Jurisprudence

Theory and Context
For Joseph Raz
Preface to the Sixth Edition

This book derives from efforts over the course of two decades to teach jurisprudence: in particular, the struggle to explain some of the more difficult ideas in the area in a way that could be understood by those new to the field, at the same time without simplifying the ideas to the point of distortion. This text is grounded in a combination of frustrations: the frustration I sometimes feel as a teacher, when I am unable to get across the beauty and subtlety of the great writers in legal theory\(^1\); and the frustration my students sometimes feel, when they are unable to understand me, due to my inability to explain the material in terms they can comprehend.

I do not underestimate the difficulty of the task I have set myself, and I am sure that this text does not always achieve all that it sets out to do. At the least, I hope that I do not appear to be hiding my failures behind legal or philosophical jargon. H. L. A. Hart once wrote the following in the course of discussing an assertion made by the American judge and theorist Oliver Wendell Holmes, Jr.:

“To make this discovery with Holmes is to be with a guide whose words may leave you unconvinced, sometimes even repelled, but never mystified. Like our own [John] Austin . . . Holmes was sometimes clearly wrong; but again like Austin he was always wrong clearly.”\(^2\)

I do not purport to be able to offer the powerful insights or the elegant prose of Holmes and Hart, but I do strive to emulate them in the more modest, but still difficult task, of expressing ideas in a sufficiently straightforward manner such that when I am wrong, I am “wrong clearly”.

This book is part introductory text and part commentary. In the preface to his classic text, *The Concept of Law*, Hart stated his hope that his book would “discourage the belief that a book on legal theory is primarily a book from which one learns what other books contain.”\(^3\) My aims

---


are less ambitious: the present text is a book meant to inform readers what other books contain—the idea being that the primary texts are not always as accessible as they might be. However, this book is distinctly not meant as a substitute for reading those primary texts: the hope and the assumption is that readers will go to the primary texts first, and will return to them again after obtaining whatever guidance is to be offered in these pages. Additionally, there are a number of places in the text where I go beyond a mere reporting of the debate, and try to add my own views to the discussion. This is especially true of Chapters 2 and 11, but, in smaller ways, throughout the other chapters of the book as well.

WHY JURISPRUDENCE?

Why study jurisprudence?

For many students, the question has a simple answer: for them, it is a required course which they must pass in order to graduate. For students in this situation, the questions about any jurisprudence book will be whether it can help them to learn enough of the material to get them where they need to be: passing the course (or doing sufficiently well in the course that their overall class standing is not adversely affected). However, even students who have such a minimal survival attitude towards the subject might want to know what further advantage they might obtain from whatever knowledge of the subject they happen to pick up.

At the practical level, reading and participating in jurisprudential discussions develops the ability to analyse and to think critically and creatively about the law. Such skills are always useful in legal practice, particularly when facing novel questions within the law or when trying to formulate and advocate novel approaches to legal problems. So even those who need a “bottom line” justification for whatever they do should be able to find reason to read legal theory.

There is also a sense that philosophy, even where it does not have direct applications to grades or to practice, has many indirect benefits. Philosophy trains one to think sharply and logically; one learns how to find the weaknesses in other people’s arguments, and in one’s own; and one learns how to evaluate and defend, as well as attack, claims and positions. Philosophy could thus be seen as a kind of mental exercise program, on a par with chess or bridge (or theology). Giving the centrality of analytical skills to what both lawyers and law students do, one should not quickly dismiss any activity that can help one improve those abilities.

At a professional level, jurisprudence is the way lawyers and judges reflect on what they do and what their role is within society. This truth is reflected by the way jurisprudence is taught as part of a university
THE SELECTION OF TOPICS

education in the law, where law is considered not merely as a trade to be learned (like carpentry or fixing automobiles) but as an intellectual pursuit. For those who believe that only the reflective life is worth living, and who also spend most of their waking hours working within (or around) the legal system, there are strong reasons to want to think deeply about the nature and function of law, the legal system, and the legal profession.

Finally, for some (whether the blessed or the cursed, one cannot say), jurisprudence is interesting and enjoyable on its own, whatever its other uses and benefits. There will always be some for whom learning is interesting and valuable in itself, even if it does not lead to greater wealth, greater self-awareness, or greater social progress.

THE SELECTION OF TOPICS

One can find entire books on many of the topics discussed in the present volume in short chapters (or parts of chapters). I have done my best to offer overviews that do not sacrifice the difficulty of the subjects, but I fear that some mis-reading is inevitable in any summary. In part to compensate for the necessarily abbreviated nature of what is offered, a list of “Suggested Further Reading” is offered at the end of each chapter (and there are footnote citations to the primary texts in the course of the chapters) for those who wish to locate longer and fuller discussions of certain topics.

A related problem is that in the limited space available, I could not include all the topics that are associated with jurisprudence (a course whose content varies greatly from university to university, and even from teacher to teacher in the same university). The variety of topics included in one source or another under the category of jurisprudence is vast, so inevitably there always seems to be more missing from than present in any text. Through my silence (or brevity), I do not mean to imply that the topics not covered are not interesting, not important, or not properly part of jurisprudence.

It is inevitable that those using this book will find some chapters more useful for their purposes than others, even (or especially) if they are students using this book to accompany a general jurisprudence course. In particular, the topics in the first part of the book are usually not covered in university courses, though I believe that thinking through some of the questions raised there might help one gain a deeper or more coherent view of jurisprudence as a whole.

One caveat I must offer is that references to legal practice offered in this book will be primarily to the practices in the American and English

---

4 I am following the usual convention of using the term “English legal system” to refer to the legal system that extends over both England and Wales.
legal systems, as these are the systems with which I am most familiar. It is likely (though far from certain) that any comments based on those two legal systems would be roughly generalised to cover all common law systems. The extent to which my lack of familiarity with civil law systems biases my views about legal theory and about the nature of law I must leave to others to judge.

I take seriously the obligation that comes with publishing a new edition of an existing book. I believe that any new edition should offer resources that the prior edition did not have. While there is rarely time to revisit and rewrite everything, in the preparation of the sixth edition of this book, many of the chapters have been expanded, discussions of the most recent scholarship has been added throughout, and many topics have been significantly rethought. While there are changes throughout the book, the most extensive changes are located in Chapters 2, 3, 7, 9, 15, 18, 21, and 22.

Where possible, I have tried to include references (especially in each chapter’s “Suggested Further Reading” list) that are readily accessible: e.g., articles in well-known journals that would be available in most law libraries or from electronic law journal collections (like Hein OnLine), and articles from Internet sources (like The Stanford Encyclopedia of Philosophy (plato.stanford.edu) and the Social Services Research Network (www.ssrn.com)) that are available without cost (at least at the time of writing).

Work on this book often overlapped with work I was doing for other smaller projects: sometimes work done for the book was borrowed for other projects, and sometimes I found that work done for other projects could be usefully incorporated in the book. An earlier version of parts of Chapter 2 appeared in “Conceptual Questions and Jurisprudence”, 1 Legal Theory 415 (1995); earlier versions of parts of Chapters 5, 6, and 7 appeared in “Natural Law Theory”, in A Companion to the Philosophy of Law and Legal Theory (D. Patterson, ed., Blackwell, Oxford, 1996, 2nd ed., 2010); an earlier version of brief sections of Chapters 1 and 7 appeared in “Questions in Legal Interpretation”, in Law and Interpretation (A. Marmor, ed., Clarendon Press, Oxford, 1995), pp. 137–154; and an earlier version of parts of Chapters 1, 2, and 14 appeared in “Questions in Legal Interpretation”, 18 Tel Aviv Law Review 463 (1994) (translated into Hebrew). I am grateful to the publishers of these texts for allowing me permission to use material from those articles.

I would like to thank the following for their helpful comments and suggestions: Mark Addis, Larry Alexander, Jack Balkin, Lisa Bernstein, Scott Brewer, Keith Burgess-Jackson, Kenneth Campbell, Tom Campbell, Richard Delgado, Anuj Desai, Anthony M. Dillof, Neil Duxbury, Neal Feigenson, John Finnis, Stephen Gilles, Martin P. Golding, Aristides N. Hatzis, Alex M. Johnson, Jr., Sanford N. Katz, Matthew H. Kramer, Kenneth J. Kress, Brian Leiter, Andrei Marmor, Jerry Mashaw, Linda R. Meyer, Martha Minow, Thomas Morawetz, Martha C. Nussbaum,
Frances Olsen, Dennis Patterson, Stanley L. Paulson, Margaret Jane Radin, Julian Rivers, Daria Roithmayr, Frederick Schauer, Scott Shapiro, A. J. B. Sirks, M. B. E. Smith, Larry Solum, Scott Sturgeon, Brian Tamanaha, Adam Tomkins, Lloyd L. Weinreb, Tony Weir, James Boyd White, Kenneth Winston, Mauro Zamboni, and Yushuang (Alex) Zheng. I am also grateful for the research assistance of Joshua Gitelson, Annie Jacob, Galen Lemei, Ruchita Sethi, Justin Stec, Jason Steck, and Erin Steitz.
Contents

Preface to the Sixth Edition vii
Why Jurisprudence? viii
The Selection of Topics ix
List of Cases xix

PART A Legal Theory: Problems and Possibilities

Chapter One: Overview, Purpose and Methodology 3
Questions and Answers in Jurisprudence 3
Descriptive Theory 4
Transforming the Question 5
To What Extent is it Legal Theory? 7
Suggested Further Reading 8

Chapter Two: Legal Theory: General Jurisprudence and Conceptual Analysis 9
The Problem of Theories of Law 9
Conceptual Analysis 12
Alternative Purposes 19
Challenges to Conceptual Analysis 25
Boundary Lines in Law 27
Conclusion 29
Suggested Further Reading 30

PART B Individual Theories About the Nature of Law

Chapter Three: H. L. A. Hart and Legal Positivism 33
An Overview of Legal Positivism 33
Summary of Hart’s Position 37
The Rule of Recognition 40
The Internal Aspect of Rules (and of Law) 41
Open Texture 45
The Minimum Content of Natural Law 48
Inclusive versus Exclusive Legal Positivism 49
Other Approaches 52
Suggested Further Reading 55
Chapter Four: Hans Kelsen’s Pure Theory of Law 57
  The Pure Theory of Law 58
  Reduction and Legal Theory 61
  Hart versus Kelsen 63
  On the Nature of Norms 65
  Suggested Further Reading 65

Chapter Five: Natural Law Theory and John Finnis 67
  Traditional Natural Law Theory 67
  Medieval and Renaissance Theorists 73
  John Finnis 75
  Natural Law Theory versus Legal Positivism 77
  Other Directions 79
  Suggested Further Reading 80

Chapter Six: Understanding Lon Fuller 83
  A Different Kind of Natural Law Theory 83
  Fuller’s Approach 84
  Contemporary Views 88
  Fuller and Legal Process 88
  Suggested Further Reading 89

Chapter Seven: Ronald Dworkin’s Interpretive Approach 91
  Earlier Writings 91
  Constructive Interpretation 93
  Right Answers 98
  Dworkin versus Hart 100
  Debunking Questions 102
  Suggested Further Reading 104

PART C Themes and Principles

Chapter Eight: Justice 107
  John Rawls and Social Contract Theory 109
  Rawls’ Two Principles 112
  Rawls’ Later Modifications 114
  Robert Nozick and Libertarianism 115
  Michael Sandel, Communitarianism and Civic Republicanism 117
  Feminist Critiques 120
  Suggested Further Reading 122

Chapter Nine: Punishment 123
  Starting Point 123
  Retribution 124
“Making Society Better”: Consequentialism/Utilitarianism 126  
Other Objectives 127  
Suggested Further Reading 128  

Chapter Ten: Rights and Rights Talk 131  
Hohfeld’s Analysis 134  
Will Theory Versus Interest Theory 136  
Other Topics 137  
Suggested Further Reading 138  

Chapter Eleven: Will and Reason 141  
Legal Positivism and Natural Law Theory 142  
Social Contracts and Economic Analysis 144  
Suggested Further Reading 146  

Chapter Twelve: Authority, Finality and Mistake 147  
Suggested Further Reading 151  

Chapter Thirteen: Common Law Reasoning and Precedent 153  
Suggested Further Reading 158  

Chapter Fourteen: Statutory Interpretation and Legislative Intentions 161  
Legislative Intention 161  
“Plain Meaning” 163  
Suggested Further Reading 166  

Chapter Fifteen: Legal Enforcement of Morality 169  
Dividing Lines 169  
Topics 171  
Hart versus Devlin 172  
A New Start 175  
Suggested Further Reading 178  

Chapter Sixteen: The Obligation to Obey the Law 181  
Obligation and Consent 182  
Other Approaches 184  
The Argument Against a General Moral Obligation to Obey 186  
Connections 189  
Suggested Further Reading 189  

PART D Modern Perspectives on Legal Theory 193  

Chapter Seventeen: American Legal Realism 193  
The Target: Formalism 195
Realism and Legal Analysis 197
Realism and the Courts 200
An Overview and Postscript 202
Suggested Further Reading 204

Chapter Eighteen: Economic Analysis of Law 205
In Search of Consensus 206
The Coase Theorem 211
Description and Analysis 216
Economics and Justice 218
Game Theory 221
Public Choice Theory 224
Other Variations 226
The Limits of Law and Economics 227
Suggested Further Reading 231

Chapter Nineteen: Modern Critical Perspectives 235
Critical Legal Studies 235
“Outsider Jurisprudence” 240
Feminist Legal Theory 241
Critical Race Theory 247
Other Critical Approaches 253
Suggested Further Reading 254

Chapter Twenty: Law and Literature 257
Interpretation and Constraint 258
Other Critics 261
Miscellaneous Connections 262
Suggested Further Reading 263

Chapter Twenty One: Philosophical Foundations of the Common law 265
Tort Law 266
Contract 267
Property 268
Criminal Law 270
Causation 271
Suggested Further Reading 272

Chapter Twenty Two: Other Approaches 275
Historical Jurisprudence 275
Free Law Movement 276
Marxist Jurisprudence 277
Scandinavian Legal Realism 278
Legal Process 279
## CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pragmatism</td>
<td>280</td>
</tr>
<tr>
<td>Postmodernism</td>
<td>284</td>
</tr>
<tr>
<td>Suggested Further Reading</td>
<td>287</td>
</tr>
<tr>
<td>Bibliography</td>
<td>291</td>
</tr>
<tr>
<td>Index</td>
<td>329</td>
</tr>
</tbody>
</table>
List of Cases

Adams v Lindsell (1818) 106 Eng. Rep. 250, KB 197n
American Booksellers Assoc. v Hudnut, 771 F.2d 323 (7th Cir. 1985), affid mem., 475 U.S. 1001 (1986) 171n, 245n
Re Baby M, 537 A.2d 1227 (N.J. 1988) 171n
Black-Clauson International Ltd v Papierwerke Waldhof-Aschaffenburg A.G. [1975] 1 All E.R. 810 163n
Board of Education v Barnette, 319 U.S. 624 (1943) 149n
Bowers v Hardwick, 478 U.S. 186 (1986) 171n
Brown v Board of Education, 347 U.S. 483 (1954) 151n
Cooper v Aaron, 358 U.S. 1 (1958) 148n
Davis v Johnson [1979] A.C. 264 147, 163
Donoghue v Stevenson [1932] A.C. 562 158
Ellison v Brady, 924 F.2d 872 (9th Cir. 1991) 250n
Garcia v San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 149n
Henthorn v Fraser [1892] 2 Ch. 27 197n
Lawrence v Texas, 539 U.S. 558 (2003) 171n
Lochner v New York, 198 U.S. 45 (1905) 198n
Madzimbamuto (Stella) v Lardner-Burke N.O. (1968) (2) S.A.L.R. 284 28n
Muller v Oregon, 208 U.S. 412 (1908) 202n
Murphy v Brentwood District Council [1990] 3 W.L.R. 414 149n
Omychund v Barker (Ch. 1744) 1 Atk. 21, 26 Eng. Rep. 95n
Palsgraf v Long Island Railroad, 248 N.Y. 339, 162 N.E. 99 (1928) 198
Pepper v Hart [1993] A.C. 591 163n, 164
Plessy v Ferguson, 163 U.S. 537 (1896) 150n
Ploof v Putnam, 71 A. 188 (Vt. 1908) 269n
Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234 154n
R. v Brown [1994] 1 A.C. 212 158n, 171n
R. v Shiptoni [1987] A.C. 1 149n
River Wear Commissioners v Adamson (1877) 2 App. Cas. 743 165n
Schwegmann Bros. v Calvert Distillers Corp., 341 U.S. 384 (1951) 163n
Southern Pacific v Jensen, 244 U.S. 205 (1917) 154n, 198n
Swift v Tyson, 41 U.S. 1 (1842) 154n
United States v Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947) 217n
United States v E.C. Knight Co., 156 U.S. 1 (1895) 196
Vincent v Lake Erie Transportation Co., 124 N.W. 221 (Minn. 1910) 269n
Young v Bristol Aeroplane Co. Ltd. [1944] K.B. 718 147n, 154n