

Bricolage Jurisprudence

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Roger Cotterrell, *Why Jurisprudence Is Not Legal Philosophy*, 5 **Jurisprudence** 41 (2014), available at [SSRN](#).

Most people who use the terms at all treat “jurisprudence” and “legal philosophy” as interchangeable terms. In “Why Jurisprudence is Not Legal Philosophy,” [Roger Cotterrell](#) argues for a distinct meaning for the two terms, and for a greater emphasis on jurisprudence, in comparison to what he perceives as undue current attention to and an unduly high valuation of legal philosophy.

For Cotterrell, legal philosophy is the application to law, usually at a high level of abstraction, of ideas from philosophy, sociology, economics, or other disciplines in the humanities or social sciences. His particular concern is that much of what goes on under “legal philosophy” today—in particular, under what he calls “contemporary legal positivism”—inclines towards questions about what is true “essentially” or “necessarily” of all legal systems (or legal systems “in all possible worlds,” he might have added). These kinds of inquiries might be the sort of thing that is of interest to professional philosophers, Cotterrell maintains, but they are of little interest—and little use—to practicing lawyers.

In contrast to “legal philosophy,” Cotterrell describes jurisprudence as “an important body of thought about law that aims at exploring, aiding and developing the *prudentia* of jurists.” (P. 42.) What is “*prudentia*”? Cotterrell points to a cluster of meanings around “acquaintance, knowledge, sagacity, prudence, discretion, and foresight.” (P. 42) Jurisprudence, thus understood, is meant to be of practical use to the practice of law, rather than a timeless search for law’s “essence” or “nature.” And where is one to gain the relevant insights? Cotterrell reports favorably on the idea of “bricolage jurisprudence” (PP. 43, 53), “collect[ing] magpie-like, insights from anywhere they can be found.” (P. 53.) While Cotterrell does not note this, such broad borrowing from a variety of approaches and disciplines has been true now for some decades in how law is taught and legal textbooks written, at least in the United States.

Cotterrell argues for a kind of theorizing that is “bottom up” rather than “top down,” focused on the particular practices and institutions of a single legal system, rather than trying to determine what is true universally. For example, Cotterrell would prefer that we not focus on the general question of whether there is a moral obligation to obey the law, but rather on more specific questions regarding what we would need to do in *this* society and to *this* legal system to attract a sense of obligation. There are questions specific to our legal system, our legal profession, our practices, *today*, *here* that are best confronted at this local level, to consider what we can do to make matters better. The focus on the particular echoes movements in other disciplines: e.g. experimental and behavioral approaches in economics, moral particularism in moral philosophy, and contextualism in philosophy of language.

Cotterrell singles out Karl Llewellyn and Lon Fuller as theorists whose work was grounded in the legal practices of their community, focused in particular “on law as a practice and, indeed, a craft.” (P. 54.) Cotterrell would likely note the irony that these are theorists whose reputation among “legal philosophers” is shaky—as many traditional legal philosophers would be too quick to mark off points for lack of rigor in their theories, while giving no extra credit for those theorists’ practical prescriptions for practitioners and law-makers.

While Cotterrell is (in my view—though admittedly I am biased here) too dismissive and contemptuous of much of the theorizing that is goes on under (what he labels) “legal philosophy,” he gives a strong argument for giving more attention to the more local and practical concerns of what he calls “jurisprudence.” And as indicated above, there may yet be some common ground between Cotterrell’s localized “jurisprudence” and comparably contextualized approaches in some other disciplines (from which “legal philosophy” often borrows).

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