Law's Empire

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LAW'S EMPIRE

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FOR BETSY

. PREFACE .

We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed. And we *argue* about what it has decreed, even when the books that are supposed to record its commands and directions are silent; we act then as if law had muttered its doom, too low to be heard distinctly. We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.

What sense does this make? How can the law command when the law books are silent or unclear or ambiguous? This book sets out in full-length form an answer I have been developing piecemeal, in fits and starts, for several years: that legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be. The distinctive structure and constraints of legal argument emerge, on this view, only when we identify and distinguish the diverse and often competitive dimensions of political value, the different strands woven together in the complex judgment that one interpretation makes law's story better on the whole, all things considered, than any other can. This book refines and expands and illustrates that conception of law. It

excavates its foundations in a more general politics of integrity, community, and fraternity. It tracks its consequences for abstract legal theory and then for a series of concrete cases arising under the common law, statutes, and the Constitution.

I use several arguments, devices, and examples that I have used before, though in each case in different and, I hope, improved form. That repetition is deliberate: it allows many discussions and examples to be briefer here, since readers who wish to pursue them in greater detail, beyond the level necessary for this book's argument, may consult the references I provide to fuller treatment. (Many of these longer discussions are available in *A Matter of Principle,* Cambridge, Mass., and London, 1985.) This book touches, as any general book on legal theory must, on a number of intricate and much-studied issues in general philosophy. I have not wanted to interrupt the general argument by any excursion into these issues, and so I have, whenever possible, taken them up in long textual notes. I have also used long notes for extended discussions of certain arguments particular legal scholars have made.

I have made no effort to discover how far this book alters or replaces positions I defended in earlier work. It might be helpful to notice in advance, however, how it treats two positions that have been much commented upon. In *Taking Rights Seriously* I offered arguments against legal positivism that emphasized the phenomenology of adjudication: I said that judges characteristically feel an obligation to give what I call "gravitational force" to past decisions, and that this felt obligation contradicts the positivist's doctrine of judicial discretion. The present book, particularly in Chapter 4, emphasizes the interpretive rather than the phenomenological defects of positivism, but these are, at bottom, the same failures. I have also argued for many years against the positivist's claim that there cannot be "right" answers to controversial legal questions, but only "different" answers; I have insisted that in most hard cases there are right answers

to be hunted by reason and imagination. Some critics have thought I meant that in these cases one answer could be *proved* right to the satisfaction of everyone, even though I insisted from the start that this is not what I meant, that the question whether we can have reason to think an answer right is different from the question whether it can be demonstrated to be right. In this book I argue that the critics fail to understand what the controversy about right answers is really about—what it must be about if the skeptical thesis, that there are no right answers, is to count as any argument against the theory of law I defend. I claim the controversy is really about morality, not metaphysics, and the no-right-answer thesis, understood as a moral claim, is deeply unpersuasive in morality as well as in law.

I have not tried generally to compare my views with those of other legal and political philosophers, either classical or contemporary, or to point out how far I have been influenced by or have drawn from their work. Nor is this book a survey of recent ideas in jurisprudence. I do discuss at length several fashionable views in legal theory, including "soft" legal positivism, the economic analysis of law, the critical legal studies movement, and the "passive" and "framers' intention" theories of American constitutional law. I discuss these, however, because their claims fall across the argument I am making, and I entirely neglect many legal philosophers whose work is of equal or greater importance.

Frank Kermode, Sheldon Leader, Roy McLees, and John Oakley each read a draft of a substantial part of the book and offered extensive comments. Their help was invaluable: each saved me from serious mistakes, contributed important examples, saw issues that had eluded me, and made me rethink certain arguments. Jeremy Waldron read and improved Chapter 6, and Tom Grey did that for Chapter 2. Most of the notes, though not the long textual ones, were prepared by William Ewald, William Riesman, and, especially, Roy McLees; any value the book has as a source

of references is entirely to their credit. I acknowledge the generous support of the Filomen D'Agostino and Max E. Greenberg Research Fund of New York University School of Law. I am grateful to David Erikson of Xyquest, Inc., who volunteered to make special adaptations to that firm's remarkable word-processing program, XyWrite III, so that I could use it for this book. Peg Anderson of Harvard University Press was exceptionally helpful and long-suffering in tolerating changes beyond the last moment.

I owe more diffuse debts. My colleagues in the jurisprudential community of Great Britain, particularly John Finnis, H. L. A. Hart, Neil MacCormick, Joseph Raz, and William Twining, have been patient tutors to a dense pupil, and my friends at New York University Law School, especially Lewis Kornhauser, William Nelson, David Richards, and Laurence Sager, have been a steady source of imaginative insight and advice. I am grateful, above all, to the powerful critics I have been lucky enough to attract in the past; this book might have been dedicated to them. Replying to criticism has been, for me, the most productive of all work. I hope I shall be lucky again.

LAW'S EMPIRE

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ONE

WHAT IS LAW?

WHY IT MATTERS

It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court. Learned Hand, who was one of America's best and most famous judges, said he feared a lawsuit more than death or taxes. Criminal cases are the most frightening of all, and they are also the most fascinating to the public. But civil suits, in which one person asks compensation or protection from another for some past or threatened harm, are sometimes more consequential than all but the most momentous criminal trials. The difference between dignity and ruin may turn on a single argument that might not have struck another judge so forcefully, or even the same judge on another day. People often stand to gain or lose more by one judge's nod than they could by any general act of Congress or Parliament.

Lawsuits matter in another way that cannot be measured in money or even liberty. There is inevitably a moral dimension to an action at law, and so a standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated theirs to him. If this judgment is unfair, then the community has inflicted a moral injury on one of its members because it has stamped him in some degree or dimension an outlaw. The injury is gravest when an innocent person is convicted of a crime, but it is substantial enough

when a plaintiff with a sound claim is turned away from court or a defendant leaves with an undeserved stigma.

These are the direct effects of a lawsuit on the parties and their dependents. In Britain and America, among other places, judicial decisions affect a great many other people as well, because the law often becomes what judges say it is. The decisions of the United States Supreme Court, for example, are famously important in this way. That Court has the power to overrule even the most deliberate and popular decisions of other departments of government if it believes they are contrary to the Constitution, and it therefore has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make public the secrets of his office. When the Court decided in 1954 that no state had the right to segregate public schools by race, it took the nation into a social revolution more profound than any other political institution has, or could have, begun.[1]

The Supreme Court is the most dramatic witness for judicial power, but the decisions of other courts are often of great general importance as well. Here are two examples, chosen almost at random, from English legal history. In the nineteenth century English judges declared that a factory worker could not sue his employer for compensation if he was injured through the carelessness of another employee.[2] They said that a worker "assumes the risk" that his "fellow servants" might be careless, and anyway that the worker knows more than the employer about which other workers are careless and perhaps has more influence over them. This rule (which seemed less silly when Darwinian images of capitalism were more popular) much influenced the law of compensation for industrial accidents until it was finally abandoned.[3] In 1975 Lord Widgery, a very influential judge in Britain, laid down rules stipulating how long a Cabinet officer must wait after leaving office to publish descriptions of confidential Cabinet meetings.[4] That decision fixed the

official records that are available to journalists and contemporary historians criticizing a government, and so it affected how government behaves.

DISAGREEMENT ABOUT LAW

Since it matters in these different ways how judges decide cases, it also matters what they think the law is, and when they disagree about this, it matters what kind of disagreement they are having. Is there any mystery about that? Yes, but we need some distinctions to see what it is. Lawsuits always raise, at least in principle, three different kinds of issues: issues of fact, issues of law, and the twinned issues of political morality and fidelity. First, what happened? Did the man at the lathe really drop a wrench on his fellow worker's foot? Second, what is the pertinent law? Does the law allow an injured worker damages from his employer for that sort of injury? Third, if the law denies compensation, is that unjust? If so, should judges ignore the law and grant compensation anyway?

The first of these issues, the issue of fact, seems straightforward enough. If judges disagree over the actual, historical events in controversy, we know what they are disagreeing about and what kind of evidence would put the issue to rest if it were available. The third issue, of morality and fidelity, is very different but also familiar. People often disagree about moral right and wrong, and moral disagreement raises no special problems when it breaks out in court. But what about the second issue, the issue of law? Lawyers and judges seem to disagree very often about the law governing a case; they seem to disagree even about the right tests to use. One judge, proposing one set of tests, says the law favors the school district or the employer, and another, proposing a different set, that it favors the schoolchildren or the employee. If this is really a third, distinct kind of argument, different both from arguments over historical fact and from moral ar-

guments, what kind of argument is it? What is the disagreement about?

Let us call "propositions of law" all the various statements and claims people make about what the law allows or prohibits or entitles them to have. Propositions of law can be very general—"the law forbids states to deny anyone equal protection within the meaning of the Fourteenth Amendment"—or much less general—"the law does not provide compensation for fellow-servant injuries"—or very concrete—"the law requires Acme Corporation to compensate John Smith for the injury he suffered in its employ last February." Lawyers and judges and ordinary people generally assume that some propositions of law, at least, can be true or false.[5] But no one thinks they report the declarations of some ghostly figure: they are not about what Law whispered to the planets. Lawyers, it is true, talk about what the law "says" or whether the law is "silent" about some issue or other. But these are just figures of speech.

Everyone thinks that propositions of law are true or false (or neither) in virtue of other, more familiar kinds of propositions on which these propositions of law are (as we might put it) parasitic. These more familiar propositions furnish what I shall call the "grounds" of law. The proposition that no one may drive over 55 miles an hour in California is true, most people think, because a majority of that state's legislators said "aye" or raised their hands when a text to that effect lay on their desks. It could not be true if nothing of that sort had ever happened; it could not then be true just in virtue of what some ghostly figure had said or what was found on transcendental tablets in the sky.

Now we can distinguish two ways in which lawyers and judges might disagree about the truth of a proposition of law. They might agree about the grounds of law—about when the truth or falsity of other, more familiar propositions makes a particular proposition of law true or false—but disagree about whether those grounds are in fact satisfied in a particular case. Lawyers and judges might agree, for exam-