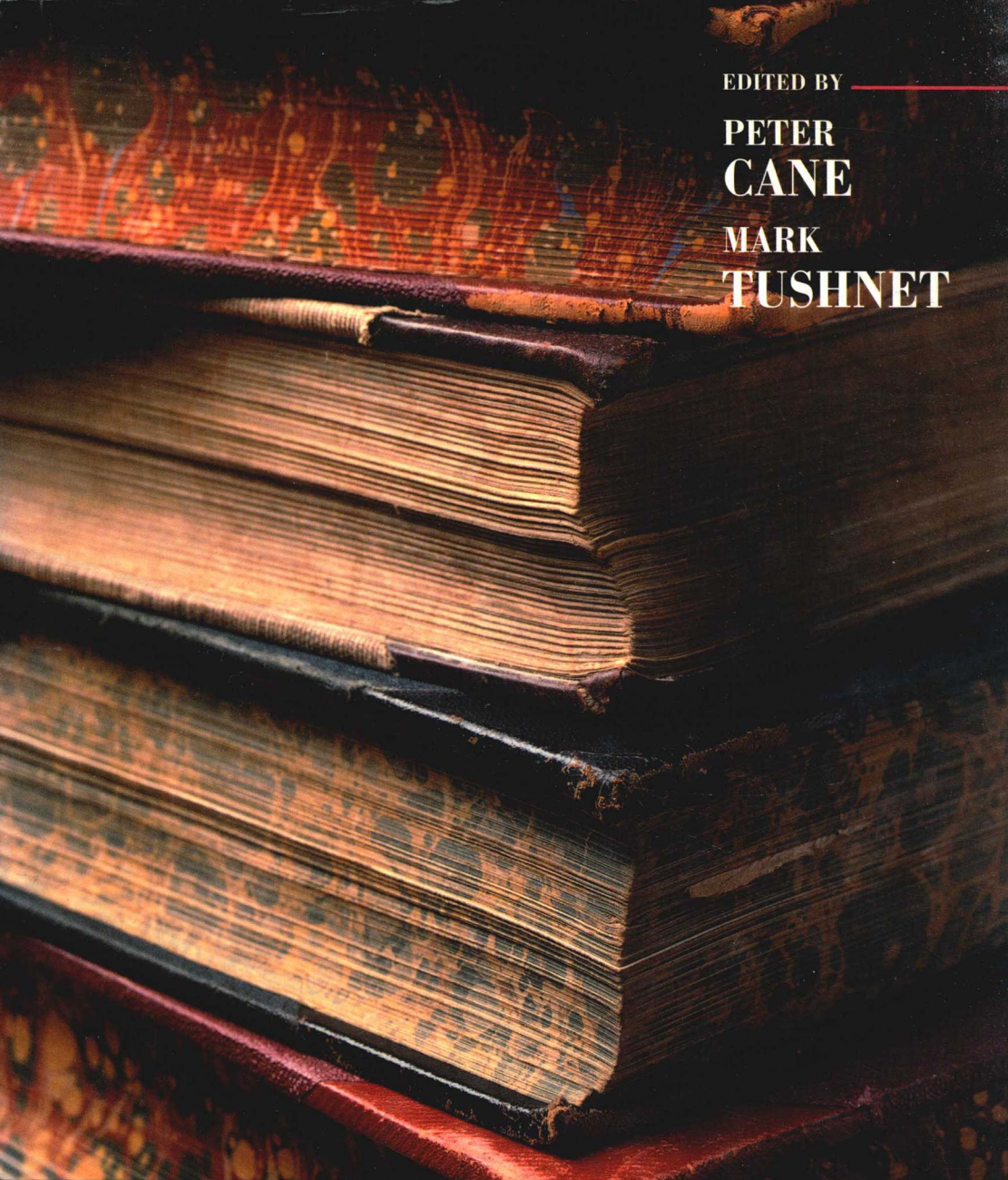




EDITED BY

PETER
CANE

MARK
TUSHNET

≡ The Oxford Handbook of
LEGAL STUDIES

THE OXFORD HANDBOOK OF

LEGAL STUDIES

Edited by

PETER CANE

AND

MARK TUSHNET

OXFORD
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Auckland Bangkok Buenos Aires Cape Town Chennai
Dar es Salaam Delhi Hong Kong Istanbul Karachi Kolkata
Kuala Lumpur Madrid Melbourne Mexico City Mumbai Nairobi
São Paulo Shanghai Taipei Tokyo Toronto

Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries

Published in the United States
by Oxford University Press Inc., New York

© The editors and contributors 2003

The moral rights of the author have been asserted

Database right Oxford University Press (maker)

First published 2003

All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system, or transmitted, in any form or by any means,
without the prior permission in writing of Oxford University Press,
or as expressly permitted by law, or under terms agreed with the appropriate
reprographics rights organization. Enquiries concerning reproduction
outside the scope of the above should be sent to the Rights Department,
Oxford University Press, at the address above

You must not circulate this book in any other binding or cover
and you must impose this same condition on any acquirer

British Library Cataloguing in Publication Data

Data available

Library of Congress Cataloging in Publication Data

Data available

ISBN 0-19-924816-8

1 3 5 7 9 10 8 6 4 2

Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India

Printed in Great Britain
on acid-free paper by

Biddles Ltd., Guildford and King's Lynn

INTRODUCTION AND GUIDE FOR THE READER

THIS volume in the series of Oxford legal handbooks is about legal scholarship. This superficially straightforward statement needs some explanation. The prime focus of the chapters in this book is not on law, legal rules, and legal institutions but on *scholarship about* law, legal rules, and legal institutions. As Upendra Baxi notes (see Ch. 22), in global terms the vast majority of published legal scholarship originates in countries of the developed 'North'; and this volume inevitably reflects that fact. More particularly, the main orientation of the essays is towards scholarly activity in what might loosely be called 'the common law world', made up of those legal systems that are more or less closely related, in terms of their conceptual and institutional structure, to the English. A corollary of this orientation is a focus on scholarship written in English. The explanation and justification for these limitations on the scope of the book are purely pragmatic. And it is, of course, our hope and expectation that this volume will prove to be accessible, and of interest and use, to lawyers both within the academy and outside it, and to people interested in legal scholarship wherever they might be within the common law world or beyond.

The basic idea for a volume of essays on scholarship about law came from John Louth, who is Senior Editor responsible for 'academic and scholarly' law publishing at Oxford University Press's 'mother house' in Oxford. Obviously, such a large idea could be developed in various ways, and we take responsibility for the shape of the project as defined by the table of contents and the brief given to the authors—of which, more later. The field of legal scholarship is as large and diverse as the social phenomena which legal scholars attempt to map and interpret; and the forms and styles of scholarly output are many and varied. This volume can make no claim to comprehensiveness either in terms of the subject-matter of legal scholarship or in terms of its forms and styles. Our aim was to cover a broad range of legal topics that seemed to us to have generated significant and important bodies of legal scholarship. No doubt, there are other topics that could profitably have been included—one that sprang to our minds rather too late was 'evidence and proof'. More importantly, perhaps, there are certainly other illuminating ways in which the field of legal scholarship could be divided up into manageable chunks. If the chosen coverage and arrangement of this volume stimulate readers to imagine other helpful ways of portraying and understanding the rich and complex doings of legal scholars, so much the better.

Each of the chapters in Parts I to VI deals with scholarship about a particular substantive area of law. Although a conscious attempt was made to avoid compiling a list of textbook titles (*The Law of Contract*, *Corporations Law*, *Environmental Law*, and so on), inevitably the scope of many of the chapters reflects the pedagogical imperatives by which the professional life of the typical legal researcher is constrained. The chapters in Part VII deal with various issues related to the activities of legal researchers (including pedagogy) but which cut across the substantive areas dealt with in the other parts of the book. It will be immediately obvious to the critically observant reader that there are no chapters on scholarly 'movements' such as legal realism or law and economics, and none on general concepts such as responsibility and precedent. Apart from the fact that no single volume of sensible length could deal with the whole range of legally related scholarship, a conscious editorial decision was made to carve out for this collection an identity and focus distinctly different from that of volumes (including the one in this series edited by Jules Coleman and Scott Shapiro) devoted to 'legal theory', 'jurisprudence', and 'philosophy of law'. Because areas covered by the various chapters in this handbook are large, the discussions they contain are typically conducted at quite a high level of abstraction from the details of particular legal provisions and the law of particular jurisdictions. However, no attempt has been made to survey scholarship that defines itself as concerned with the *theory* or *philosophy* of law as opposed to *law* and *legal institutions* as such.

The authors were given a set of guidelines which it is important that the reader understand in order to get the most out of the book and not to expect more than is on offer. Authors were asked to focus not on the law in the substantive areas respectively allocated to them, but on scholarship about the law in those areas. Concentration on scholarship published since 1960 was recommended (except in relation to Chs 38 and 42). This temporal limit was suggested partly in order to make the authors' task more manageable, but also because it seemed to us that 1960 represented a watershed of sorts in the life of the legal academy, marking the beginning of a period in which the quantity and quality of legal scholarship has increased enormously. The rate of production of scholarship seems unlikely to abate; and in surveying the past, authors were asked to keep an eye on likely trends in the preoccupations of legal scholars in the early years of the twenty-first century.

Authors were encouraged to take a comparative, or at least a multi-jurisdictional, approach. In other words, they were asked to look beyond the scholarship with which they were most familiar in their own respective jurisdictions and to find distinctive scholarly contributions to our understanding of law and legal institutions from anywhere and everywhere in the common law world. Of course, we did not expect authors to (be able to) survey the whole body of legal scholarship published in any area since 1960, nor to write accounts that were jurisdictionally neutral. We were content for authors to privilege what they knew best, while at the same time pushing out the frontiers of their knowledge. Nor did we ask or expect authors to conceal or suspend their personal intellectual commitments, or to be impartial as between

different styles or schools of scholarship or competing views about law and legal institutions. Rather, each contributing scholar was encouraged to write a personal reflection on a body of legal research and a set of legal ideas related to the area of law loosely defined by the title of the chapter for which he or she was responsible. We did not want, and we did not get, a set of substantively and structurally uniform 'reports' of various bodies of legal scholarship.

More technically, authors were instructed to eschew footnotes in order to maximize readability and the accessibility of the various contributions to a mixed audience. Each author was given a word limit, in some cases 8,000 words, in others 10,000, and in yet others 12,000. These length allocations reflect undoubtedly contestable editorial judgements about the relative significance and vibrancy of various bodies of scholarship. Somewhat to our surprise, and to our great relief, authors were generally and cheerfully punctilious in observing their personal word limits.

More controversial was the instruction to cite a maximum of thirty pieces of academic writing. We owe it to our authors to explain to readers this initially surprising constraint, which at least some of them found irksome and most found challenging—even though all managed in the end to work within or close to it. In some social-science disciplines (but not in law), the 'literature review' is a well-known and respected genre of academic writing. Literature reviews can be extremely valuable, especially when the topic addressed is relatively narrow and the time-frame quite short. The practicability and worth of a review of forty years of literature on topics as broad as those dealt with in each of the chapters of the *Handbook* are much more questionable. More importantly, what we wanted from each of the authors was his or her personal perspective on scholarship in the relevant area; and we wanted to relieve them of the burden of giving a comprehensive or 'balanced' account. One of the criteria for choosing authors was that each should be an authority in the field they were asked to write about. So we encouraged them to tell the reader not what others have said, but what they think about what others have said—to identify and comment upon themes and trends rather than to recount or focus on individual scholarly contributions. In different ways, each chapter in this book is itself an original contribution to, rather than an account of, an area of legal scholarship. Without putting too fine a point on the matter, we would say that there will almost inevitably be considerable room for disagreement about the items that should or should not have been included in the list of works referred to in the various chapters, as there will be about the authors' vision of the areas they discuss. The lists of references should not be thought of as encapsulating the author's answer to an (impossible and worthless) question such as, 'what are the thirty most significant scholarly contributions to your field in the last forty years?' Rather the references will most likely have been chosen for their aptness to support the particular argument that the author has chosen to make about scholarship in that field.

When first the outlines, and later the drafts, of chapters were submitted, we were considerably surprised by the variety of interpretations of the brief we had given to authors. As readers will find, there is considerable variation between chapters within

the volume in the way that our authors strike the balance between, on the one hand, explaining what things scholars are talking about and, on the other, what they are saying about those things. For us, this is a cause for celebration rather than regret. If the intellectual posture of this volume could be summarized, the injunction to 'let a thousand flowers bloom' would do the job well enough. We hope that the chapters presented here will provoke some readers to offer their own perspectives on the fields discussed, approaching the work of our authors in a spirit of constructive criticism.

Partly because of this diversity of approach, we have made no attempt to integrate the various chapters by adding cross-references to discussions of related topics elsewhere in the volume. Instead, the *Handbook* has been provided with a detailed index which, we hope, will enable the reader to trace themes and topics across the boundaries of particular chapters.

As is true of many other areas of life, the world of anglophone legal scholarship can, for some purposes at least, be divided between the United States and 'the rest'. In relation to most of the chapters in the *Handbook*, 'the rest' effectively refers to major jurisdictions such as England, Canada, Australia, and New Zealand. Whereas 'US legal scholarship' can be conveniently referred to as such, it is not so obvious how best to refer generically to 'the rest'. We have encouraged authors to use the term 'Commonwealth' for this purpose. When used in this way, it refers to non-US, anglophone, common-law legal scholarship with particular reference to the larger jurisdictions in the 'developed' world.

A word about Chapter 41 (The Role of Academics in the Legal System) is in order. Unfortunately, the author who had agreed to write this chapter was ultimately not able to do so. It occurred to us that we might turn the consequent logistical problem into an opportunity to ask several scholars to write about the system with which each was most familiar. This also made it possible for us to focus on the international legal system as a phenomenon of independent importance and interest. Moreover, although the *Handbook* is primarily concerned with common law systems, we seized the chance to ask a European scholar to provide insights into the role of scholars in civil law systems. We believe that although the division of this chapter into four discrete sections creates a certain discontinuity, it more than compensates by the breadth of coverage that it offers of this relatively unexamined topic.

This volume would not have come into being without John Louth's initial vision and continuing confidence that the project was both doable and worth doing, and we are very grateful to him for his support and commitment. An undertaking of this size requires a considerable investment of organizational time and energy, and it would not have been possible without the help of Chris Treadwell, the administrator of the Law Program in the Research School of Social Sciences at the Australian National University, to whom we owe a large debt of thanks.

P.C.

M.T.

NOTES ON THE CONTRIBUTORS

Richard L. Abel is Connell Professor of Law at the University of California at Los Angeles. He has written extensively on the sociology of legal professions; law, lawyers, and social change; disputing; harmful speech; and torts. Oxford University Press will publish *English Lawyers between Market and State: The Politics of Professionalism* in 2003.

Edwin Baker is Nicholas F. Gallicchio Professor of Law at the University of Pennsylvania Law School, where he has taught since 1981. Earlier he taught at the University of Toledo and the University of Oregon and has visited at the University of Texas, Cornell, Kennedy School at Harvard, University of Chicago, and New York University. His works on free expression and the regulation of the media include *Media, Markets, and Democracy* (Cambridge University Press, 2002), *Advertising and a Democratic Press* (Princeton University Press, 1994), and *Human Liberty and Freedom of Speech* (Oxford University Press, 1989).

John Baldwin is Professor of Judicial Administration in the Law School, University of Birmingham, and has been Director of the Institute of Judicial Administration since 1982. In the past thirty years, he has conducted a great number of empirical research projects, concerned in particular with the administration of justice, both criminal and civil. His latest book is *Small Claims in County Courts in England and Wales: The Bargain Basement of Civil Justice?* (Clarendon Press, 1997).

Robert Baldwin is a Professor of Law at the London School of Economics and Political Science where he teaches regulation and criminal law. He is the author/editor of numerous articles and books on public law and regulatory issues, including *Rules and Government* (Oxford University Press, 1995), *Law and Uncertainty* (Kluwer, 1996), *Understanding Regulation* (with M. Cave, Oxford University Press, 1999), and *The Government of Risk* (with C. Hood and H. Rothstein, Oxford University Press, 2001). He has advised numerous bodies on regulation, including HM Treasury, the National Audit Office, the Cabinet Office, the European Commission, and the International Labour Organization.

Mark Barenberg is Professor of Law at Columbia University Law School. He joined the Columbia faculty in 1987 after practising labour, constitutional, and international law in New York. He has been a Tutor in comparative labour studies at Harvard and a Visiting Professor of labour law at Yale Law School, the University of Tokyo, Peking

University, and the European University Institute. He is a member of the International Commission on Labor Rights, and his scholarship concentrates on issues of US and transnational labour law.

Upendra Baxi is Professor of Law at Warwick University in the UK. Between 1973 and 1995 he held posts at Indian universities, including that of Vice-Chancellor of the University of Delhi from 1990–4. His areas of specialist interest include comparative constitutionalism, social theory of human rights, and law in globalization. His recent publications include *The Future of Human Rights* (Oxford University Press, 2002). He has been actively engaged with the struggle of the Bhopal violated and has innovated social action litigation in India.

John Bell is Professor of Law (1973) at the University of Cambridge. He was Pro-Vice Chancellor for Teaching in the University of Leeds (1992–4) and has undertaken a number of projects in British legal education, including developing Benchmark statements for Law for the Quality Assurance Agency. He has taught extensively in France and Belgium.

Brian H. Bix is the Frederick W. Thomas Professor of Law and Philosophy at the University of Minnesota. He received a JD from Harvard University and a D.Phil. from Balliol College, Oxford. Prior publications include *Law, Language, and Legal Determinacy* (Oxford University Press, 1993) and *Jurisprudence: Theory and Context* (Sweet & Maxwell, 2nd edn., 1999; 3rd edn., forthcoming).

Linda Bosniak is a Professor at Rutgers Law School–Camden. She has written widely on the subjects of citizenship, alienage, and national membership, and is currently completing a book on these themes.

John Braithwaite is a Professor in the Law Program, Research School of Social Sciences, Australian National University and Chair of the Regulatory Institutions Network (RegNet). His most recent books are *Global Business Regulation* (Cambridge University Press, 2000), *Information Feudalism* (Earthscan Publications, 2002) (both with Peter Drahos), *Shame Management through Reintegration* (Cambridge University Press, 2001) (with Eliza Ahmed, Nathan Harris, and Valerie Braithwaite), and *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002).

Peter Cane is Professor of Law and Head of the Law Program in the Research School of Social Sciences at the Australian National University. Between 1978 and 1997 he taught law at Corpus Christi College, Oxford. His main research interests are in the law of obligations (especially tort law) and public law (especially administrative law). His most recent book is *Responsibility in Law and Morality* (Hart, 2002).

Deborah Z. Cass teaches International Economic Law in the Law Department at the London School of Economics. She has recently co-edited (with Brett G. Williams and George Barker) *China and the World Trading System: Entering the New Millennium*

(Cambridge University Press, 2003) and is currently writing a book on the constitutionalization of the World Trade Organization. Contact: d.z.cass@lse.ac.uk

Brian R. Cheffins has been, since 1998, the S. J. Berwin Professor of Corporate Law at the Faculty of Law, University of Cambridge. He was a member of the Faculty of Law at the University of British Columbia from 1986 to 1997. He has held visiting appointments at Duke, Harvard, Oxford, and Stanford. Professor Cheffins is author of *Company Law: Theory, Structure and Operation* (Oxford University Press, 1997) and various articles on corporate law and corporate governance.

Jane Maslow Cohen is the Edward Clark Centennial Professor of Law at the University of Texas School of Law.

Gwynn Davis is Emeritus Professor and Senior Research Fellow attached to the Department of Law, University of Bristol. Over the past twenty-five years he has conducted over forty empirical research projects in the fields of family law and practice, criminal justice, and developments in the legal profession. He is the author of *Partisans and Mediators* (Clarendon Press, 1988) and, most recently, *Child Support in Action* (with Nick Wikeley and Richard Young, Hart, 1998).

John Dewar is Dean and Professor of Law at Griffith University in Queensland, Australia. He is Director of the Families, Law and Social Policy Research Unit, hosted by the Socio-Legal Research Centre at Griffith University, and Director of Studies for the World Congress on Families, Youth and the Rights of the Child. He is Chair of the Family Law Council and was a member of the Australian Federal Government's Family Law Pathways Advisory Group. His current research interests include self-represented litigants in family law proceedings, superannuation on divorce, and post-separation parenting.

Neil Duxbury teaches law at the University of Manchester. He is the author of *Patterns of American Jurisprudence* (Clarendon Press, 1995), *Random Justice* (Clarendon Press, 1999), and *Jurists and Judges* (Hart, 2001). His long-term research focuses on the development of law as an academic discipline in England.

Keith Ewing has been Professor of Public Law at King's College, University of London since 1989, having taught previously at the Universities of Edinburgh and Cambridge. He has held visiting appointments in Australia, Canada, and Japan, and has written in the fields of constitutional law, human rights, and labour law. His writings include (with C. A. Gearty) *Freedom under Thatcher: Civil Liberties in Modern Britain* (Oxford University Press, 1990) and *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain 1915-1945* (Oxford University Press, 2000). With A. W. Bradley he is also editor of A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (13th edn., Longman, 2002).

Ward Farnsworth is an Associate Professor at the Boston University School of Law. He previously served as a law clerk to Hon. Anthony M. Kennedy of the Supreme

Court of the United States and to Hon. Richard A. Posner of the United States Court of Appeals for the Seventh Circuit. His writings include 'Talking Out of School: Notes on the Transmission of Intellectual Capital from the Legal Academy to Public Tribunals', *Boston University Law Review* 81 (2001), 13.

Malcolm M. Feeley is the Claire Sanders Clements Dean's Professor of Law in the Jurisprudence and Social Policy Program at the University of California at Berkeley. He has held positions at New York University, Yale Law School, the University of Wisconsin. He is the author of several books, including *The Process is the Punishment* (Russell Sage Foundation, 1979) (recipient of the ABA's Silver Gavel Award for 'best book'), (with Austin Sarat); *The Policy Dilemma* (University of Minnesota Press, 1981), *Court Reform on Trial* (Basic Books, 1983), and most recently, (with Edward Rubin), *Judicial Policy Making and the Modern State* (Cambridge University Press, 1998). His articles have focused on various aspects of law and politics, including methodology, the criminal process, prison privatization, and most recently women and crime.

Phil Fennell is a Reader in Law in Cardiff Law School in Wales where he teaches Medical Law and European Community Law. He is a member of the Law Society's Mental Health and Disability Committee and was a member of the Mental Health Act Commission from 1983-9. He has published many articles on law and psychiatry. He is an editor of Butterworths Medico-Legal Reports, and is honorary legal adviser to Wales Mind. He is co-author of Lawrence O. Gostin and Phil Fennell, *Mental Health: Tribunal Procedure* (Sweet and Maxwell, 1992) and author of *Treatment without Consent: Law, Psychiatry and the Treatment of Mental Disorder since 1845* (Routledge, 1996).

Sandra Fredman is Professor of Law at Oxford University and Fellow of Exeter College, Oxford. She has written widely on equality, labour law, public law, and human rights. Her book *Women and the Law* was published by Clarendon Press in 1997, and her most recent book *Discrimination Law* appeared in the Clarendon Law Series in 2002. She has written two other books *The State as Employer* with Gillian Morris (Mansell, 1989), and *Labour Law and Industrial Relations in Great Britain* with Bob Hepple (Kluwer Law and Taxation, 2nd edn., 1992).

David J. Gerber is Distinguished Professor of Law and Director of the Program in International Law and Comparative Law at Chicago-Kent College of Law. He specializes in comparative law with an emphasis on competition law and business regulation. He has been a Visiting Professor at the law schools of the University of Pennsylvania, Northwestern University, and Washington University in the United States as well as in the law faculties of Munich and Freiburg in Germany and Stockholm and Uppsala in Sweden. His book *Law and Competition in Twentieth Century Europe* was published by Oxford University Press in 1998 (paperback, 2001).

H. Patrick Glenn is the Peter M. Laing Professor of Law, McGill University.

John C. P. Goldberg is Professor at Vanderbilt University Law School. Professor Goldberg received Masters degrees in Politics from Oxford and Princeton Universities, and his JD from New York University Law School. He has published numerous articles and essays on tort law and tort theory and has been an active participant in the drafting of the Third Restatement of Torts as a member of the American Law Institute. He is currently completing a casebook on torts with Professors Anthony Sebok and Benjamin Zipursky entitled *Tort Law: Responsibilities and Redress*, to be published by Aspen Law and Business.

James Gordley is Shannon Cecil Turner Professor of Jurisprudence at the University of California at Berkeley School of Law, where he has taught since 1978. He specializes in comparative law, and is the author of *The Enforceability of Promises in European Contract Law* (Cambridge University Press, 2001) and *The Philosophical Origins of Modern Contract Doctrine* (Oxford University Press, 1991).

Wendy J. Gordon is Professor of Law and Paul J. Liacos Scholar in Law at Boston University. Her articles include 'An Inquiry into the Merits of Copyright', *Stanford Law Review*, 41 (1989), 1343, 'Fair Use as Market Failure', *Columbia Law Review*, 82 (1982), 1600, 'A Property Right in Self-Expression', *Yale Law Journal*, 102 (1993), 1533, and 'On Owning Information', *Virginia Law Review*, 78 (1992), 149. Professor Gordon has been a Fulbright Scholar, and Visiting Senior Research Fellow at St John's College, Oxford. She is the recipient of several grants and honours, most recently an award from the Ronald A. Cass Fund for Teaching Excellence.

Lawrence O. Gostin is Professor of Law at Georgetown University; Professor of Public Health at the Johns Hopkins University; and the Director of the Center for Law & the Public's Health. He is an elected lifetime Member of the National Academy of Sciences and serves its Board on Health Promotion and Disease Prevention. He works internationally with the World Health Organization and UNAIDS. He is Health Law and Ethics Editor of the *Journal of the American Medical Association*. Professor Gostin's latest books are both published by the University of California Press: *Public Health Law: Power, Duty, Restraint* (2000) and *Public Health Law and Ethics: A Reader* (2002).

Lisa Heinzerling is Professor of Law at the Georgetown University Law Center. She received an AB from Princeton University and a JD from the University of Chicago Law School, where she was editor-in-chief of the Law Review. She clerked for Judge Richard A. Posner on the United States Court of Appeals for the Seventh Circuit and for Justice William J. Brennan, Jr. on the United States Supreme Court. She served as an assistant attorney general in Massachusetts, specializing in environmental law. She has been a Visiting Professor at the Yale and Harvard law schools.

Michael A. Heller is the Lawrence A. Wien Professor of Real Estate Law at Columbia Law School. He joined Columbia after eight years on the faculty at the University of

Michigan Law School. Before entering teaching, he worked for the World Bank and the Urban Institute on housing policy in developing and post-socialist countries.

Jeremy Horder is Porjes Foundation Fellow, and Reader in Criminal Law, Worcester College, Oxford.

David Ibbetson is Regius Professor of Civil Law at the University of Cambridge.

Benedict Kingsbury is Professor of Law and Director of the Institute for International Law and Justice at New York University Law School. He also directs the Law School's Program in the History and Theory of International Law. He held a permanent teaching position in the Law Faculty at Oxford before moving to Duke University in 1993, and New York University in 1998. He is a member of the Editorial Board of the *American Journal of International Law*, and the Advisory Boards of the *European Journal of International Law* and the *New York University Journal of International Law and Politics*. He is completing a book on indigenous peoples in international law.

Beverly I. Moran is Professor of Law and Sociology at the Vanderbilt University Law School. She is a graduate of the New York University Law School LL M programme in taxation as well as of the University of Pennsylvania Law School and Vassar College. Professor Moran has taught public finance, development, and tax-related subjects in North America, Europe, Asia, and Africa. She has received a number of grants including a Ford Foundation grant and a Fulbright award.

David Nelken After teaching Law at Cambridge, Edinburgh, and London Universities, David Nelken moved in 1990 to be Distinguished Professor of Legal Institutions and Social Change at the University of Macerata in Italy. He is also Distinguished Research Professor in Law at the University of Wales, Cardiff, UK, and Visiting Professor of Law at the London School of Economics. He was awarded the 1985 Distinguished Scholar prize of the American Sociological Association (Criminology section). Recent books include *Contrasting Criminal Justice* (Dartmouth, 2000), *Adapting Legal Cultures* (Hart Publishing, 2001) and *Law's New Boundaries* (Dartmouth, 2001). He is a Trustee of the Law and Society Association (USA), and Vice-President of its European equivalent.

Christine Parker is a Senior Lecturer in the Law Faculty, University of Melbourne, Australia, where she teaches legal ethics and corporate law and regulation. Parker researches and writes on the relationship between legal regulation and self-regulation in the normative context of deliberative democracy. Her first book, *Just Lawyers* (Oxford University Press, 1999), evaluated the regulatory and self-regulatory regimes governing the legal profession. *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) examines corporate regulatory compliance systems and the 'meta-regulation' of corporate self-regulation. Parker also speaks and consults widely on regulatory compliance for industry and the public sector.

Jordan Paust is Law Foundation Professor of International Law at the Law Center of the University of Houston. He has served on several committees on international law, human rights, terrorism, and the use of force in the American Society of International Law, the American Branch of the International Law Association, and the American Bar Association. He is currently Co-Chair of the American Society's International Criminal Law Interest Group. He was also Chair of the Section on International Law of the Association of American Law Schools and was on the Executive Council and the President's Committee of the American Society of International Law.

Judith Resnik is the Arthur Liman Professor of Law at Yale Law School, where she teaches and writes about procedure, federalism, and feminism. She serves on committees of the ABA and the National and International Association of Women Judges, and is a member of the American Law Institute, the American Academy of Arts and Sciences, and the American Philosophical Society, and is a consultant to RAND. She has chaired the Sections on Federal Courts, Civil Procedure, and Women in Legal Education of the American Association of Law Schools. She has authored many books (most recently, *Adjudication and its Alternatives: An Introduction to Procedure*, Westbury, N.Y.: Foundation Press, 2003, with Owen M. Fiss) and articles and has testified many times before congressional and judicial committees and has been a court-appointed expert as well as an occasional litigator.

Kent Roach is a Professor of Law and Criminology at the University of Toronto. His books include *Due Process and Victims: The New Law and Politics of Criminal Justice* (University of Toronto Press, 1999), *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, 2001), and *September 11: Consequences for Canada* (McGill Queens Press, 2003). He edits the *Criminal Law Quarterly* and co-edited recent collections of essays on restorative justice and anti-terrorism law. His present research includes work on anti-terrorism politics and policy, regulatory offences, and wrongful convictions.

Jo Shaw is Professor of European Law and Jean Monnet Chair, University of Manchester and Senior Research Fellow at the Federal Trust for Education and Research, London, UK.

Lionel Smith is William Dawson Scholar in Law at McGill University. He studied Zoology and Philosophy at the University of Toronto, and Law at the Universities of Western Ontario, Cambridge, and Oxford. He was a law clerk to Justice Sopinka at the Supreme Court of Canada and taught Law at the Universities of Alberta and Oxford before joining McGill in 2000. He is the author of *The Law of Tracing* (Clarendon Press, 1997) and numerous articles, including 'Restitution: The Heart of Corrective Justice', *Texas Law Review*, 79 (2001). He is a member of the Common Core of European Private Law project in Trent, and is Canadian Editor of the *Restitution Law Review*.

Michael Taggart teaches at the Faculty of Law, The University of Auckland, New Zealand. His latest book is *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply* (Oxford University Press, 2002). Contact: mb.taggart@auckland.ac.nz

Fernando Tesón is Tobias Simon Eminent Scholar at Florida State University. He is the author of *Humanitarian Intervention: An Inquiry into Law and Morality* (2nd edn., Transnational Publishers, 1997), and *A Philosophy of International Law* (Westview Press, 1998). He has published many articles on international law and political philosophy, most recently 'Self-Defeating Symbolism in Politics' (with Guido Pincione), *The Journal of Philosophy*, 98 (Dec. 2001), and 'The Liberal Case for Humanitarian Intervention', forthcoming in J. Holzgrefe and R. Keohane (eds.), *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press). Professor Tesón has taught and lectured widely in the United States, Europe, and Latin America.

Gerald Thain is Professor of Consumer Law at the University of Wisconsin Law School (Madison). His numerous articles for law reviews and other scholarly journals include, 'The E.C. Directive on Unfair Contract Terms: A Perspective From the U.S', *Consumer Law Journal*, 2 (1994), 127. He has directed many academic conferences, is a frequent consultant or expert witness for federal and state agencies, and is one of the US members of the US–EU Transatlantic Consumer Dialogue which seeks the adoption of uniform consumer-friendly rules for international electronic commerce. Professor Thain spent three years as an Air Force Judge Advocate, and eleven years at the Federal Trade Commission in various legal and administrative positions.

Mark Tushnet has taught at Georgetown University Law Center since 1981. He served as a law clerk to Justice Thurgood Marshall of the United States Supreme Court in 1972–3, after which he began teaching at the University of Wisconsin Law School. He has published widely in American legal history and US constitutional law. His most recent book is *The New Constitutional Order* (Princeton University Press, 2003).

William Twining was Quain Professor of Jurisprudence from 1983–96 at University College London, where he is now Research Professor of Law. He has been President of the Society of Public Teachers of Law (SPTL), Chairman of the Commonwealth Legal Education Association, and is a Fellow of the British Academy. His recent books include *Blackstone's Tower: The English Law School* (Hamlyn Lectures, 1994), *Law in Context: Enlarging a Discipline* (Oxford University Press, 1997), *Globalisation and Legal Theory* (Butterworth, 2000), and *The Great Juristic Bazaar* (Ashgate, 2002).

Stefan Vogenauer is Fellow at the Max Planck Institute for Foreign Private Law and Private International Law, Hamburg.

Nick Wikeley holds the John Wilson Chair in Law at the University of Southampton, UK. His books include *Compensation for Industrial Disease* (Dartmouth 1993),

Judging Social Security (with John Baldwin and Richard Young, Clarendon Press, 1992), *Child Support in Action* (with Gwynn Davis and Richard Young, Hart, 1998), and *The Law of Social Security* (2002). He holds a part-time judicial appointment as a deputy Social Security Commissioner and is Honorary Secretary of the Society of Legal Scholars (formerly SPTL). He also co-edits the *Journal of Social Security Law* with Professor Neville Harris.

Sarah Worthington is Reader in Law, London School of Economics and Political Science.

CONTENTS

Introduction and Guide for the Reader ix

Notes on the Contributors xiii

PART I PROPERTY AND OBLIGATIONS

1. Contract 3
JAMES GORDLEY

2. Tort 21
JOHN C. P. GOLDBERG

3. Restitution 48
LIONEL SMITH

4. Property 62
MICHAEL A. HELLER

5. Equity 80
SARAH WORTHINGTON

PART II CITIZENS AND GOVERNMENT

6. The Nature and Functions of the State 101
MICHAEL TAGGART

7. Regulation 119
CHRISTINE PARKER AND JOHN BRAITHWAITE

8. Review of Executive Action 146
PETER CANE