Jurisprudence

Theory and Context

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NINTH EDITION

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In Memory of Joseph Raz

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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;[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:

> "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 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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[1] 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.

[2] H. L. A. Hart, "Positivism and the Separation of Law and Morals", 71 *Harvard Law Review* 593 at 593 (1958).

[3] 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-

fered 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[4] 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) and the Social Services Research Network (*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",

[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.

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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Brian Bix
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