

Why We Are All Jurisprudes (or, at Least, Should Be)

Michelle Madden Dempsey

Introduction

What follows is a lightly revised speech I presented at a symposium on *The Future of Legal Scholarship* in April 2016 at Northeastern University School of Law. It presents a brief overview of the questions that have traditionally occupied the field of jurisprudence, flags up a growing movement within the field to eliminate these questions, and defends the view that getting the right answers to these questions remains an important project.¹

We've gathered today to address the future of legal scholarship. Given the "new normal" in the legal academy, with restricted (or eliminated) resources dedicated to supporting scholarship, many areas of legal scholarship are under threat. The value of legal scholarship in general is being attacked both within and outside the academy, and perhaps no area of legal scholarship is more derided than jurisprudence. Most critics will agree that at least *some* kinds of legal scholarship may still be of value. Empirical legal scholarship, they may concede, can tell us something useful and true about the world in which we live, while doctrinal scholarship can potentially be of service to judges in interpreting and applying the law, to litigators in arguing what the law is or should be, and to legislators in creating new law, etc. But jurisprudence? In the "new normal" of the legal academy, jurisprudence is increasingly regarded as an indulgent waste of time.²

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1. By way of clarification, the term "jurisprudes" in my title is meant simply to refer to legal scholars who engage legal philosophy (jurisprudence).
2. See, e.g., Chief Justice of the United States John G. Roberts, Jr., Interview at Fourth Circuit Court of Appeals Annual Conference, available at www.c-span.org/video/?300203-1/conversation-chief-justice-roberts at approx. 30:40 (June 25, 2011) ("Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."). Roberts's comment was widely regarded as disdainful of legal scholarship such as jurisprudence. For an amusing response, see Orin Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 GREEN BAG 2D 251, available at http://online.wsj.com/public/resources/documents/kantbulgaria_kerr.pdf

In this atmosphere, it is tempting to be pessimistic about the future of jurisprudence. Perhaps the skeptics are right and jurisprudence is a waste of time—time better spent focusing on empirical or doctrinal scholarship or, better yet, teaching our students to be “practice ready” at graduation.³ However, I think the skeptics are wrong—and the time is ripe to be optimistic about the future of jurisprudence. Indeed, I think the future of jurisprudence can and should be defended not only from nonjurisprude critics, but from the internal critique it faces from the relatively new “eliminativism” trend within jurisprudence.

Before I go any further, two points deserve attention. First, I should confess that I don’t consider jurisprudence to be my main focus of scholarship. While my doctoral studies and much of my scholarship is informed by analytic legal philosophical methods, most of my work tends to focus on the philosophy of criminal law.⁴ Second, as you might expect of an analytic legal philosopher, I think we should start by getting *very clear* about what, precisely, we mean by jurisprudence. Literally, jurisprudence means (from the Latin), “wisdom about the law”—but I take it that I’ve been asked to address the philosophical study of law. Understood as such, the topic of jurisprudence can be carved up in different ways. One helpful way is to subdivide it into general and particular jurisprudence—with general jurisprudence referring to a topic that concerns philosophical puzzles presented by all legal systems (e.g., What counts as valid law? What is the normative force of valid law?), and particular jurisprudence referring to philosophical puzzles that pop up in a given jurisdiction (e.g., What state actions violate the Fourteenth Amendment due process clause? What is the nature of judicial interpretation in a common law jurisdiction?), or within particular doctrinal categories (e.g., Is tort concerned with civil wrongs or the allocation of risk? What is the difference between torts and crimes?).

I take it that the topic I’ve been asked to address today concerns general jurisprudence. One way to think about the topic of general jurisprudence is to divide it up into different camps—or, as Ronald Dworkin memorably put it, competing “doctrinal armies.”⁵ Each army comes with its historic commander—

3. By “doctrinal scholarship” I mean scholarship that seeks to answer relatively narrow questions regarding which legal rules apply in a particular area of law in one or more jurisdictions (e.g., “Is necessity a defense to homicide in English law?” “Is sex without consent sufficient to establish the *actus reus* of rape in most U.S. states?”)—as distinct from jurisprudence which (as discussed below) tends to focus on more general questions (“What is law?” “What is the normative force of law?” “How does precedent constrain judicial decision-making?”). Of course, Ronald Dworkin’s influence in shaping questions of general jurisprudence has tended to blur the lines between doctrinal scholarship and jurisprudence. See, especially, RONALD DWORKIN, *LAW’S EMPIRE* (1986).
4. All of this is simply to say that I don’t view myself as having any stake in ongoing debates in the field of jurisprudence—although, as will become clear, I do have some philosophical commitments regarding jurisprudential issues that will inform my reflections.
5. Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 OXFORD J. LEGAL STUD. 1, 37 (2004), urging “young scholars who have not yet joined a doctrinal army” to endorse his interpretivist methodological commitments. Note that Dworkin’s use of the

the intellectual leader of that jurisprudential army, who contributed most to framing the questions and providing answers that concern general jurisprudence. And so, on this view, we have H.L.A. Hart as the commander of the legal positivist army⁶—with later variations of legal positivism giving rise to Joseph Raz’s exclusive legal positivist camp⁷—and Wil Waluchow, Jules Coleman and others in the inclusive legal positivist camp.⁸ On the other side we have Commander Ronald Dworkin and his forces in the anti-positivist doctrinal army.⁹ And somewhere closer to legal positivism, albeit uncomfortably so, we have Commander John Finnis and the New Natural Law general jurisprudential forces.¹⁰

Primarily, general jurisprudence has been concerned with getting clear (perhaps obsessively so) about what it means to characterize something as legal and explaining what legal validity entails in terms of its normative force. Yet, in one of the more intriguing recent contributions to general jurisprudence, Scott Hershovitz urges us to embrace what he calls “The End of Jurisprudence”—by which he means both that we should put an end to this obsessive concern with clarity regarding what is legal and what is not, and that we should adopt a new “end” (goal) for jurisprudence—one that focuses more explicitly on “the moral consequences of our legal practices.”¹¹ Later, I’ll push back on Hershovitz and explain why I think the future of jurisprudence should continue to be concerned with getting clear about what is legal, precisely *because* of the moral consequences of our legal practices. First, however, I want to explain the sense in which we (meaning, we legal academics) are all jurisprudes (or, at least, why we *should* be)—and why we shouldn’t be *only* jurisprudes.

We Are All Jurisprudes (or, at Least, We Should Be)

If the way I’ve set up the topic of jurisprudence is plausible, then, to some extent, at least, we are all jurisprudes. We might not be writing articles, chapters or books on topics such as, “What is law?” “What is a legal system?” “What is legal reasoning?” “What is the normative force of law?” etc.—but certainly all law professors must have *some* background sense of what their answers to

phrase “doctrinal army” here is more akin to what I would characterize as “jurisprudential army.” See *supra* note 3, observing that Dworkin’s scholarship tended to blur the lines between doctrine and jurisprudence.

6. H.L.A. HART, *THE CONCEPT OF LAW* (Leslie Green, ed., 3d ed. 2012).
7. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (2d ed. 2009).
8. WIL WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* (1994); Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).
9. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); DWORKIN, *supra* note 3.
10. JOHN FINNIS, *NATURAL LAW, NATURAL RIGHTS* (2d ed. 2011). On Finnis’s discomfort regarding the similarities between his account of the nature of law and the legal positivist’s account, see Michelle Madden Dempsey, *On Finnis’s Way In*, 57 VILL. L. REV. 827 (2012); John Finnis, *Response*, 57 VILL. L. REV. 925 (2012).
11. Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L. J. 1160, 1204 (2015).

these questions would be. This background sense then informs our teaching and scholarship. To the extent that we can be self-aware of our answers to these questions, and consistent in our philosophical commitments as we teach any particular area of law, all the better. We don't need to jump into the deep end of the Hart-Dworkin debates to get our 1L torts class through the basics of *Palsgraf*, or contemplate whether Finnis's account of basic human goods is adequate in order to teach the difference between duress and necessity in criminal law. Of course, we might choose do that in our teaching (at our own risk of negative student evaluations), but we don't have to engage these jurisprudential questions explicitly. What we do need, however—and what I imagine all of us have—is some more or less worked-out understanding of what we think we're teaching when we teach law. And if something is a law, then we have some underlying explanation regarding whether we think that fact should mean anything for the people to whom it is addressed (e.g., Should people obey that thing that is a law?). So, in that sense, we're all jurists—or, at least, we should be.

But even more important, we shouldn't *just* be jurists—at least not in the sense of being exclusively focused on the questions that have traditionally concerned general jurisprudence. Rather, as Robin West has compellingly argued, we (the legal academy) should take up a new kind of jurisprudence—one that has been missing from the American scholarly landscape.¹² This “progressive natural law jurisprudence,” as she calls it, would focus on areas that have been neglected in the traditional general jurisprudence literature: “What does it mean for human beings to flourish, and how can law and legalism contribute? . . . When and where is law needed? What makes a good law good . . . and what makes it inefficacious or worse?”¹³

In substance, I agree with West that we should focus far more than we do on questions regarding what makes for good (or bad) laws, and that our answers to those questions should be informed by a robust, progressive account of basic human goods. My only quibble is whether we should label this project under the heading of “jurisprudence” (as she does), or whether the project is better understood simply as a matter of “law reform.” If we stick with my limited account of general jurisprudence as a branch of philosophy that is concerned with questions such as “What is law?” “What is the normative force of law?” etc., then I would think that West's project falls outside the ambit of jurisprudence. So while I endorse the project in substance, I prefer to think of it as an advisable add-on to jurisprudence, not an alternative or replacement.

Perhaps it doesn't matter whether we call it “jurisprudence” or “law reform.” Indeed, perhaps my desire for a tidy demarcation between the two is symptomatic of the arguably obsessive search for clarity that can make jurists so annoying. As Jeremy Waldron puts it,

12. ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* (2011).

13. *Id.* at 11.

[Jurisprudes] often comport themselves like the inhabitants of a small Pacific island . . . threatened by something like global warming: the waters of sloppy thinking are rising all around them and they must huddle closer and closer together on the vanishingly small piece of high ground that they currently occupy.¹⁴

While I take Waldron's point, I do still think it's important to distinguish jurisprudence from law reform, if only because the projects undertaken by the jurisprude are essential to the work of the law reformer. Jurisprudence (most importantly) provides an account of what law is. Without some understanding of what law is, how can the law reformer undertake to reform it? The law reformer with a confused understanding of law—one that sloppily conflates legal norms with nonlegal social or political norms—would be an ineffective law reformer, indeed. Simply put, what counts as law matters—especially if you're trying to reform it.

The End of Jurisprudence?

Of course, not everyone agrees that what counts as law matters all that much. As I noted earlier, Hershovitz has recently urged jurisprudes to embrace “the end of jurisprudence,” and thus put aside our traditional concern with getting clear about how we characterize what is legal and what is not.¹⁵ On Hershovitz's eliminativist account, he doesn't “see why we should feel pressure” to get very clear about how we “characterize the legal domain.”¹⁶ Indeed, he thinks it's a mistake to think of legal normativity as distinct from moral normativity—and he holds this view *even* in the face of morally bad laws.¹⁷ Tracking closely onto Mark Greenberg's view, neither Hershovitz nor Greenberg is terribly concerned to distinguish the legal from the nonlegal, because, they suppose,

14. Jeremy Waldron, *Legal and Political Philosophy*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE* 375 (Jules Coleman and Scott Shapiro, eds. 2004).

15. Hershovitz, *supra* note 11.

16. *Id.* at 1202. Hershovitz characterizes his view as an “eliminativist” approach to jurisprudence because it eliminates the need to answer the central questions that frame the Hart-Dworkin debate—namely, what is law and what, if any, normative force does law have—by denying the existence of “a distinctively legal domain of normativity, or quasi-normativity—that more traditional pictures presuppose.” *Id.* at 1193.

17. *Id.* at 1193. Hershovitz puts the point in terms of *positing* a distinctively legal domain (“[I]t seemed that we had to posit a distinctively legal domain of normativity, or quasi-normativity, to make sense of the way that we talk about law. But that's a mistake.”). I reformulated the point in my recounting of Hershovitz's because I take him to mean something like, “[I]t seemed that we had to [(think in terms of) or (assume the existence of)] a distinctively legal domain of normativity.” I don't take him to be making any claims regarding whether it seemed that we had to “posit” such a domain—since that claim would raise a quite distinct question of whether it seemed we should have a distinctively legal domain, not whether we should think in terms of or assume the existence of such a domain.

“the question of what obligations we classify as legal has no bearing ‘on what we take our genuine obligations to be.’”¹⁸

Like many other jurists, I agree that the question of what obligations we classify as legal *should have* no bearing on what we take our genuine obligations to be. Which is to say, I agree that the law is “normatively inert”—the fact that some directive is a *legal* directive doesn’t mean that we should obey it.¹⁹ Indeed, it could just as easily mean that we should criticize it and reform it. The fact that something counts as law doesn’t tell us anything about what sort of practical attitude to adopt toward it in terms of obedience, critique, or reform.

I’m less inclined than Herskovits to want to eliminate questions of what counts as legal and what does not, and the related question of which laws (if any) bear normative force—since, in practice, the distinction between what is legal and what is not legal *does* have great bearing on the perceptions and actions of many people who take themselves to be bound by the law. The real world is not filled with jurists who recognize that the law has no genuinely moral normative force. Rather, it’s filled with people who very often perceive themselves to have a general moral obligation to obey the law. For them, the question of what obligations count as legal obligations has *tremendous* bearing on what they take their genuine moral obligations to be.

For this reason, if none other, we should continue the project of general jurisprudence—and defend it from its critics, both external and internal. We should still be concerned with getting very clear about what is legal and what is not—and not kid ourselves into thinking that the distinction doesn’t matter. It matters not because there is any genuinely moral normative force to law; it matters because folks out there often mistakenly think there is such moral normative force.

The Importance of Jurisprudence in the Age of Trump

The importance of what counts as law was driven home to me recently listening to John Hockenberry’s National Public Radio broadcast *The Takeaway*.²⁰ Mike Breen, CEO of Truman National Security Project and a former Army officer who served in Iraq and Afghanistan, offered the following observations regarding Donald Trump’s potential presidency: “If you take the man at his word and you listen to his statements on the [campaign] trail, he set himself up, if he’s elected, to trigger the largest civil military crisis probably since the American Civil War.”²¹

18. *Id.* at 1201, citing Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1323-24 n.73 (2014).

19. John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 202-04, 210, 213 (2001).

20. *Veteran: Trump Will Throw the Military into ‘Crisis,’* THE TAKEAWAY (NPR radio broadcast Apr. 28, 2016).

21. *Id.*

The discussion recounted orders that Trump has suggested he would direct U.S. soldiers to carry out, which Breen characterized as “illegal orders”—for example, targeting the children and families of suspected terrorists, intentionally murdering civilians, and torturing just for the sake of torturing. (“[Trump] says even if [torture] doesn’t work, let’s do it anyway.”²²) Moreover, as Breen recounts, Trump has said “the Geneva Convention makes American soldiers afraid to fight”²³: “He’s talking about, as a presidential candidate, issuing clearly illegal orders that I think our senior military leaders would be very unlikely to follow.”²⁴

Note the phrasing—“clearly illegal orders that *I think* our senior military leaders would be very *unlikely* to follow.” Hockenberry pushed back—pointing out the obvious fact that a morally evil legal order is, nonetheless, a legal order. Now, if Breen had been an exclusive legal positivist (as is my predilection), he could have taken Hockenberry’s point on board and simply replied (hypothetically) as follows:

Sure, a Commander in Chief’s order is a legal order—but even so, that doesn’t mean soldiers should kill innocent civilians! John, John, John . . . silly John. . . . Legal obligation is not a species of moral obligation. Rather, legal obligation is a distinct normative domain. Perhaps you’ve been reading too much Hershovitz?

Now, perhaps role morality gives members of the military good reasons to be cautious about rejecting the idea that legal obligation is a species of moral obligation. Perhaps some roles in society enjoin people to be inclined to treat law *as if* it bears genuine moral normativity. Perhaps. But then, that all depends on whether we can reasonably assume that the law is going to be good—or at least neutral—or, at the very least, only a little evil. If the law is really, deeply, horrifically evil, then we might just want everyone to recognize the truth that legal obligation is a distinct domain from moral obligation.

In any event, that is the kind of discussion Breen and Hockenberry might have had—but, instead, the conversation quickly devolved and they started talking past one another. Breen began using a concept of law that implicitly included moral criteria as a condition of legal validity, and Hockenberry doubled down on a concept of law that oddly combined both legal positivism *and* the assumption that valid laws ought to be obeyed.²⁵

22. *Id.*

23. *Id.*

24. *Id.*

25. I’m oversimplifying somewhat. Breen did refer to legal doctrine that might ground arguments against the legality of Trump’s potential orders. That said, each consideration Breen raised is itself subject to the Rule of Change. HART, *supra* note 6, 76-77. As such, there is nothing to prevent Trump’s orders from being recognized as valid legal orders.

Conclusion

In conclusion, we are all and should be jurists—perhaps not explicitly so in our scholarship—but certainly *implicitly so*, in both our teaching and our citizenship. Moreover, at least some of us should be law reformers. And, crucially, none of us should seek to eliminate the questions that make jurisprudence and law reform intelligible.

The future of jurisprudence should continue both to clarify the conceptual criteria of what counts as law and to emphasize that legal obligations are not a species of moral obligation. For, if we do face an evil legal system that posits evil laws and evil legal orders, we should be steadfast in recognizing that legal validity does *not* entail the moral obligation to obey—and we should remain clear-eyed in identifying which laws need reform in order to eliminate the evil.

I will end with a quote from H.L.A. Hart—first published in the aftermath of a horrifically evil, yet tragically legal, atrocity:

What surely is most needed in order to make [people] clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience. . . . A concept of law which allows the invalidity of law to be distinguished from its immorality, enables us to see the complexity and variety of these [two] separate issues. . . . So long as human beings can gain sufficient cooperation from some to enable them to dominate others, they will use the forms of law as one of their instruments.²⁶

And so, let us all be, and remain, jurists—and never forget that what the law demands we do, morality may demand we resist.

26. Hart, *supra* note 6, 210-211.