Preface

Readers familiar with our work from a cyberlaw background may be surprised or concerned to find that we have suddenly turned our hands to jurisprudence. Similarly, scholars of jurisprudence might be surprised to find a pair of cyberlawyers trespassing on their territory. Both groups deserve an explanation, while an understanding of how this book came about might assist readers who fall into neither category.

Between us we muster more than 50 years of study into the law relating to cyberspace and its predecessor technologies, and throughout that time have tried to answer the question, ‘What is the law applicable to a given situation?’ We find however that we have almost never been able to answer that question to our satisfaction. The answer has never successfully identified ‘the’ law but, at best, ‘some of these laws’. At first we thought this was a defect in our own understandings, but over time we have come to the view that it is in fact a defect in law itself.

Once we were forced to accept that the answer was usually ‘some of these laws’, that generated the key question: ‘Which of these laws ought to be obeyed?’ Given the overwhelming number of laws simultaneously claiming obedience, this normative question required us to understand why any law should be obeyed, and what the source of its authority might be. This inevitably led us to jurisprudence.

Part I of this book examines the source and nature of authority in cyberspace, where we find that the explanations commonly given for the physical world no longer hold good and that a new explanation is required. A consequence of our new explanation is that lawmakers can no longer merely issue commands and expect them to be obeyed. That finding gave birth to Part II, which attempts to explain how law actually operates in cyberspace. Part III of the book explores how lawmakers should react if they wish to achieve lawmaking that has some authority in cyberspace and still maintains the rule of law, for it is our belief that this is also a jurisprudential inquiry rather than a matter of accurate drafting and beefing up of enforcement capabilities.

Our approach to all these issues might best be described as one of applied jurisprudence. For this reason there is an unusual amount of substantive law discussion in the book. In part this is to illustrate to
jurisprudence scholars how the real and pressing legal difficulties in cyberspace illuminate the limitations of current jurisprudential theories and indicate the shape that jurisprudence in cyberspace might take. It also serves to explain to cyberlawyers what the jurisprudential issues are and why they are important, by grounding those issues in the legal problems that worry cyberlawyers. Mainly, though, it is our way of testing our own analysis and theorising. If jurisprudence claims to explain law at the most fundamental level, any jurisprudential work’s claims need to be tested against substantive law problems.

Finally we wish to expand the horizons of cyberlawyers. We observe that discussion of cyberlaw too often focuses on the cyber and not the law. Commentators tend to focus on what makes cyberspace different (in legal terms), and thus to ignore what it shares with the rest of the legal world. This book asks cyberlawyers to reset their thinking about cyberspace, and to recognise that it is indeed a ‘legal’ space rather than merely a technical (or code) space. Because all laws have jurisprudential roots, or to put it another way are applied jurisprudence (even if most lawyers forget this fact), we have attempted to map the jurisprudential roots of cyberlaw to encourage colleagues in the cyberlaw field to engage in a more focused ‘legal’ analysis that we think is required.

Thus briefly summarised, our project seems hopelessly ambitious. Nonetheless, we are content (for the moment at least) that we have said what we meant, and that our work should cast some new light on both jurisprudence and cyberlaw. We hope that the inevitable deficiencies, which are entirely our responsibility, do not detract from the useful parts.

Because this kind of crossing of intra-disciplinary boundaries is sometimes viewed with bemused suspicion we have largely kept our obsession to ourselves. Some of the ideas here have been presented at conferences, and not immediately laughed at, and of course the conversations we have held over the years with colleagues, both academic and practising, and with students, have enlarged our understanding of the law and helped identify and clarify the problems we examine here. So there are no specific acknowledgements, but you all helped.

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