



PHILOSOPHY OF LAW

CLASSICAL AND
CONTEMPORARY READINGS

EDITED BY LARRY MAY AND JEFF BROWN



 WILEY-BLACKWELL

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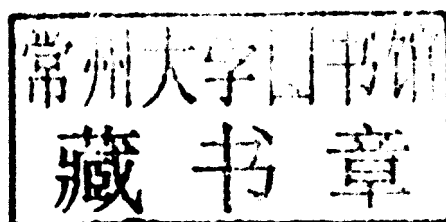
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Preface

The aim of this textbook is to provide students with many diverse theoretical justifications for our legal rules, systems, and practices. With this in mind, we seek to introduce students both to the classical questions of philosophy of law, and to new emerging areas of theoretical dispute for legal theorists, philosophers, and lawyers. We provide introductions to all major areas of Anglo-American law, and the major philosophical underpinnings of each of these areas. This textbook also examines questions concerning the theoretical foundation and application of international law.

One important emphasis in the book is the relationship between morality and its application to law. Philosophers and legal theorists are split between those who take a moral approach to the law and those who reject a moral application of the law. We explore the relationship between morality and law in general, and also in sections devoted to specific areas of law, such as torts, property law, contract law, and constitutional law. In examining this important philosophical question, we include seminal essays from the history of philosophy, including works from Thomas Hobbes, John Locke, John Austin, Jeremy Bentham, Immanuel Kant, and John Stuart Mill. We also include many contemporary theorists, such as H. L. A. Hart, Ronald Dworkin, Robert Nozick, Richard Posner, Richard Epstein, A. M. Honore, and Michael Moore.

We will introduce students to diverse voices such as those of feminists, critical theorists, postmodernists, and critical race theorists. We explore viewpoints from the rest of the world, where Anglo-American law is not the norm; for example, Chinese conceptions of property law; Japanese conceptions of intellectual property; French and Canadian approaches to “bad Samaritanism”; and Indian, Irish, and Chinese approaches to fundamental constitutional rights.

In addition to introducing students to critics of contemporary Anglo-American law, we also explore the philosophical underpinnings of international law. In an increasingly interconnected world, important legal questions no longer simply concern the application of law within a specific society or legal system. This textbook introduces students to philosophical questions concerning the application of international law in a world immersed in diverse interests, global conflict, and war.

The essays on international law pervade most of the sections of the text. We begin with a section on legal reasoning, and even here we have included an essay on the use of custom in the reasoning of judges in international law. In the section on jurisprudence, we start with a piece from H. L. A. Hart’s *The Concept of Law* and then begin the third section on the theory of international law with the final chapter of the same book by Hart. We also examine, for

example, whether the use of force by one nation to stop an atrocity in another nation can be justified, and whether international criminal trials, like those that had Eichmann or Milosevic in the dock, were merely show trials. In the section on constitutional law, we have included discussion of *jus cogens* norms and basic human rights.

In these discussions, students will be exposed to a wide range of theoretical perspectives. By bringing as many different voices as possible into dialog with each other, we try to represent the philosophical foundations of various areas of law. And by exposing students to a wide range of theoretical views, this book also aims to challenge them to think critically about law within the US and other nations, as well as between nations.

The Structure of the Book

This book begins by looking at the principles of legal reasoning, especially how a consideration of the facts of particular cases can evolve into a settled body of abstract rules. Throughout the book, we introduce students to legal cases, interspersed with theoretical essays by philosophers and lawyers. As discussed in law, real-life cases are quite different from abstract, hypothetical cases, which philosophers trained in the analytic tradition rely on heavily. Although hypothetical cases are important and have their place, we believe it is important to introduce students to real patterns of fact for two reasons. First, a consideration of legal cases forces philosophers to think about concrete situations in which a decision has to be made about what is to be done. Having an abstract conception of justice is not enough; one must also be able to see how such a conception can be applied to adjudicate disputes between two equally well-defended parties. The problem is that fanciful hypothetical examples are often disengaged from the real world and its complexities. Although such examples have their place, we believe that the interaction between philosophy and law should be engaged with the real world and its problems. And second, a consideration of real-life legal fact patterns makes us aware of how a change in just one fact may make a huge difference in deciding which rules apply and what types of remedy are appropriate.

Unlike most of the standard texts in philosophy of law, we have organized our selections according to the areas of law that reflect how philosophical study of the subject relates to the normal set of courses taken at US law schools. Sections of our text correspond to the standard first-year courses in torts, criminal law, property law, and constitutional law. We also provide sections on jurisprudence, family law, and international law. Before each of these selections, we introduce students to the main concepts in these areas of law, as well as setting the stage for the detailed treatment of the various philosophical approaches to the core ideas in the essays that follow.

Our textbook tries to strike a balance between important philosophical essays in the analytic tradition and important non-traditional material; the latter includes a collection of essays that approach traditional topics in legal philosophy from the perspective of minority members within mainstream US culture as well as some non-Western material. Because law intersects in everyone's lives in so many ways, philosophical thinking on the subject is not simply an analytic exercise. It is a topic debated by lawyers, policy analysts, politicians, political activists, and philosophers alike. We believe that balancing traditional and non-traditional material helps us focus the student's attention on the interplay of voices and outlooks that constitute today's diverse world; a diversity that is deep both within countries and between them. Throughout, we have tried to offer readings that bring philosophical ideas alive by confronting them with real-life predicaments of people struggling to interact with one another in a diverse and pluralistic world.

Finally, we have included more readings than might be expected from law journals, as well as essays by prominent legal theorists teaching in US law schools. This has two advantages over most textbooks in this area. First, it introduces undergraduates to the way in which philosophy of law, or jurisprudence, is approached by lawyers as well as by philosophers. Second, for law students, it connects the philosophical study of law with some of the main figures in the area whom the students will already have encountered in their other courses.

In our view, philosophy of law has produced the richest literature of all the subfields of ethics

and political philosophy. Philosophy of law is a rigorous field of inquiry in its own right, as one can see especially clearly when work by lawyers is brought together with work by philosophers in a single volume and then juxtaposed with the best work by contemporary critics of mainstream approaches. We hope that this book will

inspire generations of students to bridge the gap between theory and practice and to look beyond the system of law in their own country when considering the exciting and diverse writings in philosophy of law.

Larry May
Jeff Brown

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Introduction

The Relationship Between Law and Philosophy

“Where there is law, there is injustice”

This quotation from Tolstoy is interestingly ambiguous. On one level, we are told that law’s primary goal or aim is to confront and remedy injustice. In most societies, one of law’s major functions is to act as the major institution entrusted with providing individual or collective remedies for people who have been harmed by the intentional or unintentional acts of others. On another level of meaning, we are told that where there are laws, there will be injustice. To some, this second meaning might sound a bit strange. Law can create injustice because it works through the application of general rules, but general rules do not easily fit specific patterns of facts. The rules always overlap or underdetermine the facts. This means that the application of law to facts may cause injustice to be done to someone. Law is based on an attempt to remedy injustice, but, by its very nature, law can create injustice as well. In both respects, we can see that law and justice are intertwined. This is one reason that philosophers have been intrigued by the ideas of both. For several thousands of years, the philosophical study of law has centered on the relationship between the concept of justice and

the law. This volume will be no different. We provide many articles by both philosophers and lawyers who argue about the law’s relationship with questions of justice.

Philosophical questions also extend to foundational questions concerning areas of law. In most contemporary law courses, the first few days are spent on the philosophical foundations of that legal subject. For example, property courses begin with discussions of how property rights are created in the state of nature, where there are no such rights. Contracts courses discuss the nature of promises and what it is about promises that creates an obligation in the world where none existed before. Torts and criminal law begin with discussions of why harm is considered such a bad thing in a society, as well as appropriate responses to acts that cause harm. Courses in constitutional law often begin with discussions of what is most foundational to any system of rules that calls itself law. Classes in international law often start with the question of whether “international law” is a meaningful concept at all. As these classes continue, there are additional discussions concerning “policy” considerations – namely, moral, social, political, and economic theorizing about the proper role of law in regulating our lives and the actions of other sovereign nations.

The study of philosophy intersects with the study of law in many different ways. As with the relationship between law and justice, the very

idea, or concept, of law has been studied by philosophers since at least the ancient Greeks. Each branch of law has at least one question that has been rigorously explored by philosophers. What differentiates a contract from a promise? Is the government ever justified in redistributing property? Should tort law hold people liable for failing to help one another? Should constitutions be interpreted narrowly or liberally? Is punishment justified for reasons of retribution or deterrence? Are states ever justified in violating another state's sovereignty by force?

The Law's Goal of Stability in Social Relationships Among People and Nations

The various domestic fields of law all aim at one goal: providing the mechanisms that allow individuals to order their lives and plan for the future. International law works in a similar way. It allows states to put their interactions in order and plan for future relations between states. For example, contracts provide a mechanism by which obligations and rights can be created by mutual agreement. When you and I agree that you will clean my garage this weekend and that I will pay you 50 dollars to do so, the world for both of us has changed by our own free acts. You have an obligation to clean my garage, and I have an obligation to pay you 50 dollars. This contract gives us rights. I have a right to have my garage cleaned by you, and you have a right to be paid 50 dollars by me. Importantly, none of these rights existed until we exchanged promises. These rights are enforceable at law simply because we made an agreement, unless the contract violates some legal principle of fair dealing.

Property likewise provides a mechanism for regulating our lives concerning the acquisition and transfer of land and durable goods. Property law has helped create a base on which societies achieve a certain kind of economic stability. If on my deathbed I transfer the deed for my acre of homestead to my favorite grandchild, the law will generally recognize and enforce the peaceful transfer of title to this piece of property. Such transfer creates rights and obligations for my grandchild that she did not have before. Importantly, fights over who should inherit the land are

extinguished, and individuals can plan for the future with relative security. Most societies have established complex sets of rules regarding contract and property transfers. These rules allow individuals to regulate their own lives with minimal interference from the state.

Criminal and tort law also aim to secure a stable society, but in a very different way from that of contract or property law. Rather than helping people figure out how best to get what they want, the law intervenes to penalize or punish those who have acted in harmful and socially disruptive ways. The opportunity for individuals to be harmed by strangers or neighbors and loved ones creates a different kind of insecurity. For example, if you are lying on a stretcher in an operating room, unconscious and at the mercy of the medical team, we want some assurance that a doctor will not neglect to take good care of you or, at least, that you are not intentionally harmed or taken advantage of. Both tort and criminal law function to provide a basis for securing these goals. Importantly, how much protection the law provides varies from state to state and country to country. As you will read in this volume, different legal systems differ about whether there is a "duty to rescue" a stranger in need.

In constitutional law, we see attempts to regulate and stabilize societies concerning the behavior of high-placed political leaders. In the United States, constitutional law determines the stability of presidential office. In recent years, constitutional law has played a large role in presidential power. It was used to determine whether one president, Bill Clinton, should be removed from office for lying under oath and whether another, George W. Bush, should rightfully be president in a disputed election. Here, the US Constitution serves to provide for peaceful transfer of power and it also provides checks on the possible abuses of power by societies' most powerful members.

When we switch from areas of domestic law to international law more generally, we also see the role of law in trying to provide stability between nations. Given that we live in a world that is immersed in diverse interests, global conflict, and war, stability in international affairs is an important topic for international lawyers and philosophers. These questions have been

raised during both the invasions of Iraq by the US and its allies. During the 1991 invasion, the coalition forces (led by the United States) had United Nations approval, but not in the more recent and ongoing Iraqi conflict. Due to the global and regional instability that war creates, international law looks to provide a stable mechanism to curtail the use of force by one nation against another. But there is still an important philosophical and legal question concerning that status of international law. How does international law “bind” a nation? If international law binds a nation, is there any conflict between international law and national sovereignty? Does it make sense to say that international law is “law” at all?

This book will explore significant areas of legal philosophy. We introduce the reader to important questions concerning law and justice,

the foundations of law and legal systems, and the foundations of specific areas of law, such as contracts, torts, criminal law, etc. The topics in this book reflect the intimate link between philosophy and law, a link going back to the earliest philosophers, such as Plato and Aristotle, and in our text, we continue in the same tradition. We strive to display a wider overlap between law and philosophy, where each of the main areas of law is shown to raise significant philosophical issues. Just as Tolstoy is correct to say that where there is law there is also injustice, so we would say that where there is injustice there have been philosophers. Whenever there have been debates about justice or injustice, injury and responsibility, desert and punishment, there has also been a dialog between philosophers and lawyers. The continuation of that dialog is what this book is about.