JURISPRUDENCE:

THEORY AND CONTEXT

Brian Bix Third Edition

THOMSON

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For Joseph Raz

Preface to the Third Edition

This book derives from past efforts 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, 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 felt as a teacher, when I was unable to get across the beauty and subtlety of the great writers in legal theory[1]; and the frustration my students sometimes felt, when they were unable to understand me, due to my inability to explain the material in terms they could 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 he 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 he 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

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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 pp. 565–580, I do not distinguish between "Jurisprudence", "legal theory", and "legal philosophy", and I will use those terms interchangeably.

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

[3] H.L.A. Hart, *The Concept of Law* (2nd ed., Clarendon Press, Oxford, 1994), p. vi.

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 Chs 2 and 11, but in a number of other places throughout 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 analyze 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 skills.

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* education in the law, where law is considered not merely as a trade to be learned

(like carpentry or fixing automobiles) hut 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 Readings" 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). 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. 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] legal systems, as these are the systems with which I am most familiar. It is

[1] 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.

likely (though far from certain) that any comments based on those two legal systems would be roughly generalizable 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.

In the preparation of the third edition of this book, many of the chapters have been expanded, and discussions of the most recent scholarship has been added throughout (along with the expected correction of small typographical errors from the prior edition).

Work on this book often overlapped 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 he usefully incorporated in the hook. 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), pp. 223–240; 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.

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Contents

PART A

Legal Theory: Problems and Possibilities

It is surprising how often one can go through entire jurisprudence books or entire jurisprudence courses without the most basic questions ever being raised, let alone resolved. The purpose of the opening chapters is to at least touch on some of these basic questions:

(1) In what sense is a general theory of law possible?

(2) What is the point of conceptual claims, and how can one evaluate them?

(3) In which senses can one speak of the relative merits of different legal theorists or of different approaches to law?

Some of these questions, and the answers suggested for them, will be applicable primarily to the second part of this book, which covers a number of individual theories about the law. Other questions will have resonance that extends throughout all the book's topics.

Chapter One

Overview, Purpose and Methodology

QUESTIONS AND ANSWERS IN JURISPRUDENCE

Part of the purpose in writing this book was to counter a tendency to treat jurisprudence as just another exercise in rote memorization. it is often tempting for jurisprudence students, especially those whose background is primarily in law rather than philosophy, to treat the major writers in the area as just a variation on black-letter, doctrinal law: that is, as points, positions and arguments to he memorized, in order that they can later be repeated on the final examination.

A second problem in the way in which legal theory is presented and studied is the tendency to see different legal theorists as offering competing answers to simple questions. Thus, H.L.A. Hart and Lon Fuller are thought to be debating certain easily stateable propositions in their 1958 exchange in the *Harvard Law Review*.[1] The only thing allegedly left for the student is to figure out which theorist was right and which one was wrong.

Legal theory would be more clearly (and more deeply) understood if its issues and the writings of its theorists were approached through a focus on questions rather than answers. Once one sees that different theorists are answering different questions and responding to different concerns, one can see how these theorists are often describing disparate aspects of the same phenomenon rather than as disagreeing about certain simple claims about law. This text will focus on the questions being answered (the problems to which the theories try to respond), and will frequently point out the extent to which apparently contradictory legal theories can be shown to be compatible.

When reading a particular claim by a legal theorist, it is important to ask a series of questions: Why is this theorist making this claim? Who might disagree, and why? While many theorists can be criticized for not

[1] H.L.A. Hart, "Positivism and the Separation of Law and Morals" 71 *Harvard Law Review* 593 (1958); Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart", 71 *Harvard Law Review* 630 (1958).