The Problems of Jurisprudence

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THE PROBLEMS *of* JURISPRUDENCE

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In Memoriam
Paul M. Bator

Preface

By "jurisprudence" I mean the most fundamental, general, and theoretical plane of analysis of the social phenomenon called law. For the most part it deals with problems, and uses perspectives, remote from the daily concerns of legal practitioners: problems that cannot be solved by reference to or by reasoning from conventional legal materials; perspectives that cannot be reduced to legal doctrines or to legal reasoning. Many of the problems of jurisprudence cross doctrinal, temporal, and national boundaries.

"Philosophy" is the name we give to the analysis of fundamental questions; thus the traditional definition of jurisprudence as the philosophy of law, or as the application of philosophy to law, is prima facie appropriate. Problems of jurisprudence include whether and in what sense law is objective (determinate, impersonal) and autonomous rather than political or personal; the meaning of legal justice; the appropriate and the actual role of the judge; the role of discretion in judging; the origins of law; the place of social science and moral philosophy in law; the role of tradition in law; the possibility of making law a science; whether law progresses; and the problematics of interpreting legal texts.

All these are examples of what may be termed "wholesale" problems of jurisprudence, to distinguish them from such "retail" problems as the philosophical pros and cons of forbidding abortion or capital punishment, or of imposing tort liability for failing to rescue a stranger. The retail problems are no less worthy than the wholesale ones, nor even less fundamental in a useful sense; they are only narrower. The line is as indistinct as it is unimportant, and it will be crossed frequently in this book—for example, to discuss in Chapter 5 both the state of mind required for criminal liability and the distinction between voluntary and involuntary confessions; in Chapter 6 the problem of legal proof; in

Chapter 9 affirmative action; in Chapter 11 abortion; in Chapter 15 free speech. Yet I shall suggest that philosophy has less to contribute to the retail problems of jurisprudence than to the wholesale ones (see last section of Chapter 11).

The principal tools that I use in dealing with both the wholesale and the retail problems of jurisprudence are those of analytical philosophy, the study of "normative problems about reasons and reasoning" (L. Jonathan Cohen, *The Dialogue of Reason: An Analysis of Analytical Philosophy* 11, 1986). Although moral and political philosophy figure as well in my analysis, the emphasis on the analytical approach places the question of law's objectivity at center stage. I want to make clear at the outset that I am a consumer rather than a producer of philosophy. I seek neither to compete with professional philosophers nor to take sides in philosophical debates, but only to mine philosophy for insights useful to law. At times, though, this requires me to indicate which among competing philosophical positions on a question I find more persuasive.

The spirit in which I approach the problems of jurisprudence is that of the epitaph that William Butler Yeats composed for his tombstone:

> Cast a cold eye
> On life, on death.
> Horseman, pass by!

"Cold" for Yeats is not the coldness of indifference or hostility, for we read in "The Wild Swans at Coole" of swans that "lover by lover, / They paddle in the cold / Companionable streams or climb the air." It is the cold of detachment—a clear-eyed, no-nonsense, but passionate detachment, as in these lines from "The Fisherman":

> 'Before I am old
> I shall have written him one
> Poem maybe as cold
> And passionate as the dawn.'

I try to examine the problems of jurisprudence with the coldness recommended by Yeats, and hence without the piety and cant that are *de rigueur* in many discussions of law. I defend a jurisprudence that is critical of formalism (less pejoratively, of traditional legalism) and that has affinities with legal realism, shorn however of the left-of-center politics characteristic of that movement and its offspring. It is a jurisprudence that, like legal realism, draws on the philosophy of pragmatism (though not only on that philosophy) but that, unlike some versions of legal realism, seeks to demythologize law without either denigrating or diabolizing it.

I have tried to keep the presentation as simple as possible, with a minimum of legal and philosophical jargon. There is no reason why the fascinating subject of jurisprudence should be the exclusive preserve of the handful of academic lawyers who specialize in it. It should be of interest to all lawyers and law students—and also to the increasing number of philosophers, economists, political scientists, sociologists, psychologists, and historians interested in law and justice. Because this is a book not about the scholarship of jurisprudence but about the problems which that scholarship addresses, the reader should not expect a comprehensive exegesis of the classics of jurisprudence. Nor do I discuss *all* the problems of jurisprudence, although I touch on enough of them to warrant titling the book as I have. At times the touch is light, however, and perhaps the implicit title is *The Problems of Jurisprudence as I See Them*.

My interest in jurisprudence goes back a number of years. In the 1970s I began writing about Bentham's attack on Blackstone, about the normative foundations of economic analysis of law, about law's roots in revenge, and about corrective justice. Since becoming a judge in 1981, I have, naturally, become fascinated by the issue of objectivity in adjudication, and it occupies center stage in this book. The approach I take to the issue is sketched in "The Jurisprudence of Skepticism," 86 *Michigan Law Review* 827 (1988), and I reprint portions of that article in this book along with portions of several other articles: "The Concept of Corrective Justice in Recent Theories of Tort Law," 10 *Journal of Legal Studies* 187 (1981), © 1981 The University of Chicago; "Lawyers and Philosophers: Ackerman and Others," 1981 *American Bar Foundation Research Journal* 231, © 1981 American Bar Foundation; "Wealth Maximization Revisited," 2 *Notre Dame Journal of Law, Ethics and Public Policy* 85 (1985), © 1985 Thomas J. White Center on Law & Government, University of Notre Dame; "The Decline of Law as an Autonomous Discipline: 1962–1987," 100 *Harvard Law Review* 761 (1987), copyright © 1987 The Harvard Law Review Association; "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," 37 *Case Western Reserve Law Review* 179 (1987), copyright © 1987 Case Western Reserve University; "The Law and Economics Movement," 77 *American Economic Review Papers and Proceedings* 1 (May 1987), copyright American Economic Association 1987; "Conventionalism: The Key to Law as an Autonomous Discipline?" 38 *University of Toronto Law Journal* 333 (1988), © University of Toronto Press 1988; "Conservative Feminism," 1989 *University of Chicago Legal Forum* 191, © 1989 The University of Chicago. The book is largely new, however, and its previously published components appear here heavily revised and rearranged.

Selections from "A Coat," "The Fisherman," and "Under Ben Bulben" are reprinted with permission of Macmillan Publishing Company from *Collected Poems of W. B. Yeats,* copyright 1916, 1919 by Macmillan Publishing Company, renewed 1944, 1947, by Bertha Georgie Yeats and copyright 1940 by Georgie Yeats, renewed 1968 by Bertha Georgie Yeats, Michael Butler Yeats, and Anne Yeats.

I am more than usually indebted for help in bringing this book to its present form. Ricardo Barrera, James Taggart, Catherine Van Horn, Darren Fortunato, Laura Neebling, Adam Pritchard, Barbara Smith, Steven Hetcher, and Philip Clark provided excellent research assistance. Ronald Allen, Dennis Black, Steven Burton, Frank Easterbrook, William Eskridge, Robert Ferguson, David Friedman, Robert Fullinwider, Linda Hirschman, Stephen Holmes, David Luban, Stephen McAllister, Eric Posner, Margaret Radin, Eva Saks, George Stigler, Stephen Stigler, David Strauss, Lloyd Weinreb, Robin West, and an anonymous reader for the Harvard University Press made valuable comments on the manuscript; so did participants in the University of Chicago's Seminar for Contemporary Social and Political Theory and in the University of Maryland's Legal Theory Workshop. The extensive and provocative comments of Lawrence Lessig, Frank Michelman, and Martha Minow require a special acknowledgment, as do Albert Alschuler's valiant efforts, through comments and correspondence, to save me from error; the comments, support, guidance, and wise counseling of Michael Aronson, General Editor at the Harvard University Press; and the sensitive and meticulous copyediting of Elizabeth Gretz. The philosophers Daniel Brudney, Jonathan Cohen, Jules Coleman, Michael Corrado, and Russell Hardin were kind enough to read parts or all of the manuscript and point out errors in it; Brudney's comments resulted in substantial changes in several chapters. To Ronald Allen and Steven Burton I owe an additional debt for helpful conversations on the subject matter of the book, while to Cass Sunstein I owe a particularly large debt for extensive comments, and numerous conversations, that resulted in major revisions.

My last acknowledgment is to the late Paul Bator, who in a review of an earlier book of mine called me "a captive of a thin and unsatisfactory epistemology" ("The Judicial Universe of Judge Richard Posner," 52 *University of Chicago Law Review* 1146, 1161 [1985]). I found this an arresting accusation and one with considerable merit, and it stimulated me to examine the problems of jurisprudence in greater depth than I had ever expected to. In addition, conversations with Professor Bator on the subject matter of the book helped to shape its themes and avert many pitfalls.

THE PROBLEMS OF JURISPRUDENCE

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Introduction
The Birth of Law and the Rise of Jurisprudence

Jurisprudence addresses the questions about law that an intelligent layperson of speculative bent—not a lawyer—might think particularly interesting. What is law? A system of rules? Of rules plus judicial discretion? Of principles? Or is it just organized public opinion? Is it a thing, entity, or concept at all—and if not, does this make the original question ("What is law?") meaningless? Where does law come from? Can there be law without lawyers and judges? Is there progress in law? How do we know when a legal question has been answered correctly? What is "knowledge" of law knowledge of? What conditions are necessary or sufficient to make law objective? Should law even try to be objective? Can legal findings of fact ever be verified? Is there really a distinct form of *legal* reasoning or is it identical to some other form, such as moral or economic reasoning? Is law an autonomous discipline? How, if at all, does it differ from politics? Does the criminal law presuppose the existence of minds? Of free will? Does the case for protecting free speech depend on the existence of truth? Is objective interpretation of statutes and constitutions a chimera? What is the purpose of law? How do we identify a well-functioning legal system? Is law a science, a humanity, or neither? If a law is sufficiently vicious does it cease to be law? Does "law" mean the same thing in all these questions and, if not, what is the range of meanings of the word? A practicing lawyer or a judge is apt to think questions of this sort at best irrelevant to what he does, at worst naive, impractical, even childlike (how high is up?).[1]

1. Compare with the questions listed above such lawyers' questions as: Can the doctrine of pendent jurisdiction be used to add a party to a case or just to add a claim? Does the replacement of contributory by comparative negligence imply the demise of the doctrine of last clear chance? Can a person who returns a lost article to its owner claim the reward posted for its return if he didn't know about the reward? Does allowing a federal magistrate

To question the point of asking such questions is valid; I hope to show that there is a point.

When I entered Harvard Law School as a student thirty years ago, the emphasis in legal education was heavily practical, in the sense of anti-theoretical. (It is only slightly less so today.) I recall vividly the questions with which my first-year courses began. In torts it was whether an assault, to be actionable at law, requires a touching of the victim. The vehicle for discussing this question was a fourteenth-century case in which the defendant had swung at a tavernkeeper with an axe and missed.[2] In property the opening question was the meaning of "adverseness" in the doctrine of adverse possession. A person who occupies land in the honest but mistaken belief that it is his can by passage of time acquire a good title, but only if his possession is adverse to the "true" owner: a tenant, whose possession is not adverse to his landlord, does not acquire ownership of the premises he rents, no matter how long he has rented them. In contracts we examined the difference between liquidated damages—an estimate made in the contract itself of how much the promisee is likely to lose in the event of a breach—and penalties. Liquidated-damages clauses are enforceable, penalty clauses not. And in civil procedure we examined the difference between "substance" and "procedure." The federal rules of civil procedure authorize a litigant to require his adversary to undergo a medical examination if the adversary's physical condition is pertinent to the litigation, as it often will be in a personal-injury case. The question in the case we read was whether the rule is substantive, and consequently outside the congressional authorization for rules of procedure, or procedural, and hence within it.[3]

This way of studying law, which involves beginning the study *in*

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to preside over a jury trial in a case where federal jurisdiction is based on diversity of citizenship violate Article III of the Constitution? These questions are quite *general* by lawyers' standards, but they are not jurisprudential questions in my sense. They are not general enough, they are not fundamental, and they are not—and perhaps cannot usefully be—approached from the standpoint of philosophy.

I do not suggest that the word "jurisprudence" has an established meaning; it does not. See, for example, R. H. S. Tur, "What Is Jurisprudence?" 28 *Philosophical Quarterly* 149 (1978). I use the word to mean the set of issues in or about law that philosophy can illuminate.

2. I. de S. & Wife v. W. de S., Y. B. Liber Assisarum, 22 Edw. 3, f. 99, pl. 60 (1348 or 1349); for text and discussion, see my book *Tort Law: Cases and Economic Analysis* 13–16 (1982).

3. Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

medias res, taking the structure of the legal system and the principal rules of law for granted, and treating cases decided in different eras as if all had been decided yesterday (rather than treating old cases as historical curiosities), remains an invaluable method of professional instruction. It conveys to the student the texture of legal practice, and it does so more coherently and efficiently than would an apprenticeship system of legal training. It inducts the students into the folkways of the profession. It drills them in the critical use of logic—an essential though sometimes overworked technique of legal analysis. It teaches them to think on their feet. It instills—again more efficiently than would alternative systems of training—essential lessons, such as that legal language often differs from lay language (the legal meanings of "assault," "adverse," "substance," "procedure," and "penalty" are all counterintuitive), that—a related point—legal meanings are heavily dependent on context ("procedure," notoriously, has many different legal meanings), that many rules of law must be inferred from—they are not stated clearly, or usably, in—judicial decisions, and that at its margins law is far more plastic than the lay public believes. A layperson is apt to think that the answer to every legal question is contained in a book somewhere, and that all one has to know is where to look. The law student soon learns better.

These lessons, background, and competences, and the "Socratic" method by which they are imparted, continue to supply essential preparation for the practice of law—broadly conceived to include judging and other law functions as well as practice in a law firm—at the high level of skill that many American practitioners display. But the concern of this book is not with—more precisely, not at—the practice level of law; and it should be apparent that the pedagogic approach just described is not oriented to asking and answering the kind of questions with which I began, unless the teacher is Socrates himself. The relationship between a conventional legal education and doing jurisprudence is much like that between learning a language and doing linguistics.

The general, fundamental, and deeply problematic character of the questions with which I began mark them as philosophical. To practical people, however, including judges and lawyers and even many law professors, philosophy is an exasperating subject. Philosophers seem preoccupied with questions that no one with a modicum of common sense and a living to earn would waste a minute on, such as: How do we know that any other person has a mind, when we can never observe it? How can we prove that the sun will rise tomorrow, or that no zebras wear overcoats in the wilds—or can we? How even in principle can ideas, which have no spatio-temporal locus, affect bodies? If you are in

a room that is locked from the outside but do not know it, and while it is locked you decide not to leave, are you exercising free will in making this decision or are you "acting" under compulsion? How do you know you are not a brain in a vat, being fed impressions of an external world by a mad scientist? I ask nonphilosophical readers to suspend their disbelief, for I hope to show that questions such as these, remote as they may seem not only from common sense but from common law (and every other sort of law), can shed light on the perennial problems of jurisprudence. Meanwhile, Bertrand Russell's eloquent defense of philosophy is worth pondering:

> The man who has no tincture of philosophy goes through life imprisoned in the prejudices derived from common sense, from the habitual beliefs of his age or his nation, and from convictions which have grown up in his mind without the co-operation or consent of his deliberate reason. To such a man the world tends to become definite, finite, obvious; common objects rouse no questions, and unfamiliar possibilities are contemptuously rejected. As soon as we begin to philosophize, on the contrary, we find . . . that even the most everyday things lead to problems to which only very incomplete answers can be given. Philosophy, though unable to tell us with certainty what is the true answer to the doubts which it raises, is able to suggest many possibilities which enlarge our thoughts and free them from the tyranny of custom. Thus, while diminishing our feeling of certainty as to what things are, it greatly increases our knowledge as to what they may be; it removes the somewhat arrogant dogmatism of those who have never travelled into the region of liberating doubt, and it keeps alive our sense of wonder by showing familiar things in an unfamiliar aspect.[4]

The Origins of Law and Jurisprudence

To understand the problems of jurisprudence—even to understand why there are such problems—it is necessary to know a little about the origins of law, itself a jurisprudential question when pursued in a speculative fashion.[5] The ultimate source of these problems lies in the divi-

4. *The Problems of Philosophy* 156–157 (1912). "Philosophy, beginning in wonder, as Plato and Aristotle said, is able to fancy everything different from what it is. It sees the familiar as if it were strange, and the strange as if it were familiar. It can take things up and lay them down again. Its mind is full of air that plays round every subject. It rouses us from our native dogmatic slumber and breaks up our caked prejudices." William James, *Some Problems of Philosophy: A Beginning of an Introduction to Philosophy* 7 (1911).

5. Such questions are the domain of historical jurisprudence, the field made famous by Savigny, Maine, and Holmes. See the interesting discussion in Edwin W. Patterson, "His-

sion of labor. Even the simplest society has norms, tacit or explicit, that evolve from the needs of the society before there are judges or other officials.[6] The fact that norms precede formal legal systems is, no doubt, one cause of belief in "natural law." In its strongest form, this term, which we will encounter many times, denotes the idea that there is a body of suprapolitical principles that underwrite "positive law," meaning law laid down by courts, legislatures, or other state organs. When a customary norm is violated to someone's injury in a simple, "prelegal" society, the instinct of the victim or his family to take revenge is activated. Tacit norms enforced by the threat of revenge are the rudimentary form of a legal system; or, if one prefers, a forerunner to it, for it is unimportant from a practical standpoint whether one calls a system of enforcing customary norms through revenge "law" or "prelaw." What is important is that the grave drawbacks of a revenge system[7] make it intolerable except in the smallest or most primitive societies. There are huge advantages to having specialists in the creation and enforcement of norms, and as soon as society can afford them these specialists emerge.

The history of law in forms recognizable to us (that is, of publicly declared and enforced norms) is to a significant degree one of increasing specialization in the performance of legal tasks. In the first stage after the pure system of private revenge, a chief or king, or perhaps even a popular assembly, will legislate and adjudicate as undifferentiated aspects of governing. Examples are Agamemnon in Euripides' *Hecuba*, Creon in *Antigone*, and the jury that tried and condemned Socrates.[8] Gradually these functions are hived off to specialists, but even before

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torical and Evolutionary Theories of Law," 51 *Columbia Law Review* 681 (1951). For recent contributions see Peter Stein, "The Tasks of Historical Jurisprudence," in *The Legal Mind: Essays for Tony Honoré* 293 (Neil MacCormick and Peter Birks eds. 1986); Stein, *Legal Evolution: The Story of an Idea* (1980); Stein, "Adam Smith's Jurisprudence—Between Morality and Economics," 64 *Cornell Law Review* 621 (1979); E. Donald Elliott, "The Evolutionary Tradition in Jurisprudence," 85 *Columbia Law Review* 38 (1985); Herbert Hovenkamp, "Evolutionary Models in Jurisprudence," 64 *Texas Law Review* 645 (1985).

6. For an interesting discussion, from a philosophical perspective, of the emergence of norms, see Gilbert Harman, *The Nature of Morality: An Introduction to Ethics* 110–111 (1977).

7. Discussed in my books *The Economics of Justice*, pt. 2 (1981), and *Law and Literature: A Misunderstood Relation*, ch. 1 (1988).

8. The trial and condemnation of Socrates (see Thomas C. Brickhouse and Nicholas D. Smith, *Socrates on Trial* 24–37 [1989]) by a jury of hundreds, with no professional judges, no deliberations, and no possibility of appeal, illustrates the limitations of popular justice. So does the inability of even a modern jury to administer any but the simplest remedies. Injunctions and other equitable remedies had to await the appearance of professional judges.