AN ANTHOLOGY

PHILOSOPHY OF LAW AND LEGAL THEORY

EDITED BY DENNIS PATTERSON

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Philosophy of Law and Legal Theory

An Anthology

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Philosophy of Law and Legal Theory

for Dick Hull

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Contents

Introduction

Anthologies – be they about law or any other subject – are deceptive and difficult projects. The deceptive aspect is the apparent ease of putting together a collection of canonical works in a field. In a field as central as law, how challenging could it be to pull together a list of canonical works? With so much to choose from, the only difficulty – if difficulty there be – is paring down the list of possible candidates for inclusion in a single volume.

This surfeit of choices is exacerbated by the fact that in jurisprudence (or "legal theory") there is a lack of widespread agreement on the canonical status of many works. For this reason, any given individual's choices will be more or less controversial. As the editor of this volume, I would like to say why the list of works chosen for this volume makes sense. To do this, I need to address the question of audience: that is, for whom is this volume produced and how can that audience make the highest and best use of its contents?

The works for this volume were selected with two criteria in mind. First, I wanted to include articles that almost every person with a serious interest in jurisprudence would regard as worthy of study by a beginning student. Obviously many articles could have been included and, were it not for limitations of space, might have found their way into the volume. Second, I wanted to give initiates to jurisprudence a sense of current debates in the field. But current debates all proceed against the background of the history of legal theory. Therefore, it was important to select historical works that resonate with contemporary concerns.

With these parameters in mind we come to the first name in American legal theory, that of Christopher Columbus Langdell (1826–1906), the first dean of the Harvard Law School and the author of the first casebook (the subject matter was contracts). Langdell's view of law dominated legal discussion from the end of the nineteenth century into the early twentieth century. Langdell's aspiration was to put law on the same footing as natural science. To this end, he recommended that law students not spend their time reading vast numbers of cases in an effort to compile long lists of legal rules. Instead, Langdell recommended pursuit of the principles which provide the best explanation for the constitution and organization of doctrinal areas of law. Langdell believed that once the few organizing principles of a field were identified, the content of law could be divined. Like nature, law had a hidden order or logic which, once disclosed, revealed an organizing structure of principle which made sense of the play of diverse legal opinions.

Langdell is the figure who comes most readily to mind when legal academics look for an example of "legal formalism." Here history and the contemporary discussion come together for the first time. In the article by Ernest Weinrib (b. 1943), "Legal Formalism: On the Immanent Rationality of Law," Professor Weinrib argues that law does, indeed, exhibit a conceptual architecture. Through his unique synthesis of the work of Aristotle, Aquinas, Kant and Hegel,

Professor Weinrib argues that "law" is not reducible to the discourse of law. In a real sense, "law" is a product of thought or rationality. It is the task of legal theory to identify the fundamental organizing structure of law be it principles or concepts.

In the late nineteenth and early twentieth centuries, formalism was dominant but by no means the only account of the nature of law and legal reasoning. First, there was the "bad man" account of law by Oliver Wendell Holmes (1841–1935). In "The Path of the Law," Holmes asserts that to understand law we need know only what a "bad man" might wish to know, that is, how judges are likely to rule. Thus, prediction is the most important aspect of knowledge of "law." As one might say, "law is what the judges say it is": it is the business of bad men and lawyers alike to predict how judges would rule on questions of the day.

Between Holmes and Langdell we find Wesley Hohfeld (1879–1918). The gravamen of Hohfeld's work is his attempt to articulate fundamental categories of legal thought. Hohfeld believed that legal discourse could be clarified through analysis of what he termed "fundamental legal conceptions." His work is analytic in spirit without being conceptualist in the manner of Langdell. True, Hohfeld's approach to law could be just as abstract as that of Langdell. But unlike Langdell, Hohfeld insisted that jurisprudential analysis be grounded in conventional legal reasoning.

In the early part of the twentieth century, the formalism of Langdell meets its great challenge in the work of the American Legal Realists. The Realists are often seen as a source of great skepticism in legal theory. In a sense, this is true but somewhat misleading. Realists such as the jurist Jerome Frank (1889–1957) took a "psychological" view of legal decision-making. Frank believed that the study of the psychology of individual judges was a clue if not a key to deciphering how cases are "really" decided. Emphasis on the skeptical dimension of Realist thought might give one the impression that the Realists believed that law had no real connection with human reason. The work of the most prominent Realist, Karl Llewellyn (1893–1962), belies this notion. Llewellyn's greatest contribution to law is his work on the Uniform Commercial Code, which he produced in the 1940s. This statute is in many respects an expression of what is best in realism. True, Llewellyn did reject the Langdellian view of law as grounded in abstract reason. But simply because Llewellyn rejected the formalist account of reason in law, this does not mean that he rejected the idea of reason in law. In fact, it can safely be said that in Llewellyn's hands, reason is not rejected but relocated.

With the Uniform Commercial Code, Llewellyn makes the case that law's "reason" is located not in abstract thought but in the practices of merchants. With concepts like "agreement," "good faith," and "commercial reasonableness," Llewellyn sought to bring the logic of the marketplace into the logic of legal decision-making. In this way, Llewellyn's jurisprudence can rightly be viewed as both skeptical (of formalist methodology) and pragmatic.

In the academic scene beyond the confines of jurisprudence one finds considerable attention given to "pragmatism" of one sort or another. Implicating the work of American pragmatists such as William James (1842–1910) and John Dewey (1859–1952), American philosophers such as Richard Rorty (b. 1931) and Hilary Putnam (b. 1926) have reinvigorated the commonsense tradition in American thought. In "What has Pragmatism to Offer Law?," the distinguished jurist Richard Posner (b. 1939) combines the healthy skepticism of the American Legal Realist tradition with his own application of the insights of law and economics. It might be fair to say that Posner is the Oliver Wendell Holmes of our day. While eschewing any commitment to preordained outcomes, Posner believes deeply in the virtues of efficiency and the practical application of legal norms. Whether this approach is sufficiently broad to characterize pragmatism as a school of thought or "philosophy," the reader must decide. Having written on subjects as diverse as the Bush/Gore election, the impeachment of President Clinton, and the topic of sex, Judge Posner is one of the most interesting figures on the academic legal scene today.

Skepticism about law has its roots in the Legal Realist reaction to formalism (or "mechanical

jurisprudence"). The contemporary expression of skepticism about law and "legal reasoning" is best exemplified in the work of the members of the Critical Legal Studies Movement. Professor Duncan Kennedy's (b. 1942) article "Form and Substance in Private Law Adjudication" is rightly regarded as one of the classic works in the field. Together with the work of Roberto Unger (b. 1947), Professor Kennedy presents the most formidable challenge to the idea that legal outcomes are tied – either directly or indirectly – to legal methodology. For clarification and challenge to the central tenets of the indeterminacy thesis, Professor Ken Kress's (b. 1958) article "Legal Indeterminacy" is without equal in the literature. Kress shows that the claim that the indeterminacy of law undermines its legitimacy cannot be sustained.

One long-standing debate in jurisprudence is that between positivism and natural law. Positivists deny any necessary connection between law and morality. More broadly, positivists devote their time to analyzing law as an artifact of human action. In accounting for the nature of law, positivists differ – sometimes starkly – in their respective accounts of what law consists in. In the famous debate between H. L. A. Hart (1907–92) and Lon Fuller (1902–78), the question of the relationship between law and morality is debated at the level of the nature of law, the meaning of legal language, and the question whether evil law can truly be said to be "law." For his part, H. L. A. Hart argues that the moral criticism of law is not possible if there is any deep and abiding connection between law and morality. Fuller counters that there is an internal "morality of order" in any normative system we call "law." No matter which side of the argument one takes, the Hart–Fuller debate remains a central focus of attention within legal theory.

There has been much debate between and among positivists and their critics since the time of the Hart–Fuller debate. The work of Jules Coleman (b. 1947) is both a refinement and development of arguments first articulated by Hart in his famous book *The Concept of Law* (1961). In his essay "Negative and Positive Positivism," Coleman responds to critics of positivism with subtle revisions of central positivist tenets. The most important of these is the "separability thesis" (denying any necessary or constitutive relationship of law to morality) and the relationship of law to morality. Coleman argues that commitment to the separability thesis does not entail denial of a connection between law and morality. The issue, says Coleman, is not whether there is a connection but in what the connection consists. For Coleman, all that positivism need show is the possibility of a convergent practice among judges, one that requires judges to articulate legal decisions in moral terms.

Are Coleman's efforts to recast Hart's positivism successful? In his essay "On the Incoherence of Legal Positivism," John Finnis (b. 1940) applauds the sophistication of modern proponents of positivism but concludes that positivism is an incoherent intellectual enterprise. In addition to arguing that positivists systematically misread the natural law tradition, Professor Finnis asserts that the central question of jurisprudence is not the "nature of law" but the question whether positive law can create moral obligations. To this question, Professor Finnis believes legal positivism has no answer. Thus, the authority of law – its "binding" character – cannot be explained by the positivist account of law.

Perhaps the greatest contemporary critic of legal positivism is Ronald Dworkin (b. 1931). In his early essay "The Model of Rules," Professor Dworkin attacks the ontology of law advanced by H. L. A. Hart. Hart, who argued that law was a matter of rules, is criticized by Dworkin for failing to appreciate the role of principles in adjudication. Through a series of well-developed examples, Dworkin demonstrates rather convincingly the descriptive inadequacies of legal positivism.

The late John Mackie (1917–81) has described Dworkin's theory as a "third theory of law"; that is, a theory that attempts to bridge the divide between positivism and naturalism. Contemporary positivists like to think they can accommodate Dworkin's ontological critique. In this way, contemporary positivists like to acknowledge Dworkin as a "helpful" critic of

positivism. The question whether positivism can accommodate the role of principles in law without giving up the separability thesis is a question of deep concern to contemporary positivism.

In addition to his criticism of positivism, Dworkin has advanced some independent and quite controversial theses. In his article "Hard Cases," Dworkin argues that there is always a "right answer" to legal disputes and that law and political morality are connected at the deepest levels of moral and political justification. In "Law as Interpretation," Dworkin advances a thesis that would reach its full expression in his 1986 book *Law's Empire*. In this article, Dworkin borrows a page from continental philosophers, especially Martin Heidegger (1889–1976), with his thesis that law is an interpretive practice. What Dworkin means to say with this provocative assertion is not always clear. What is clear is that Dworkin joins a major academic trend – one could call it "the interpretive turn" – with his claim that the meaning of legal concepts is a function of interpretation. Bold in his presentation, trenchant in argument and always controversial, Dworkin's work is central to any discussion in legal philosophy.

It would be simplistic to see the work of contemporary law and economics scholars as a single-minded focus on the empirical. In fact, law and economics scholarship can usefully be classified along three lines of endeavor. First is the substantive or "positive" evaluation of law. Economists are especially adept at answering the question whether particular laws accomplish the goals and purposes for which they were fashioned. Imagine a regulatory scheme designed to increase the efficiency of business regulation. After defining key terms like "efficiency," economists can employ their sophisticated analytical and measuring tools for evaluation of the success or failure of a legal regime in effecting its avowed purposes.

Normative law and economics does not take the law as we find it. Rather, normative economic theory asks after the ideal point or purpose of law. Over the course of the last two decades there has been a veritable explosion in the volume of normative economic analysis of law, especially in private law areas such as torts and contracts. In tort law, for example, economists have questioned the point or purpose of a regime of tort or accident law and have inquired as to how the rules of tort law may be recast to better effect the ideal purposes of tort law. Much of this work has made its way into the work of legislators and even first-year torts casebooks.

Finally, there is positive law and economics. In many ways, this approach to economics has great affinities with philosophical approaches to law. One of the questions posed by positive law and economics asks why the law is as it is? It might be said that positive law and economics tries to "explain" the law as we find it. For the present volume, I have selected an article from this corner of the economics literature. Ronald Coase (b. 1910) won the Nobel Prize in economics for developing the Coase Theorem. In "The Problem of Social Cost," Coase argues that individuals will value entitlements without regard to their ownership. For example, it matters not whether the law grants water rights to one riparian owner or her neighbor because the parties will themselves ultimately decide who values the entitlement most. In a sense, Coase is arguing that "rights do not matter." Coase's behavioral assumptions have come under scrutiny in recent years, and his central thesis remains controversial. Nevertheless, no understanding of the economic approach to law would be possible without some understanding of the Coase Theorem. For this reason alone, the choice to include "The Problem of Social Cost" was easy.

This anthology is a companion volume to *A Companion to Philosophy of Law and Legal Theory* published in 1996. Since its publication, the *Companion* has enjoyed great success and has proven to be an extremely useful tool for law students interested in having a grasp of the

theoretical dimensions of the subjects they study on a daily basis. The anthology is published to provide students with original source material which can be usefully read together with the analytical articles in the *Companion*. Taken together, these two volumes provide a complete introduction to law and legal theory and provide a solid footing to further study of law and legal theory.

Part I

Nature of Law