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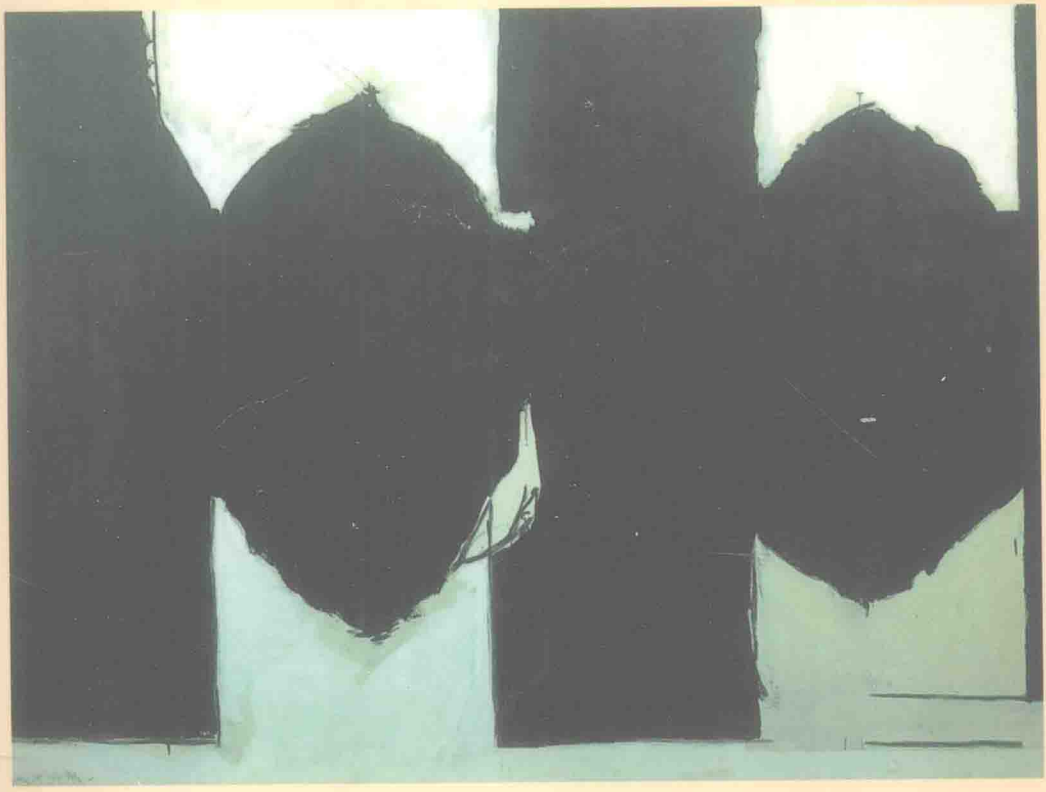
A Companion to Philosophy of Law and Legal Theory



Edited by

DENNIS PATTERSON

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A Companion to Philosophy of Law and Legal Theory

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Preface

It is the purpose of this preface to introduce a collection of essays on current topics in law and legal theory. Each of the essays that follow is an original contribution to the topic. In the course of this preface I wish to do two things. First, I shall state the overall plan of the work. Second, I would like to speak to the question of the readership of this book.

From the start, it was the goal both of the editor and the publisher to assemble the best writers in contemporary jurisprudence to address live issues in the field in the course of providing an introduction to the concerns of contemporary legal theory. Each of the authors was asked both to survey the topic assigned to them and, where appropriate, to indicate their own view of the questions and issues at stake. In short, it was the purpose of the editor and the publisher to have entries that would be of interest both to beginning students and other professionals.

There are two aspects to the question of readership. First, the book has a decidedly American perspective. This is no doubt due to the fact that the editor and most of the contributors are American legal academics. However, it is the student perspective, driven by the sizeable American law school population, which decided the orientation of many of the essays.

It is almost impossible in the modern American law school to encounter any subject matter that does not carry with it a heavy theoretical orientation. For example, in their first semester of law school, students are virtually barraged with all matter of theoretical perspective. Subjects ranging from philosophy to economics to critical theory are all very much a part of American casebooks and the teaching styles of American law professors. To date, no single volume has met the need of the beginning student to get a handle quickly on the vast and diverse theoretical landscape that is the first-year experience. This volume was conceived in direct response to this situation. It is the editor's hope that first-year students will find this volume a useful and rewarding supplement to their casebooks and other first-year materials.

I wish to thank all of the authors who contributed their time and talents to this volume. Many of the essays in this book are remarkable both in their pedogogical depth and originality of thought and presentation.

Let me thank my editors at Blackwell, Stephan Chambers and Steve Smith, for their patience and continuing support of this project.

D. P.

Contents

PART I

AREAS OF LAW

1

Property law

JEREMY WALDRON

Philosophical thought about the law of property covers two types of issue. First there are analytic issues, about the meaning and use of the most important concepts in property law, such as "private property," "ownership," and "thing." The second type of issue is normative or justificatory. The law of property, as we know it, involves individuals having the right to make decisions about the use of resources – the land and the material wealth of a country – without necessarily consulting the interests and wishes of others in society who might be affected. So what in general justifies giving people rights of this kind? And specifically, what principles justify the allocation of particular resources to particular owners? The two sets of issues are of course connected, for the point of sharpening our analytical understanding of concepts like "ownership" is to make clearer what is actually at stake when questions of justification are raised.

Analytical issues

Any attempt to define terms like "private property" and "ownership" runs the risk of either over-simplifying the complexities of property law or of losing any sense of the broader issues in a maze of technical detail. Some jurists have argued, indeed, that these terms are indefinable and largely dispensable (see Grey, 1980). They say that calling someone the "owner" of a resource does not convey any exact information about the rights she (or others) may have in relation to that resource: a corporate owner is not the same as an individual owner; the owner of intellectual property has a different array of rights than the owner of an automobile; and even with regard to one and the same resource, the rights (and duties) of a landlord who owes nothing on his property might be quite different from those of a mortgagor who lives on his own estate.

If one is patient, however, it is possible to build up a reasonably clear conceptual map of the area, which respects both the technician's sensitivity to legal detail and the philosopher's need for a set of well-understood "ideal types" to serve as the focus of justificatory debate (see Waldron, 1986, pp. 26–61).

The objects of property

Let us start with some ontology. The law of property is about *things*, and our relations with one another in respect of the use and control of things. What sorts of things? Material things, certainly, like apples and automobiles; but property has never confined itself to tangible objects. Real estate provides an interesting example. A mobile home is a thing, and so is the plot of land on which it sits. In the eyes of the law, however, the land is not a tangible object. It is tempting to identify the land with the soil and rocks on which the mobile home sits; but take away any amount of soil and rock and the land remains. The land is more like the region of space or the portion of the earth's surface at which the soil, the rock and indeed the mobile home are located. A different kind of intangibility is involved with intellectual property. My Madonna CD is a different material object from your Madonna cassette. But they contain the same songs and the songs themselves – the tunes and the lyrics – may be regarded as things in which there can be property rights just as much as apples and automobiles.

A third sort of intangibility involves the "reification" of legal relations themselves. If Jennifer owes Sarah 50 pounds and Sarah despairs of collecting the debt, she may accept a payment of 30 pounds from Bronwen, a specialist debt-collector, in return for which Bronwen acquires the right to recover the 50 pounds from Jennifer (if she can get it). It seems natural to say that Sarah has sold the debt to Bronwen and that therefore the debt was a thing that Sarah owned and had the right to dispose of even before Bronwen entered the picture. The legal term for this sort of thing is "chose-in-action." (More complex choses-in-action include checks and shares in a company.) Now, it may be helpful for some purposes, to regard choses-in-action as an appropriate subject-matter for property law, but in general they do not raise important issues in the philosophy of property in the way that land, intellectual property, and material chattels do. A composition, a plot of land, and an automobile are things which exist independently of the law and about which the law is required to make certain decisions, settle certain disputes, and so on. By contrast, a chose-in-action exists only because the law has *already* settled certain disputes in a particular way. The philosophical issues raised by a chose-in-action are thus better regarded as issues in the law of contracts or corporate law, not issues in the law of property.

The ontological differences between material chattels, land, and intellectual property can have an important bearing on questions of justification. In some ways there is a stronger case for private property in intellectual objects than for private property in land. An original tune that I have composed is, in a sense, nothing but a product of my will and intellect. Apart from my creativity, the song might never have come into existence, and anyone who complains about the profits I derive from my copyright must concede that she would have been no worse off if I had never composed the tune and thus never acquired a right in it at all. A piece of land, by contrast, is sheer nature rather than human product or invention. Or, if we define it as a region in space, land is simply what is *given* in advance of any individual's activity; it is part of the given framework for human life and action.