


the
Philosophy
of
LAW

An
Encyclopedia



The Philosophy of Law

An Encyclopedia

Editor

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Introduction

This book is a reference for the professions of law and philosophy, for individuals interested in legal theory and the issues with which it deals, and for students who will contend with formulating a philosophical conception of law and the values that lie at its foundation. The law is a means for controlling behavior and constructing the framework within which the quality of life is defined. There is, therefore, an increasing need to understand the principles upon which it is based. The best first step for gaining such an understanding is appeal to a comprehensive reference work—an encyclopedia—that can present the issues that constitute the philosophy of law fairly and point the interested reader to the means for further investigation.

Interest in philosophy of law thrives today around the world. New developments in law in both age-old and more recently established nations call for a good deal of philosophical reflection. New institutional and disciplinary contexts encourage that reflection and have further increased its range. New areas of employment for practitioners of philosophy and law have opened up. An encyclopedia of philosophy of law is an essential tool for investigating the field's conventions and current developments. This encyclopedia is organized around the historically significant legal cultures, schools, and persons, as well as around the systematic daily practice of law, in order to inspire and assist thought about legal issues and thereby aid such an investigation.

Philosophy of Law: An Encyclopedia covers virtually all topics under discussion in the recent literature in philosophy of law. Though the primary focus is upon issues relevant to a North America soon to enter the twenty-first century, coverage includes the international application of core issues, often following their historical development back to ancient sources. It is not a truism that both the public and the private remain significant in legal discourse, nor that narrowly defined legal practices are just as amenable to philosophical reflection as the grand topics. The encyclopedia reflects this awareness.

The broad scope of the volume is made possible by expert contributors, over three hundred men and women from over forty countries, nearly half of them working in philosophy and nearly half in the law, as judges, jurists, or jurisprudents. In addition, the contributions of scholars from related fields in the social sciences and humanities provide an even greater breadth of perspective. Although this is an English-language work, which suggests its readership and its serviceability, contributors to this volume were chosen with an eye toward surpassing regional narrowness. They were therefore encouraged to remain cognizant of the wide-ranging application of their topic to the philosophy of law today, since questions peculiar or current to any one legal system or constitutional instrument have no a priori determinative effect upon legal philosophy.

All of the contributors are participants in the debates in which the theorists of philosophy of law engage, and (as might be expected) each has a conceptual loyalty and an inclination to promote it. However, each was directed to be as even-handed in the treatment of his or her area as is pos-

sible, and the resulting work demonstrates the seriousness with which this instruction was taken. The reader can rely upon an academic objectivity rare in modern scholarship. The book presents a comprehensive picture of contemporary philosophy of law, including studies approximating doctrinal exposition of the law on one hand, and studies near to the philosophical ethics of society on the other. As is most desirable for the neophyte philosopher of law, most entries fall within these limits. The reader can rely upon the reportage and judgment of the contributors, who are among the current practitioners in the field of philosophy of law—its working professionals.

The reader is encouraged to browse at leisure. The titles of the majority of studies in the encyclopedia are drawn from the names of the issues under discussion as they would be recognized by practitioners of the law. In the study of law, specific activities are organized by jurisdiction, and the choice of entries in the encyclopedia was made with this in mind. For example, studies on public law issues (international and constitutional, criminal and administrative) stand alongside those concerning the private law (persons and property, contracts and tort).

However, when a burning inquiry is one's motive for opening the encyclopedia, a variety of tools are available to aid the search. The book is arranged alphabetically, but in order first to place a topic in a conceptual context, the Subject List by Topic at the beginning of the book should be consulted. The scope of one's investigation might expand as a result, but consciousness of related issues always leads to a more confident understanding of a topic of interest. For those readers interested in fundamental questions, such as the status and role of knowing and the normative assumptions of the law, the subject list will serve as a guide to investigation that lays the groundwork for understanding the rationales governing legal thinking.

The entries, for all their excellence, can be only starting points for learning. Research references follow each entry in order to carry cross-referencing beyond the confines of one volume. *See also* notes at the end of most entries lead to related topics in the encyclopedia, pointing the reader in a more specific way to study the interconnection of the principles of law and legal theory.

Such features—the alphabetical organization of the encyclopedia, its subject list and reference lists, as well as a comprehensive index—combine to facilitate inquiry: it is possible to satisfy very quickly the curiosity that first inspires the reader to draw the book from the shelf. However, this work was designed also to foster learning, to deal with issues many times over and from many points of view throughout the text. A topic is often considered once from the jurisdictional perspective in a particular locale, and again from the angle of a school of thought at some point in history; or first as the work of a prominent jurisprudent, and then as a concern for which normative and critical interpretation is offered. This is not evidence of redundancy, but of completeness, affording a well-rounded consideration of each issue and of the field as a whole.

Lest all this effort be expended to reinvent the wheel, however, a good deal of space is devoted to discussions of how these issues are dealt with in other places and at other times. Entries on current legal cultures (such as common law and civilian, European and Native American) mingle with treatments of other periods (whether Hellenistic or Sixteenth-Century or Federalist). Cutting across these issues are biographies of influential jurisprudents that include discussions of the schools or methods they launched. Several lengthy entries that provide basic factual information on the practice of legal philosophy in the modern era link these historical investigations to the aforementioned systematic essays.

Prospective users of the encyclopedia are scholars and practitioners in philosophy and in law, including undergraduates in arts and the law, as well as students in the many disciplines concerned with law, from literature to social work. Even a veteran in one of these disciplines, though a master of some areas within the scope of the philosophy of law, will profit from an introduction (or a reintroduction) to an area of study requiring the specialist's expert touch. It is hoped that read-

ers will thereby gain a full appreciation of the complexity of law, and of the conceptual fabric that binds it.

In addition to support of this project by Garland Publishing and by my employer, Concordia University of Montreal, as well as by my family's patience, I gratefully acknowledge the Social Sciences and Humanities Research Council of Canada for funding many of its costs with a three-year research grant.

Christopher Berry Gray

Subject List by Topic

Historical Philosophy of Law

Western History of Philosophy of Law

- Sagas' Philosophy of Law
- Hellenic Philosophy of Law:
 - Concepts
 - Primary Sources
- Hellenistic Philosophy of Law
- Roman Philosophy of Law
- Medieval Philosophy of Law
- Renaissance Philosophy of Law
- Sixteenth-Eighteenth Century
- Nineteenth Century

Twentieth Century: Legal Cultures

- Civilian Philosophy of Law
- Common Law Philosophy of Law
- Socialist Philosophy of Law
- Developing Countries
- Aboriginal Legal Cultures

Twentieth Century: Local Cultures

- Jurisculture
- Western European Philosophy of Law
- Central, Eastern European
- Northern European Philosophy of Law
- Southern European Philosophy of Law
- Latin American Philosophy of Law
- African Philosophy of Law
- Chinese Philosophy of Law
- Japanese, Asian Philosophy of Law
- Indian Philosophy of Law
- Islamic Philosophy of Law
- Jewish Philosophy of Law

Schools and Methodologies of Philosophy of Law

- Ideology
- Legalism
- Natural Law
- Positivism, Legal

- Realism, Legal
- Sociological Jurisprudence
- Liberal Philosophy of Law
- Libertarian Philosophy of Law
- Utilitarianism
- Republican Philosophy of Law
- Communitarian Philosophy of Law
- Contractualist Philosophy of Law
- Objectivist Philosophy of Law
- Fascist Philosophy of Law
- Decisionist Philosophy of Law
- Action-Based Philosophy of Law
- Exegetical School
- Free Law Movement
- Pragmatist Philosophy of Law
- Institutionalist Philosophy of Law
- Institutionalism, French
- Array Theory
- Chaos Theory
- Hermeneutical Philosophy of Law
- Phenomenological Philosophy of Law
- Existential Philosophy of Law
- Semiotic Philosophy of Law
- Discourse Theory
- Discourse Epistemology
- Difference Theory
- Feminist Philosophy of Law
- Critical Legal Studies
- Economics and Law
- Anarchist Philosophy of Law
- Marxist Philosophy of Law
- Nihilist Philosophy of Law
- Postmodern Philosophy of Law
- Deconstructivist Philosophy of Law
- Deriddean Jurisprudents
- Radical Race, Class, and Gender Theory (Positionality)

Personages in Philosophy of Law

Ancient and Medieval

- Plato
- Aristotle
- Augustine
- Ulpian, Domitius
- Cicero, Marcus Tullius
- Isidore
- Anselm
- Maimonides
- Aquinas
- Mair, Thomas John (Major)
- Holdsworth, Richard

Modern British

- Hobbes, Thomas
- Locke, John

Hume, David
Scottish Enlightenment
Smith, Adam
Blackstone, William
Bentham, Jeremy
Burke, Edmund
Austin, John
Spencer, Herbert

Modern European

Vico, Giambattista
Macchiavelli, Niccolò
Montaigne, Michel de
Montesquieu, Baron de
Lipsius, Justus
Grotius, Hugo
Pufendorf, Samuel
Spinoza, Baruch de
Leibniz, Gottfried Wilhelm
Beccaria, Cesare
Domat, Jean
Rousseau, Jean-Jacques
Kant, Immanuel
Fichte, Johann Gottlieb
Hegel, Georg Wilhelm Friedrich

Recent Anglo-American

Hutchinson, Thomas
Paine, Thomas
Founding Jurists, 1760–1800
Federal Jurists, 1800–1860
American Jurists, 1860–1960
Idealists, British
Holmes, Oliver Wendell, Jr.
Peirce, Charles Sanders
Pound, Roscoe
Dewey, John
Llewellyn, Karl Nickerson
Hohfeld, Wesley Newcombe
Lasswell/McDougal Collaboration
Fuller, Lon L.
Hart, Herbert Lionel Adolphus
Raz, Joseph
Posner, Richard Allen
Nozick, Robert
Rawls, John
Dworkin, Ronald
Finnis, John

Recent European

Jhering, Rudolf von
Savigny, Friedrich Carl von
Rosmini, Antonio
Nietzsche, Friedrich
Marx, Karl

Durkheim, Emile
 Weber, Max
 Kelsen, Hans
 Radbruch, Gustav
 Gurvitch, Georges
 Scandinavian Realists
 Bodenheimer, Edgar
 Hayek, Friedrich von
 Gény, François
 Villey, Michel
 Maritain, Jacques
 Bobbio, Norberto
 Cossio, Carlos
 Betti, Emilio
 Gadamer, Hans-Georg
 Habermas, Jürgen
 Husserl, Gerhart
 Reinach, Adolph
 Kaufmann, Felix
 Kaufmann, Arthur
 Pashukanis, Evgeny Bronislavovich
 Petrazycki, Leon
 Frankfurt School
 Wróblewski, Jerzy
 Wittgenstein, Ludwig
 Foucault, Michel
 Perelman, Chaïm
 Luhmann, Niklas
 Derrida, Jacques

Jurisdictional Philosophy of Law

Jurisdictions

Jurisdiction
 Conflict of Laws
 Comparative Law
 Reception
 Ecclesiastical Jurisdiction
 International Jurisdiction
 Institutional Jurisdiction
 Public and Private Jurisdictions

Public Law Jurisdictions

Constitutional Jurisdiction

Constitutionalism
 Constituting Acts
 Community
 Customary Law
 Convention and Custom
 Legality
 Legitimacy
 Authority

Self-Determination

- Personal
- National
- Secession
- Social Contract
- Citizenship and Membership
- Political Obligation

Security

- Violence and Oppression
- Terrorism
- Rebellion
- Revolution
- War
- Deterrence, Strategic
- Superior Orders and Legitimate Authority

Obedience and Disobedience

- Civil Disobedience
- Conscientious Objection

State

- Nation and Nationalism
- State Action
- Asylum and Refugees
- Sovereignty

Powers of Government

- Democratic Process
- Franchise and Referendum
- Lobbying
- Monetary Power
- Legislation and Codification
- Codification
- Amendment

Entrenchment

- Fundamental Rights
- Human Rights
- Minority, Ethnic and Group Rights
- Mobility Rights
- Civil Rights
- Equality
- Liberty
- Tolerance
- Slavery

Criminal Jurisdiction

- Penal Law, Philosophy of
- Criminalization
 - Wrongdoing and Right Acting
 - Paternalism
 - Drugs
 - Rescue in Tort and Criminal Law
- Promulgation
- Ex Post Facto Legislation

Actus Reus

- Act Requirement
- Attempts
- Included Offences
- Parties, Criminal

Causation, Criminal	
Liability, Criminal	
Mens Rea	
Intent	
Negligence	
Strict Liability	
Imputation and Exculpation	
Defenses	
Coercion	
Necessity	
Self-Defense	
Automatism	
Mistake and Ignorance	
Consent	
Insanity	
Novel Defenses	
Prosecution, Private	
Torture	
Confessions	
Jury System	
Plea Bargains	
Punishment	
Deterrent Rationale	
Retributive Rationale	
Mercy and Forgiveness	
Desert	
Vengeance	
Rehabilitative Rationale	
Restitutionary Rationale	
Expressive Rationale	
Incapacitative Rationale	
Mixed Rationales	
Sentencing	
Capital Punishment	
Preventive Detention	
Criminology	
Crimes	
Treason	
Conspiracy	
Theft	
Homicide	
Dueling	
Abortion and Infanticide	
Euthanasia and Suicide	
Exploitation	
Hate Literature	
Pornography	
Sexual Abuse	
Prostitution	
Sodomy	
 Administrative Jurisdiction	
Bankruptcy	
Taxation	
Military Philosophy of Law	

- Professional Ethics
- Policy, Legal
 - Regulation
 - Compliance
 - Risk Assessment
 - Efficiency
- Administrative Decisionmaking
 - Natural Justice
 - Due process
- Standing
- Judicial Independence
- Jury Trials

Private Law Jurisdictions

Private Law

Persons Jurisdiction

- Status
- Family
 - Betrothal
 - Marriage Contract
 - Liaison
 - Divorce and Marriage
- Affinity
 - Surrogacy
 - Wrongful Life and Wrongful Death
 - Parenting and Childrearing
- Disposition of Remains
 - Inheritance and Succession
 - Trusts
- Homelessness and Residency
 - Privacy
 - Intimacy
- Aging
- Intergenerational Justice

Property Jurisdiction

- Goods
- Property
- Ownership
- Estate and Patrimony
- Acquisition and Transfer
- Possession and Recovery
- Intellectual Property
- Fragmentation of Ownership
- Secondary Rights
- Eminent Domain and Takings

Contract Jurisdiction

- Contractual Obligation
 - Legitimate Object
 - Parties, Contractual
 - Freedom, Capacity

- Justice in Contract
- Gift
- Hire
- Sale
- Negotiable Instruments
- Agency (Mandate)
- Ethics, Legal

Tort Jurisdiction

- Torts
- Fault
- Causation
 - Products Liability
- Harms
 - Personal Injury
 - Economic Loss
- Corrective Justice
- Damages
 - Punitive Damages
- Liability, Protections from

Unjust Enrichment and Restitution

Systematic Philosophy of Law

Information in Philosophy of Law:
Study, Research, and Materials

Normativity

- Axiology
 - Norms
 - Metanorms
 - Values
 - Standards
 - Validity
- Logic, Deontic Legal
 - Artificial Intelligence
 - Game Theory
- Aesthetics

Morality and Law

- Goodness and Coherence
- Is/Ought
- Time and Imputation
- Rights and Liberties
 - Powers and Rights
 - Natural Rights
 - Universal Rights
 - Abuse of Right
- Obligation and Duty
 - Omissions
 - Imperfect Obligation
 - Prima Facie Obligation
 - Responsibility
- Virtue

- Dignity
- Civility
- Liberality
- Supererogation
- Fairness
- Justice
 - Distributive Justice
 - Common Good
 - Commons
 - Order
- Persons, Identity of
 - Conscience
 - Character
 - Love
 - Roles
 - Autonomy
 - Action and Agency

Disciplines and Methods

- Jurisprudence
- Ontology, Legal (Metaphysics)
- Social Philosophy
- Political Philosophy
- History (Historicity of Law)
- Sociology
- Anthropology
- Religion and Theology
- Psychiatry
- Economics
- Empirical Evidence
- Ecology and Environmental Science

Interpretation and Argumentation

- Epistemology
 - Coherence
 - Truth
 - Error, Deceit, and Disillusion
 - Skepticism
 - Self-Reference
- Interpretation
 - Analogy
- Argumentation
 - Voice
 - Speech acts
 - Metaphor and Symbol
- Justification
 - Objectivity
 - Facts and Law
 - Indeterminacy
- Dispute Resolution
 - Rational bargaining
 - Arbitration
- Decision Making
 - Rule of Law
 - Fictions and Deemings

- Judicial Syllogism
- Precedent
- Discretion
- Intent, Legislative
- Purpose, Legislative
- Judicial Review
- Evidence
 - Oaths
 - Relevance
 - Testimony and Expert Evidence

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