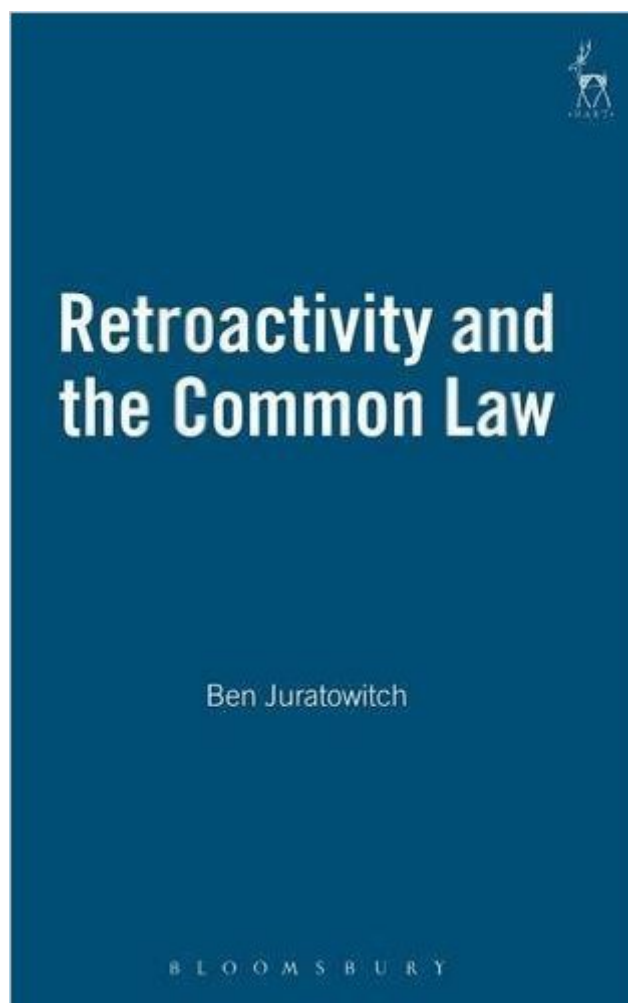


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Retroactivity And The Common Law



Synopsis

The central claim of this book is that when a court considers whether to develop or change a common law rule, the retroactive effect of doing so should explicitly be considered and, informed by the common law's approach to statutory construction, presumptively be resisted. As a platform for this claim, a definition of 'retroactivity' is established and a review of the history of retroactivity in the common law is provided. The argument is then that certainty - particularly in the form of an ability to rely on the law - and a conception of negative liberty constitute rationales for a general presumption against retroactivity, at a level of abstraction applicable both to the construction of statutes and to developing or changing common law rules. The presumption against retroactivity in the construction of statutes is analyzed. One conclusion reached is that the presumption is a principle of the common law independent of legislative intent. Across private, public, and criminal law, the retroactive effect of judicial decisions that develop or change common law rules is then considered in detail. 'Prospective overruling' is considered as a potential means to control the retroactive effect of some judicial decisions, but it is argued that prospective overruling is constitutionally impermissible. The book is primarily concerned with English and Australian law, although cases from other common law jurisdictions, mostly Canada and New Zealand, are also discussed. The conclusion is that in statutory construction and the adjudication of common law rules, there should be a consistently strong presumption against retroactivity, motivated by the common law's concern for certainty and liberty, and defeasible only to strong reasons.

Book Information

Hardcover: 239 pages

Publisher: Hart Publishing (February 1, 2008)

Language: English

ISBN-10: 1841137618

ISBN-13: 978-1841137612

Product Dimensions: 6.4 x 0.9 x 9.2 inches

Shipping Weight: 1.3 pounds (View shipping rates and policies)

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Best Sellers Rank: #4,706,221 in Books (See Top 100 in Books) #43 in Books > Law > Legal

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