footnote-10) Since I accept Leiter’s classification of Hart’s theory as realist in this wider sense, I single out my favoured version of realism by drawing attention to two ways in which it goes beyond Hart. Before delving further into them, three points of clarification. First, the focus on Hart is due to Hart’s standing in both Anglo-American legal philosophy and contemporary British public law scholarship. Second, even though the themes set out below are arguably compatible with Hart’s theory,[[11]](#footnote-11) it still makes sense to call the resulting framework realist rather than positivist since many leading legal positivists, such as Joseph Raz and Matthew Kramer, roundly reject these themes. Third, the endorsement of a version of philosophical naturalism is a key underlying thread that connects Hart’s positivism with various realist accounts, such as Ross’s and Leiter’s. That said, the issues naturalism raises are complex, and it is impossible to analyse them within the confines of this short essay.

*Methodological amoralism*

We can now move on to discuss the first realist theme, which I dub “methodological amoralism.” Methodological amoralism flows from an interpretation of the more general commitment to some form of moral anti-realism, i.e., roughly, the idea that there are no mind- and judgement-independent moral facts, nor universally binding categorical imperatives.[[12]](#footnote-12) Whilst moral anti-realism has been endorsed by leading positivists such as Hans Kelsen and H.L.A. Hart, its most forceful proponents have historically been Scandinavian realists, including Alf Ross and Karl Olivecrona.[[13]](#footnote-13) What is more apposite for present purposes is that Ross leveraged moral anti-realism to draw the following more specific conclusions regarding the form that a scientific theory of law should take. First, moral disagreements are, ultimately, rationally irresolvable, since moral outlooks ultimately depend on the non-rational endorsement of potentially conflicting grounding norms.[[14]](#footnote-14) Second, the unavailability of objective moral truths entails that theories of law aiming at representing their subject matter in a descriptively and explanatorily accurate manner should withhold reference to such truths.[[15]](#footnote-15) Note that, contrary to the well-known positivist “separability thesis,”[[16]](#footnote-16) which purportedly concerns the *objects* law and morality, Ross’s contention is methodological, i.e., applies to *theories* of the objects. According to Ross, who takes Kelsen’s lead,[[17]](#footnote-17) theorists of law that subscribe to scientific ideals should adopt a stance of axiological neutrality. To the extent that they make value judgments, these are strictly epistemic; moreover, the imperatives on which they rest are hypothetical, not categorical.[[18]](#footnote-18) Third, and conversely, when scholars morally evaluate the behaviour of officials, they are not in the business of furthering a cognitive interest in the description and explanation of those officials’ behaviour. Rather, scholars attempt to practically influence the officials’ course of action, an endeavour that Ross labels “legal politics.”[[19]](#footnote-19) Prescriptive legal/moral theories are in reality “legal ideologies,” which are themselves in need of accurate description and explanatory investigation in methodologically amoral terms.[[20]](#footnote-20) Fourth, methodologically amoral theories of law are radically separate from their subject-matter, i.e., law.[[21]](#footnote-21) The latter, of course, might be morally, politically or otherwise evaluatively loaded. But this does not entail that the theorist should express, as opposed to describing and explaining, norms. In Ross’s helpful terminology, the theorist should make norm-descriptive, as opposed to norm-expressive, statements.[[22]](#footnote-22) Thus, the theorist adopts a point of view of exteriority vis-à-vis participants in legal practice: her sole aim is explanatory success.

*Legal indeterminacy*

The second realist theme concerns what Brian Leiter call the “sceptical doctrine”[[23]](#footnote-23), i.e., roughly, the idea that, in judicial decision-making contexts, and at least regarding appellate cases, there are significant limits to the causal efficacy of legal norms. The doctrine typically divides more orthodox positivist approaches, such as Hart’s, from more ambitiously realistic ones.[[24]](#footnote-24) The basis of the sceptical doctrine is a strong form of legal indeterminacy. In Leiter’s helpful characterisation, legal indeterminacy in general occurs when the class of sociologically identified[[25]](#footnote-25) legitimate legal reasons either fails to justify some single outcome (rational indeterminacy) or fails to cause legal interpreters to arrive at some single outcome (causal indeterminacy).[[26]](#footnote-26) Whilst most positivists and realists accept some version of the sceptical doctrine, realists traditionally embrace more radical varieties thereof. I shall here mention two types of arguments that support the more radical reading. Importantly, both are empirical and thus survive Hart’s famous disparagement of so-called conceptual “rule-scepticism”, i.e., of “the claim that talk or rules is a myth.”[[27]](#footnote-27)

Let us begin with rational indeterminacy. The classical way in which positivists have approached this topic is through Hart’s doctrine of the open texture of legal rules.[[28]](#footnote-28) The doctrine presupposes the existence of determinate legal rules ultimately identified through the rule of recognition. Indeterminacy is located at the level of application of those rules to sets of facts, and it is mainly due to vagueness.[[29]](#footnote-29) Legal realists, on the other hand, locate indeterminacy at the level of identification of the applicable legal rules themselves. An important argument to this effect was initially made by the American realists.[[30]](#footnote-30) In short, it stated that positivistically identified legal sources are often, and in appellate cases perhaps almost always, semantically, methodologically or ideologically ambiguous.[[31]](#footnote-31) Accordingly, there is often a plurality of conflicting legal norms that can be derived from the sources on the basis of interpretive procedures accepted as legitimate by the relevant juristic community. Such rational indeterminacy, moreover, often results in causal indeterminacy, since the class of legitimate legal reasons fails to justify, and thus fails to cause rational actors to accept, unique interpretive outcomes.[[32]](#footnote-32) By the same token, when legal sources are indeterminate, the formulation of determinate legal norms partly rests on non-legal reasons. Through extensive empirical investigation American realists found that these non-legal reasons comprised, among other things, widely-accepted social norms or conceptions of justice operative in contexts of commercial transactions.[[33]](#footnote-33) The realist approach thus made possible a new understanding of traditional legal scholarship. The latter was now viewed as a project that attempts to systematically reduce legal indeterminacy by providing reasonably coherent blends of political/moral and legal arguments that reconstruct initially indeterminate parts of the legal system.[[34]](#footnote-34) It is important to stress, moreover, that the indeterminacy thesis just sketched is not a form of rule-scepticism. It merely holds that, as a matter of empirical fact, there exist sources of rational indeterminacy beyond open texture.[[35]](#footnote-35) This position hardly entails radical scepticism. The law is deemed to be rationally indeterminate only with respect to the relatively small fraction of scenarios where two or more equally good, but conflicting, arguments can be made using conventionally accepted interpretive procedures. Such an understanding of indeterminacy is fully compatible with the existence of massive agreement for the majority of—easy—cases.

Now, whilst rational indeterminacy entails—under certain conditions—causal indeterminacy, the converse does not hold. With respect to causal indeterminacy outside rational indeterminacy contexts, there exist two rough possibilities. The second of those is particularly instructive for present purposes. First, officials might make good-faith mistakes by misinterpreting the law even when the latter is rationally determinate. These are straightforward scenarios where rationally determinate law fails to cause outcomes. Since in systems that contain hierarchies of law-applying institutions mistakes can often be corrected, such cases involve “one-offs” that do not produce wider systemic effects. Second, and more interestingly, officials might also, especially if they are powerful enough, deliberately ignore law that they themselves consider rationally determinate. by the officials’ own lights and. Instead, they may proceed to formulate a completely novel legal norm. In relatively exceptional cases the mistaken interpretations might even concern the rule of recognition of a system, i.e., roughly (and without entering deeply into issues of Hartian exegesis[[36]](#footnote-36)), the criteria of what counts as a valid source of law. When the officials that made the mistakes have the legal or *de facto* power of final say-so, the legal mistakes may “stick” irrespective of substantive correctness. In those circumstances, the mistaken application of the law becomes, in fact, a modification of the law, and it may even alter the rule of recognition. In both cases, the law changes by sheer force of fact. Though this phenomenon is oftentimes approached on purely normative grounds, to wit, from the point of view of whether it is justified or unjustified[[37]](#footnote-37), it is significant enough to also merit analysis in explanatory, as opposed to merely normatively loaded, terms.

**British public law realistically studied**

This section illustrates the potential explanatory fruitfulness of the legal realist framework set out in the previous section by examining in a cursory and non-exhaustive manner a selected number of extant debates in British public law through the prism of the two themes previously discussed, whilst also proposing a realistic reframing of these debates. The first thing to note is that the realist combination of moral anti-realism and axiological neutrality at the level of the theory of law entails a distinctive take on extant normative debates in British public law and constitutional theory. In fact, many of those debates are to do with the ways in which various abstract normative theories, where these include liberalism,[[38]](#footnote-38) republicanism[[39]](#footnote-39) and thick interpretations of the rule of law,[[40]](#footnote-40) are leveraged to argue at the wholesale level that, say, manner X of reconstructing the British constitution (or some other normative object, such as, for example, parts of administrative law[[41]](#footnote-41)) is “uniquely correct,” to the detriment of competing reconstructions Y or Z (whose proponents, of course, claim that it is their own preferred reconstructions that are uniquely correct).[[42]](#footnote-42) Normative debates also play out at the retail level, with respect to specific cases decided in, typically controversial, ways. At that level, the arguments set forth by scholars often scrutinise the propriety of judicial decisions on the basis of more general normative premises, where that typically includes moral values such as democracy, the rule of law, and accountability. Pertinent examples attributable to the first category include the debate between so-called “legal” versus “political” constitutionalists[[43]](#footnote-43) or the debate between proponents of the so-called “orthodox view” on parliamentary supremacy[[44]](#footnote-44) versus defenders of the so-called “common law constitution.”[[45]](#footnote-45) Pertinent examples attributable to the second category include the extremely complex and wide-ranging disputes on *Miller I*[[46]](#footnote-46) or the ongoing and seemingly intractable disagreement on the “proper construction” of ouster clauses in judicial review contexts.[[47]](#footnote-47) In regard to specific cases, moreover, scholars typically make implicit claims of rational legal determinacy even when the cases discussed are of mind-boggling legal complexity. There is no significant doctrinal debate—of which I at least am aware—where scholars have analysed controversial cases on the assumption that both sides to a disputed legal question were legally correct on account of the indeterminacy of the sources and/or of interpretive procedures. In fact, in most high-profile disputes involving cases such as *Miller I* and *II*, scholars typically seem to, at least implicitly, accept a Dworkinian premise to the effect that there exist unique objectively correct answers.[[48]](#footnote-48)

With respect to standard normative debates in public law, whether of the high-level or of the piecemeal variety, the legal realism adumbrated in this essay takes a two-step approach. Step one is sceptical in two different but complementary ways. First, legal realism embraces rational legal indeterminacy at least as regards the subset of difficult appellate cases. Hence, it denies that in cases such as *Miller II* there are uniquely correct right answers. Moreover, legal realism also recognises that the Supreme Court might, in some instances, unilaterally modify the rule of recognition, at least if the other branches of government acquiesce to its interpretation of it. Second, legal realism also denies that there exist objective, i.e., mind- or judgment-independent, moral truths or facts undergirding normative reconstructions of public law sources. Whilst I cannot adequately address meta-ethical specifics here, I merely mention two broad anti-realist alternatives. The first involves an error theory, i.e., roughly, the idea that the use of moral concepts entails a non-negotiable commitment to the mind-independence and categoricity of moral imperatives, but the world fails to satisfy that commitment.[[49]](#footnote-49) On this view, none of the moral positions undergirding public law debates are true. Second, one may construe moral truths as both mind-dependent and contingent.[[50]](#footnote-50) We would thus end up with a kind of anti-realist relativism, which would make the truth of normative doctrinal reconstructions depend on the psychological states or other attitudes of the persons that accept (or reject) the relevant normative judgments. On such a view, coherent versions of the conflicting normative doctrinal positions would be—simultaneously—true from the point of view of those subscribing to them and false from the point of view of those that do not.[[51]](#footnote-51) Now, irrespective of the more specific kind of moral anti-realism that the legal realist should ultimately opt for,[[52]](#footnote-52) in all of these scenarios she ends up in a position where the normative reconstructions supplied by public law scholars fail to yield objective knowledge. In Rossian terms, the reconstructions do not aim at cognizing legal things; rather, they amount to a moralised legal politics aimed at influencing decision-making processes.

This leads us to step two of the realist approach. Since moralised doctrinal work is found wanting, it is replaced by an epistemic procedure that aims to produce knowledge in continuity with relevant successful epistemic practices in the natural and social sciences.[[53]](#footnote-53) The overarching goal is to formulate systematic theories of public law that can explain, as opposed to justifying, both the legal actions of officials (or the legal aspects of their actions) and the legal structures that condition those actions. In both cases, identifying the causal chains that regulate the production, diffusion and usage of legal beliefs within given populations of officials whilst also delivering a non-moralised description of the content and structure of these beliefs is key. At least two broad explanatory research programmes emanate from the realist commitments previously sketched. The first aims at providing successful explanations of official behaviour by merging a scientifically respectable theory of public law with the social sciences widely conceived. In this scenario, political sociology and political science become directly relevant to public law. The second resembles standard doctrinal and socio-legal work on public law, albeit stripped of justificatory ambitions. It consists of describing the legal beliefs of the officials or others, whilst also placing these beliefs within wider material and cultural contexts and scrutinising their internal coherence. Large swathes of public law scholarship already deploy such an approach. The legal realism that this essay champions provides a principled epistemic basis for continuing to do so.

**Conclusion**

Large parts of traditional public law scholarship are to do with normative questions such as “was *Miller II* correctly decided?” or “is political constitutionalism the most normatively appealing reconstruction of the British constitution?” The realist approach sketched in this essay argues that these questions do not admit of objectively correct answers. *Miller II* was a hard case in which, by conventional legal standards, both sides to the debate were legally right. Political constitutionalism is a project of normative reconstruction of British public law which makes ultimately rationally non-salvageable moral claims. Legal realism proposes to replace these questions with questions such as “which kinds of legal beliefs explain *Miller II* and how did these beliefs, if they are novel, come about?” or “which cultural, social or legal factors explain the rise of legal constitutionalism as a project of normative reconstruction of the British constitution?” J.A.G. Griffith, for one, should have been able to recognise their cogency.

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1. For two exceptions see T.T. Arvind and Lindsay Stirton, “Legal ideology, legal doctrine and the UK’s top judges” [2016] P.L. 418 and D. Robertson, *Judicial Discretion in the House of Lords* (Oxford: Oxford University Press, 1998). A case could perhaps be made that J.A.G. Griffith’s work comes closest to instantiating a form of legal realism. Still, to the best of my knowledge, Griffith never deployed the term “legal realism” as such. [↑](#footnote-ref-1)
2. For a somewhat similar juxtaposition of “normativism” and “functionalism” in British public law scholarship see M. Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992). [↑](#footnote-ref-2)
3. See, for example, the group of scholars forming the Judicial Power Project (judicialpowerproject.org.uk). [↑](#footnote-ref-3)
4. See, for example, the debate opposing legal to political constitutionalists. Well-known representative examples include A. Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005) and T.R.S. Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: Oxford University Press, 2013). [↑](#footnote-ref-4)
5. Prime examples of such cases include *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (*Miller I*) and *R (Miller) v Prime Minister* [2019] UKSC 41 (*Miller II*). [↑](#footnote-ref-5)
6. Recent representative examples include R. Thomas and J. Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (London: Palgrave Macmillan, 2021) and R. Thomas, *Administrative Law in Action: Immigration Administration* (Oxford: Hart Publishing, 2022). [↑](#footnote-ref-6)
7. See P. Craig, “Theory, ‘pure theory’ and values in public law” [2005] P.L. 440. [↑](#footnote-ref-7)
8. For doubts about the existence of a single realist tradition see Brian Leiter, “Legal Realisms, Old and New” (2013) 47 *Valparaiso University Law Review* 949. [↑](#footnote-ref-8)
9. See Brian Leiter, “Positivism as a Realist Theory of Law” in T. Spaak and P. Mindus (eds.), *The Cambridge Companion to Legal Positivism* (Cambridge: Cambridge University Press, 2021), p.81. [↑](#footnote-ref-9)
10. See Leiter, “Positivism as a Realist Theory of Law”, pp.81-85. [↑](#footnote-ref-10)
11. For a parallel argument to the effect that Hart’s theory of law is compatible with that of the Scandinavian realist Alf Ross’s see Svein Eng, “Lost in the System or Lost in Translation? The Exchanges Between Hart and Ross” (2011) 24 *Ratio Juris* 194. [↑](#footnote-ref-11)
12. See S. Robertson, *Nietzsche and Contemporary Ethics* (Oxford: Oxford University Press, 2020), Chs.3 and 4. [↑](#footnote-ref-12)
13. See Alf Ross, *On Law and Justice* (Oxford: Oxford University Press, 2019) and Karl Olivecrona, *Law as Fact* (London: Oxford University Press, 1939), ch.1. [↑](#footnote-ref-13)
14. Ross, *On Law and Justice*, ch.XII. [↑](#footnote-ref-14)
15. Ross, *On Law and Justice*, ch.XIV. [↑](#footnote-ref-15)
16. A thesis which, strictly speaking, might well be false and should in any event be qualified; see Leslie Green, “Positivism and the Inseparability of Law and Morals” (2008) N.Y.U.L.R. 1035. [↑](#footnote-ref-16)
17. Ross, *On Law and Justice*, p.402. [↑](#footnote-ref-17)
18. Ross, *On Law and Justice*, ch.XIV. [↑](#footnote-ref-18)
19. Ross, *On Law and Justice*, ch.XIV. [↑](#footnote-ref-19)
20. Ross, *On Law and Justice*, ch.XIV. [↑](#footnote-ref-20)
21. See Alf Ross, “Validity and the Conflict between Legal Positivism and Natural Law”, in S. L. Paulson and B. Litschewski Paulson (eds.), *Normativity and Norms. Critical Perspectives on Kelsenian Themes*, (Oxford: Clarendon Press, 1998), p.147. [↑](#footnote-ref-21)
22. Ross, *On Law and Justice*, p.18. [↑](#footnote-ref-22)
23. Leiter, “Legal Realisms, Old and New”, p.951. [↑](#footnote-ref-23)
24. See Brian Leiter, *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007), ch.2. [↑](#footnote-ref-24)
25. Sociological legitimacy refers to the actual attitudes of actors vis-à-vis the moral standing of some object. It is distinguishable from normative legitimacy, which refers to moral considerations that apply irrespective of what actors actually think. [↑](#footnote-ref-25)
26. Leiter, *Naturalizing Jurisprudence*, ch.1. [↑](#footnote-ref-26)
27. The idea is famously discussed in H.L.A. Hart, *The Concept of Law*, 2nd edn (Oxford: Clarendon Press, 1994), p. 136. [↑](#footnote-ref-27)
28. Hart, *The Concept of Law*, p.128. [↑](#footnote-ref-28)
29. See generally T. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2000). [↑](#footnote-ref-29)
30. Leiter, *Naturalizing Jurisprudence* ch.1. [↑](#footnote-ref-30)
31. Semantic ambiguity concerns linguistic meaning. Methodological ambiguity concerns conflicting accepted methods of legal interpretation (e.g. literal versus purposive construction of statutes). Ideological ambiguity refers to potentially conflicting background principles that rationalise legal norms. For these distinctions see Pierluigi Chiassoni, *Interpretation Without Truth: A Realistic Enquiry* (Cham, Switzerland: Springer, 2019). [↑](#footnote-ref-31)
32. Leiter, *Naturalizing Jurisprudence*, ch.1. [↑](#footnote-ref-32)
33. Leiter, *Naturalizing Jurisprudence*, ch.1. [↑](#footnote-ref-33)
34. See Chiassoni, *Interpretation Without Truth*, p.22. [↑](#footnote-ref-34)
35. Leiter, *Naturalizing Jurisprudence*, ch.2. [↑](#footnote-ref-35)
36. For relevant discussion see Adam Tucker, “Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty” (2011) 31 O.J.LS. 61. [↑](#footnote-ref-36)
37. See, for example, and with specific reference to *Miller I*, Mark Elliott, “The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle” (2017) 76 C.L.J. 257, 271–272. [↑](#footnote-ref-37)
38. See, for example, Allan, *The Sovereignty of Law*, ch.3. [↑](#footnote-ref-38)
39. See, for example, Tomkins, *Our Republican Constitution*, ch.2. [↑](#footnote-ref-39)
40. See, for example, T. Bingham, *The Rule of Law* (London: Penguin, 2011). [↑](#footnote-ref-40)
41. See, for example, T.R.S. Allan, “Constitutionalism at Common Law: The Rule of Law and Judicial Review” (2023) 82 C.L.J. 236. [↑](#footnote-ref-41)
42. On how this phenomenon plays out in constitutional theory see T.T. Arvind and L. Stirton, “Slaying the Misshapen Monster: The Case for Constitutional Heuristics” in D. Kyritsis and S. Lakin (eds.), *The Methodology of Constitutional Theory* (Oxford: Hart Publishing, 2022), p.103, pp.106-114. [↑](#footnote-ref-42)
43. Once again, representative examples include Tomkins, *Our Republican Constitution* and Allan, *The Sovereignty of Law*. [↑](#footnote-ref-43)
44. See, for example, J. Goldsworthy, *Parliamentary Sovereignty, Contemporary Debates* (Cambridge: Cambridge University Press, 2010). [↑](#footnote-ref-44)
45. See, for example, Allan, *The Sovereignty of Law*. [↑](#footnote-ref-45)
46. For an extremely partial summary of enormously rich literature see Asif Hameed, “The rule of recognition and sources of law in *Miller*” [2019] P.L. 61. [↑](#footnote-ref-46)
47. For the latest developments see R.N. Fasel, “Ouster Clauses and the Silent Constitutional Crisis”, *U.K. Const. L. Blog*, *https://ukconstitutionallaw.org/2024/02/20/raffael-n-fasel-ouster-clauses-and-the-silent-constitutional-crisis/*. [↑](#footnote-ref-47)
48. See R. Dworkin, “No Right Answer?” in P.M.S. Hacker & J. Raz (eds), *Law, Morality, and Society: Essays in Honour of HLA Hart* (Oxford: Clarendon Press, 1977), p.58. [↑](#footnote-ref-48)
49. See J.L. Mackie, *Ethics: Inventing Right and Wrong* (London: Penguin, 1991). [↑](#footnote-ref-49)
50. See, for example, S. Street, “Constructivism About Reasons” (2008) 3 *Oxford Studies in Metaethics* 207. [↑](#footnote-ref-50)
51. See S. Street, “Objectivity and Truth: You’d Better Rethink It” (2016) 11 *Oxford Studies in Metaethics* 293. [↑](#footnote-ref-51)
52. A third option that has been attributed to both Hart and Ross is a form of non-cognitivism. See, generally, Max Etchemendy, “New Directions in Legal Expressivism” (2016) 22 *Legal Theory* 1. [↑](#footnote-ref-52)
53. Leiter, *Naturalizing Jurisprudence*, ch.1. [↑](#footnote-ref-53)
54. \* I wish to thank an anonymous reviewer for comments on a previous draft. [↑](#footnote-ref-54)