Law & Philosophy

An Introduction with Readings

Thomas W. Simon

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Illinois State University

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Preface

Although students in philosophy of law will make up the primary audience for this text, the work should appeal to a broad audience, including those studying jurisprudence in law school and political theory in political science. Students and teachers will find a diverse selection of readings. The work serves as an introduction to law as well as an introduction to philosophy. The readings include many of the classics from the history of political philosophy; Plato, Aristotle, Aquinas, Hobbes, Rousseau, and Locke who regain their prominent places in philosophy of law. By providing basic introductory and historical information, students receive a solid grounding in the law as well. They will attain a greater appreciation for issues through a familiarity with basic legal concepts and with legal history. The introductory materials in chapter 1 provide an overview of common and civil law as well as regional and international systems. Students also receive a solid grounding in legal reasoning in chapter 3, and constitutional interpretation in chapter 4. They benefit from knowing how to apply the analyses to concrete situations. The anthology contains a broad selection of cases, extensively edited to exclude technical legal issues and other extraneous materials. With a few exceptions, case citations and footnotes have been deleted from the selections to facilitate reading. Commentaries and analyses follow many of the cases. Along with case excerpts, the introductory material and Discussion Issues sections contain descriptions of many more cases. For ease of exposition, a simplified and somewhat idiosyncratic reference form has been adopted within the body of the text. Cases and scholarly works are cited by name, date, and page numbers. Case citations and an extensive bibliography appear at the end of the book.

The text makes complex legal and philosophical concepts understandable and accessible. Central concepts, the names of key writers, and technical terms appear throughout the text in bold face type. In place of a glossary,

technical terms are explained, wherever possible, within the text. Although the text errs on the side of inclusion, it still leaves out important material and bypasses noteworthy authors. Space limitations have precluded giving more attention to important areas of the law, such as environmental law, and to the new intellectual movements (postmodernism, pragmatism) that have recently experienced a growth spurt in law schools. To do justice to these issues requires another volume. Representative voices from contemporary legal theories (communitarianism, critical legal studies, feminist jurisprudence, critical race theory, and law and economics) appear throughout the text. The challenge of balancing breadth with depth has been difficult enough for the wide scope of issues already included. Readers will find the coverage extensive. Constitutional law receives the most attention with international and criminal law having a considerable share as well. Diverse global perspectives inform each issue and legal subject. Discussion Issues, for example, include case materials from Canada, France, Iran, Japan, and South Africa.

Philosophy of law is a story with many common themes. The text roughly traces a time line from law's beginnings in ancient times to current trends in international law. Similarly, it tracks the history of legal theory from its natural law roots to its contemporary, contested realist and moral theory branches. No one theme ties all of this together, but a number of threads give the work continuity. The text, for example, follows issues of responsibility (legal and moral) for violence as they recur throughout history. The themes give a unity and a noteworthy seriousness to the anthology. Issues surrounding war crimes tribunals (the Nuremberg trials) occur near the beginning of the text (chapter 2), and the anthology ends (chapter 8) with an assessment of the newly formed International Criminal Court. Some theorists make their voices heard in a number of chapters. For example, the modern works of Hobbes, Locke, and Kant and contemporary ones from H. L. A. Hart and Ronald Dworkin provide continuity. The contrasts between Hart's and Dworkin's philosophies become more marked as their theories are applied to new issues throughout the text. The opinions of some U.S. Supreme Court justices (Blackmun, Brennan, Marshall, Rehnquist, and Scalia) receive more than their fair share of coverage in the pages that follow. The redundancy has a purpose. Issues will begin to converge. Students will see, for example, how Justice Brennan applies his philosophical approach to a wide variety of cases, including those dealing with child abuse and the death penalty. Brennan's approach becomes more pronounced when compared to the theoretical perspective adopted by Justice Rehnquist on the same issues. These legal disputes have profound implications for the nature of law.

A text in philosophy of law should challenge students. A number of mechanisms help compensate for excluded areas. Undergraduate students want to find out about law schools, and in this anthology, they will have a window into academic disputes raging in law schools. They also read about debates concerning legal education, including the controversy over affirmative action as it affects law schools. Questions do not appear only in the designated Discussion Issues section, but rather appear throughout the text. The questions do not simply interrogate the readings. They also help extend the breadth and depth of coverage in the main body of each chapter.

The anthology has the advantage of giving instructors considerable flexibility. The units and selections, preceded by appropriate introductory material, are self-contained. This gives instructors more freedom to design an organizational structure that best suits their students' needs. For example, while a single section focuses on free speech, cases and materials relating to this issue are included throughout the anthology. Instructors will find it difficult to include all the materials in a single semester course. They may, for example, choose to focus solely on constitutional issues, covered in chapters 4–6 (constitutional law per se, Bill of Rights, privacy, and equality). The chapters break down into distinct areas of law (international, constitutional, and criminal) and into different philosophical concepts (values, reasoning, liberalism, freedom, rights, equality, responsibility, and punishment).

Introduction

Philosophy and law make odd companions. Philosophers use abstract principles that seem to have little or nothing to do with the real world. Lawyers work on concrete issues that appear far removed from the abstract world of philosophers. Philosophy students learn about theories that try to provide some degree of unity and coherence to a subject matter. Law students study many different types of laws that seem to have little or nothing to do with one another. Philosophy of law offers to help make sense of law. Armed with abstract principles, it unifies "the scraps and fragments" of law.

> I will venture to affirm, that no other body of Law, obtaining in a civilized community, has so little of consistency and symmetry as our own [English law]. Hence its enormous bulk; and (what is infinitely worst than its bulk) the utter impossibility of conceiving it with distinctness and precision. If you would know the English Law, you must know all the details that make up the mess. For it has none of those large coherent principles which are a sure index to details. And, since details are infinite, it is manifest that no man (let his industry be what it may) can encompass the whole system.
>
> Consequently, the knowledge of an English Lawyer, is nothing but a beggarly [inadequate] account of scraps and fragments. His memory may be stored with numerous particulars, but of the Law as a whole, and of the mutual relations of its parts, he has not a conception. . . .
>
> To the student who begins the study of the English law, without some previous knowledge of the rationale of law in general, it naturally appears an assemblage of arbitrary and unconnected rules. But if he approached it with a well-grounded knowledge of the general principles of jurisprudence, and with the map of a body of law distinctly impressed upon his mind, he might obtain a clear conception of it (as a system or organic whole) with comparative ease and rapidity.
>
> With comparative ease and rapidity, he might perceive the various relations of its various parts; the dependence of its minuter rules on general principles;

> and the subordination of such of these principles as are less general or extensive, to such of them as are more general, and run through the whole of its structure (Austin, *Lectures on Jurisprudence* [1869], Vol. II, pp. 1117–18).

Further, philosophy of law brings to the surface moral and other philosophical issues that often remain hidden within law's technicalities. A study of philosophy and law has mutual benefits. Philosophy attains a degree of relevance through its study of law, and law achieves greater clarity through philosophy.

> Philosophy needs an interest in the law to recover for itself the motivation that belongs only to matters of felt importance, and the respect that is accorded only to those who are making a contribution to the life of their times. The law needs philosophy to restore to itself that direction, clarification, and background, which it appears to have lost (E. T. Mitchell [1937], p. 113).

Since law has a close—although not always happy—relationship with politics, **political philosophy** plays a crucial role in law. The chapters that follow focus on different areas of law and on different philosophers and philosophies. A classical political philosopher anchors each area of the law covered: **Thomas Hobbes** (law of "primitive" cultures), **Immanuel Kant** (international law), **John Locke** (constitutional law), and **Friedrich Nietzsche** (criminal law). The philosophers offer distinct perspectives on law and on human nature. Some political philosophers talk about the **state of nature,** in which humans live without all the rules, laws, and institutions that define civil society. The seventeenth-century English philosopher Thomas Hobbes found the natural state an unpleasant one, in which life became "solitary, poor, nasty, brutish, and short" (*Leviathan* 1651). The bleak image of a Hobbesian state of nature, "where every man is Enemy to every man," made a lasting impact on political philosophy and on law. Hobbes's analysis brings to the surface fundamental and sometimes disturbing questions about humans, society, and law. Are humans, by nature, nasty, greedy, and aggressive? Can governments tame those natural instincts only through authoritarian means? Does the law play a key role in the authoritarian state?

A reading from Hobbes begins chapter I. Hobbes plays a central role in the analysis, as evidenced by the many references to him throughout the text. Like the Hobbesian image, which still sets the framework for debates over international law, fundamental questions reappear throughout the study. Those who take a pragmatic, realistic view, for example, believe self-interested states in the world of international politics operate in the same way that Hobbes's individuals do in the state of nature. On a realist's view, international law has little or no moral content, since it arises out of contracts among independent nation-states. In contrast to the realist, the Enlightenment philosopher, Immanuel Kant, has inspired a moral approach to international law. In *Perpetual Peace* (1795), he envisioned "moral states" evolving to a point at which they would agree to denounce war. Kant, far ahead of his time in his thinking about international law, found hope in the idea of nations moving from a state where the threat of war is constant to a state of perpetual peace. A reading from Kant begins chapter 2.

Moral philosphy comes to the forefront in chapter 3 in the context of **Ronald Dworkin's** highly influential work on judicial decision making.

The focus then turns more explicitly to constitutional law in chapter 4. Many scholars credit John Locke, a seventeenth-century English philosopher, with laying the intellectual foundation for the U.S. Constitution. Locke painted a far more benign picture of the state of nature than Hobbes did. His philosophy set the foundation for a limited government. His **liberalism** and its associated constitutional solutions to social problems, however, have come under attack from proponents of **communitarianism** and **critical legal studies.** The writings of the nineteenth-century philosopher **John Stuart Mill** plays a critical role in chapter 5 on freedom (liberty). Chapter 6 pits Dworkin and other proponents of rights against their critics, including **Richard Rorty** and **Michael Sandel. Aristotle** sets the terms of the debate on equality in chapter 7. Finally, chapter 8 examines responsibility and punishment within criminal law. The chapter highlights **Nietzsche,** who raised provocative questions about human irrationality and state brutality. With questions on human nature, we come, full circle, back to Hobbes. The final section, on international criminal law, also brings the discussion back to Kant. Although law has a natural affinity with political philosophy, other branches of philosophy receive ample attention. Chapter 1 provides a brief introduction to philosophy. **Ethics** plays a key role in almost every philosophical analysis of law. Different ethical theories—for example, **deontology** (basing ethics on duty) and **utilitarianism** (basing ethics on overall goodness)—provide radically different assessments of law. **Epistemology** (study of knowledge) and **logic** (study of correct reasoning) also receive their due, particularly in chapter 3.

As noted, this textbook serves as an introduction to law as well as an introduction to philosophy. Chapter 1 surveys different legal systems and branches of law, highlighting international, constitutional, and criminal law. In chapter 2 on **international law,** war crimes and slavery cases receive considerable attention since they raise issues of cultural relativists' challenges to a universal ethics. Chapter 3 includes examples from **private law,** particularly **contracts** and **torts.** Chapter 4 traces the development of the philosophical foundations of **constitutional law.** Separate chapters cover the different constitutional issues of freedom, rights, and equality. Chapter 5 deals with **freedom,** especially the freedoms of speech and religion guaranteed by the Bill of Rights of the U.S. Constitution. Chapter 6 highlights fundamental **rights,** primarily privacy rights revolving around abortion and the right to die. Chapter 7 turns the focus to **equality** particularly, the equal protection issues of discrimination and affirmative action. Finally, chapter 8, on **criminal law,** examines responsibility and punishment, especially as they apply to the insanity defense and to the death penalty.

The book thoroughly covers classical and contemporary versions of the following legal theories: **natural law, legal positivism, formalism, legal realism,** and **constructivism.** The text traces these through the history of jurisprudence. It begins with natural law in ancient Greece and ends with natural law's reformulation in contemporary jurisprudence. The reader will have ample exposure to leading figures in the history of jurisprudence: natural law theorist **St. Thomas Aquinas,** legal positivists **John Austin** and **H. L. A. Hart,** and constructivist **Ronald Dworkin.** Lesser known figures—formalist Christopher Columbus Langdell, pragmatist Oliver Wendell Holmes,

realist Felix Cohen, and many more—will also become familiar. Despite the breadth of coverage, the demands of depth require excluding a thorough treatment of the most recent legal theories. Space does not permit doing full justice to recent approaches to jurisprudence, including **critical legal studies, feminist jurisprudence, critical race theory,** and **law and economics.** However, brief introductions to the new perspectives appear in their invaluable role as critics of traditional jurisprudence.

Lively cases and heated debates, reprinted throughout the text, challenge preconceptions on controversial issues. The text takes a novel approach to **applied ethics,** with moral issues becoming more concrete in their legal setting. Also, since many moral issues in the United States take on a legal framework, "applied ethics in law" represents a realistic approach to these issues. A wide variety of accessible philosophical readings should sharpen critical faculties to assess the issues. Introductions that describe the authors and their positions provide a context for each reading and include questions to guide the reader. The Discussion Issues in each chapter take the reader beyond the readings by posing informative and provocative questions for discussion and research. Each chapter includes one or more Controversies sections, which throw the philosophical analyses and legal formulations into the heat of the political fires. The success of the journey has no exact measure. Philosophers may not make better lawyers, but they probably make better law students because law schools are dominated by appellate arguments which appear in abundance in this text. In any event, readers should come away better informed about philosophy and about law. The questions raised, however, may prove more valuable than the answers given. Minimally, the journey should provide a sense of how philosophy and law enrich one another.

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