

# Jurisprudence

*Theory and Context*



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## *Theory and Context*

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NINTH EDITION

Brian H. Bix



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*In Memory of Joseph Raz*



# CONTENTS

<i>Table of Cases</i>	xiii
<i>Preface to the Ninth Edition</i>	xv

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**PART A**  
**LEGAL THEORY: PROBLEMS AND POSSIBILITIES**

---

1	Overview, Purpose and Methodology	
	Questions and Answers in Jurisprudence	5
	Descriptive Theory	6
	Transforming the Question	7
	To What Extent is it Legal Theory?	8
	Suggested Further Reading	9
2	Legal Theory: General Jurisprudence and Conceptual Analysis	
	Introduction	11
	The Problem of General Theories of Law	11
	Conceptual Analysis	13
	Alternative Purposes	19
	Challenges to Conceptual Analysis	23
	Boundary Lines in Law	26
	Conclusion	27
	Suggested Further Reading	28

---

**PART B**  
**THEORIES ABOUT THE NATURE OF LAW**

---

3	H. L. A. Hart and Legal Positivism	
	An Overview of Legal Positivism	33
	Summary of Hart's Position	37
	The Rule of Recognition	40

## CONTENTS

The Internal Aspect or Point of View of Rules (and of Law)	40
Open Texture	44
The Minimum Content of Natural Law	46
Inclusive Versus Exclusive Legal Positivism	46
Other Approaches	49
Suggested Further Reading	52
4 Hans Kelsen's Pure Theory of Law	
Introduction	55
The Pure Theory of Law	56
Reduction and Legal Theory	59
Hart Versus Kelsen	60
On the Nature of Norms	61
Suggested Further Reading	62
5 Natural Law Theory and John Finnis	
Introduction	65
Traditional Natural Law Theory	65
Medieval and Renaissance Theorists	69
John Finnis	71
Natural Law Theory Versus Legal Positivism	73
Other Directions	75
Suggested Further Reading	75
6 Understanding Lon Fuller	
A Different Kind of Natural Law Theory	77
Fuller's Approach	78
Contemporary Views	81
Fuller and Legal Process	82
Suggested Further Reading	82
7 Ronald Dworkin's Interpretive Approach	
Introduction	83
Earlier Writings	83
Constructive Interpretation	85
Right Answers	89
Dworkin Versus Hart	91
Debunking Questions	93



CONTENTS

Mark Greenberg	94
Suggested Further Reading	95

---

PART C  
THEMES AND PRINCIPLES

---

<b>8 Justice</b>	
Introduction	101
John Rawls and Social Contract Theory	102
Rawls' Two Principles	105
Rawls' Later Modifications	106
Robert Nozick and Libertarianism	107
Michael Sandel, Communitarianism and Civic Republicanism	109
Feminist Critiques	111
Suggested Further Reading	112
<b>9 Punishment</b>	
Introduction	115
Starting Point	115
Retribution	116
“Making Society Better”: Consequentialism/Utilitarianism	117
Other Objectives and Approaches	118
Suggested Further Reading	119
<b>10 Rights and Rights Talk</b>	
Introduction	121
Hohfeld's Analysis	124
Will Theory Versus Interest Theory	125
Other Topics	126
Suggested Further Reading	127
<b>11 Will and Reason</b>	
Introduction	129
Legal Positivism and Natural Law Theory	130
Social Contracts and Economic Analysis	131
Suggested Further Reading	133

CONTENTS

12	Authority, Finality and Mistake	
	Introduction	135
	Suggested Further Reading	138
13	Common Law Reasoning and Precedent	
	Introduction	139
	Suggested Further Reading	143
14	Statutory Interpretation and Legislative Intentions	
	Introduction	145
	Legislative Intention	145
	“Plain Meaning”	146
	Suggested Further Reading	149
15	Legal Enforcement of Morality	
	Introduction	151
	Dividing Lines	151
	Topics	152
	Hart Versus Devlin	154
	A New Start	156
	Suggested Further Reading	158
16	The Obligation to Obey the Law	
	Introduction	161
	Obligation and Consent	162
	Other Approaches	163
	The Argument Against a General Moral Obligation to Obey	165
	Connections	167
	Suggested Further Reading	168

---

PART D

MODERN PERSPECTIVES ON LEGAL THEORY

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17	American Legal Realism	
	Introduction	173
	The Target: Formalism	175
	Realism and Legal Analysis	177

## CONTENTS

Realism and the Courts	179
An Overview and Postscript	181
Suggested Further Reading	182
<b>18 Economic Analysis of Law</b>	
Introduction	185
In Search of Consensus	186
The Coase Theorem	190
Description and Analysis	194
Economics and Justice	196
Game Theory	198
Public Choice Theory	201
Other Variations	202
The Limits of Law and Economics	204
Suggested Further Reading	208
<b>19 Modern Critical Perspectives</b>	
Introduction	211
Critical Legal Studies	211
“Outsider Jurisprudence”	215
Feminist Legal Theory	216
Critical Race Theory	220
Other Critical Approaches	226
Suggested Further Reading	227
<b>20 Law and Literature</b>	
Introduction	231
Interpretation and Constraint	232
Other Critics	234
Miscellaneous Connections	235
Suggested Further Reading	236
<b>21 Philosophical Foundations of the Common Law</b>	
Introduction	237
Tort Law	238
Contract	239
Property	239
Criminal Law	241

## CONTENTS

Causation	242
Suggested Further Reading	243
<b>22 Other Approaches</b>	
Introduction	247
Historical Jurisprudence	247
Free Law Movement	248
Marxist Jurisprudence	249
Scandinavian Legal Realism	249
Legal Process	251
Pragmatism	252
Postmodernism	255
Suggested Further Reading	257
<i>Bibliography</i>	261
<i>Index</i>	305

## TABLE OF CASES

Adams v Lindsell 106 E.R. 250; (1818) 1 B. & Ald. 681; [1818] 6 WLUK 27 KB	17-02
American Booksellers Assoc. Inc. v Hudnut 771 F.2d 323 (7th Cir. 1985); affirmed mem., 475 U.S. 1001 (1986)	15-03, 19-04
Re Baby M. 537 A.2d 1227 (N.J. 1988)	15-03
Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] A.C. 591; [1975] 2 W.L.R. 513; [1975] 1 All E.R. 810; [1975] 2 Lloyd's Rep. 11; [1975] 3 WLUK 14; (1975) 119 S.J. 221 HL	14-03
Board of Education v Barnette 319 U.S. 624 (1943)	12-01
Boomer v Atlantic Cement Co 26 N.Y.2d 219; 257 N.E.2d 870; 09 N.Y.S.2d 312 (1970)	18-04
Bowers v Hardwick 478 U.S. 186 (1986) US Court	15-03
Brown v Board of Education 347 U.S. 483 (1954)	12-01
Cooper v Aaron 358 U.S. 1 (1958)	12-01
Cruzan v Director, Missouri Health Dept. 497 U.S. 261 (1990)	11-03
Davis v Johnson [1979] A.C. 264; [1978] 2 W.L.R. 553; [1978] 1 All E.R. 1132; [1978] 3 WLUK 72; (1978) 122 S.J. 178 HL	12-01, 14-03
Donoghue v Stevenson, sub nom. McAlister v Stevenson [1932] A.C. 562; 1932 S.C. (H.L.) 31; 1932 S.L.T. 317; [1932] 5 WLUK 41; [1932] W.N. 139 HL (SC)	13-01
Ellison v Brady 924 F.2d 872 (9th Cir. 1991)	19-05
Garcia v San Antonio Metropolitan Transit Authority 469 U.S. 528 (1985)	12-01
Henthorn v Fraser [1892] 2 Ch. 27; [1892] 3 WLUK 88 CA	17-02
Kelo v City of New London 545 U.S. 469 (2005)	21-04
Lawrence v Texas 539 U.S. 558 (2003)	15-03
Lochner v New York 198 U.S. 45 (1905)	17-03
Lynch v Donnelly 465 U.S. 668 (1984)	19-05
MacPherson v Buick Motor Co 217 N.Y. 382; 111 N.E. 1050 (1916)	13-01
Madzimbamuto (Stella) v Lardner-Burke N.O. (1968) (2) S.A.L.R. 284	2-06
Muller v Oregon 208 U.S. 412 (1908)	17-04
Murphy v Brentwood DC [1991] 1 A.C. 398; [1990] 3 W.L.R. 414; [1990] 2 All E.R. 908; [1990] 2 Lloyd's Rep. 467; [1990] 7 WLUK 331; 50 B.L.R. 1; 21 Con. L.R. 1; (1990) 22 H.L.R. 502; 89 L.G.R. 24; (1991) 3 Admin. L.R. 37; (1990) 6 Const. L.J. 304; (1990) 154 L.G. Rev. 1010; [1990] E.G. 105 (C.S.); (1990) 87(30) L.S.G. 15; (1990) 134 S.J. 1076; <i>Times</i> , July 27, 1990; <i>Independent</i> , July 27, 1990 HL	12-01
Omychund v Barker 26 E.R. 15; (1744) 1 Atk. 21; [1744] 1 WLUK 2 Ct of Chancery	7-03
Palsgraf v Long Island Railroad 248 N.Y. 339; 162 N.E. 99 (1928)	17-03
Pepper (Inspector of Taxes) v Hart, sub nom. Pepper v Hart [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42; [1992] S.T.C. 898; [1992] 11 WLUK 389; [1993] I.C.R. 291; [1993] I.R.L.R. 33; [1993] R.V.R. 127; (1993) 143 N.L.J. 17; [1992] N.P.C. 154; <i>Times</i> , November 30, 1992; <i>Independent</i> , November 26, 1992 HL	14-03
Plessy v Ferguson 163 U.S. 537 (1896)	12-01
Ploof v Putnam 71 A. 188 (Vt. 1908)	21-04
Practice Statement (HL: Judicial Precedent), sub nom. Practice Note (HL: Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77; [1966] 2 Lloyd's Rep. 151; [1966] 7 WLUK 84; (1986) 83 Cr. App. R. 191 (Note); (1966) 110 S.J. 584 HL	13-01
R. v Brown (Anthony Joseph); joined case(s) R. v Cadman (Graham William); R. v Carter (Christopher Robert); R. v Jaggard (Roland Leonard); R. v Laskey (Colin); R. v Lucas (Saxon) [1997] 2 WLUK 339; (1997) 24 E.H.R.R. 39; <i>Times</i> , February 20, 1997; <i>Independent</i> , February 25, 1997 ECHR; dismissing complaint from	13-01, 15-03
R. v Shivpuri (Pyare) [1987] A.C. 1; [1986] 2 W.L.R. 988; [1986] 2 All E.R. 334; [1986] 5 WLUK 117; (1986) 83 Cr. App. R. 178; (1986) 150 J.P. 353; [1986] Crim. L.R. 536; (1986) 150 J.P.N. 510; (1986) 83 L.S.G. 1896; (1986) 136 N.L.J. 488; (1986) 130 S.J. 392 HL	12-01
River Wear Commissioners v Adamson (1877) 2 App. Cas. 743; [1877] 7 WLUK 93 HL	14-03
Schwegmann Bros. v Calvert Distillers Corp. 341 U.S. 384 (1951)	14-03
Southern Pacific Co v Jensen 244 U.S. 205 (1917)	13-01, 17-03
State v Greene 338 P.2d 1132 (Or. App. 2016)	3-05

TABLE OF CASES

Swift v Tyson 41 U.S. 1 (1842) ..... 13-01  
Uganda v Commissioner of Prisons, Ex p. Matovu [1966] East Afr. L.R. 514 ..... 2-06  
United States v Carroll Towing Co. 159 F.2d 169 (2nd Cir. 1947) ..... 18-04  
United States v E.C. Knight Co 156 U.S. 1 (1895) ..... 17-02  
Vincent v Lake Erie Transportation Co. 124 N.W. 221 (Minn. 1910) ..... 21-04  
Young v Bristol Aeroplane Co Ltd [1946] A.C. 163; [1946] 1 All E.R. 98; (1946) 79 Ll. L.  
Rep. 35; [1945] 11 WLUK 49 HL ..... 12-01, 13-01

## PREFACE TO THE NINTH EDITION

This book derives from efforts of over three decades teaching 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, without at the same time 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;<sup>1</sup> 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:

“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.”<sup>2</sup>

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.”<sup>3</sup> My aims are less ambitious: the present text is a book meant to inform readers what other books contain. The primary texts are not always as accessible as they might be, and there is sometimes a need for explanation and context. 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. However, there are also many places in the text where I go beyond a mere reporting of the debate and try to add my own views to the discussion.

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<sup>1</sup> Unlike some writers—e.g., William Twining, “Academic Law and Legal Philosophy: The Significance of Herbert Hart” (1979) 95 *Law Quarterly Review* 557 at 565–580, Roger Cotterrell, “Why *Jurisprudence* is Not Legal Philosophy”, 5 *Jurisprudence* 41 (2014), Michael Spencer Robertson, “More Reasons Why Jurisprudence is Not Legal Philosophy”, 30 *Ratio Juris* 403 (2017)—I do not distinguish between “jurisprudence”, “legal theory”, and “legal philosophy”, and I will use those terms interchangeably throughout this book.

<sup>2</sup> H. L. A. Hart, “Positivism and the Separation of Law and Morals”, 71 *Harvard Law Review* 593 at 593 (1958).

<sup>3</sup> H. L. A. Hart, *The Concept of Law* (3rd ed., Clarendon Press, Oxford, 2012), p.vi.

## 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: just passing the course, or perhaps 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 reasons 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 programme, on a par with chess or bridge (or theology). Given the centrality of analytical skills to what both lawyers and law students do (and its benefits for many non-legal activities), 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, and the role of law generally, is within society. This is why jurisprudence is taught as part of a university 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 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 only a handful of pages. I have done my best to offer overviews that do not sacrifice the difficulty of the subjects, but I fear that some distortion or confusion is an inevitable risk in any summary. In part to compensate for the necessarily abbreviated nature of what is offered, a list of “Suggested Further Reading” is of-



ferred 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.

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 from teacher to teacher). The variety of topics included in books and articles under the category of jurisprudence is vast, so inevitably any text will fail to include every topic that a student, scholar, and teacher might want included. 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.

Every person using this book will predictably 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 foundational questions raised there might help one gain a deeper or more coherent view of jurisprudence as a whole.

References to legal practice offered in this book will be primarily to the practices in the American and English<sup>4</sup> 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 could 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 editions did not have. While there is rarely time to revisit and rewrite everything, in the preparation of the ninth edition of this book, chapters have been expanded, discussions of the most recent scholarship have been added throughout, and many topics have been significantly rethought. I have made changes (large or small) on almost every page.

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 or JSTOR), and articles from internet sources (like The Stanford Encyclopedia of Philosophy ([plato.stanford.edu](http://plato.stanford.edu)) and the Social Services Research Network ([www.ssrn.com](http://www.ssrn.com))) that are available without cost 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",

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<sup>4</sup> 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.

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.

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