PHILOSOPHY OF LAW

EIGHTH EDITION

JOEL FEINBERG AND JULES COLEMAN

EIGHTH EDITION

PHILOSOPHY OF LAW

JOEL FEINBERG
Late of University of Arizona

JULES COLEMAN
Yale Law School

THOMSON
WADSWORTH

AUSTRALIA • BRAZIL • CANADA • MEXICO • SINGAPORE
SPAIN • UNITED KINGDOM • UNITED STATES

THOMSON
WADSWORTH

Philosophy Editor: *Worth Hawes*
Assistant Editor: *Barbara Hillaker*
Editorial Assistant: *Patrick Stockstill*
Technology Project Manager: *Julie Aguilar*
Marketing Manager: *Christina Shea*
Marketing Assistant: *Mary Anne Payumo*
Marketing Communications Manager: *Darlene Amidon-Brent*
Creative Director: *Rob Hugel*
Executive Art Director: *Maria Epes*
Print Buyer: *Karen Hunt*

Printed in the United States of America
1 2 3 4 5 6 7 11 10 09 08 07

Permissions Editor: *Roberta Broyer*
Production Service: *Matrix Productions*
Text Designer: *Lisa Henry*
Copy Editor: *Pat Herbst*
Cover Designer: *Yvo Riezebos Design/Matt Calkins*
Cover Image: *Hisham Ibrahim/Photographers Choice/ Getty Images*
Text and Cover Printer: *West Group*
Compositor: *International Typesetting and Composition*

Thomson Higher Education
10 Davis Drive
Belmont, CA 94002-3098
USA

Library of Congress Control Number: 2006936436

ISBN-13: 978-0-495-09505-7
ISBN-10: 0-495-09505-2

PREFACE

THERE IS CURRENTLY a widespread and truly philosophical perplexity about law, occasioned by the events of the day and the legal proceedings to which they give rise. Increasing numbers of students have been attracted to courses in philosophy of law and social philosophy, and law students, constantly challenged by the theoretical dimensions of law school subjects, are prompted more than ever to enroll in jurisprudence courses. These students are often disappointed by what seems to them an excessively abstract approach. Portentous terms such as *law*, *morality*, and *justice* are manipulated like counters in an uncertain game, and hoary figures from the past are marched by, each with a distinctive dogmatic pronouncement and a curious technical vocabulary. No wonder traditional jurisprudence often seems among the driest and most remote of academic subjects.

We have tried in this volume to relate the traditional themes of legal philosophy to the live concerns of modern society in a way that invigorates one and illuminates the other. The volume begins with essays by classic and contemporary figures on the essential nature of law and on the relation of law to morality or to other sources of principle outside the legal system. No attempt is made to give contending doctrines equal time or even to give them all a day in court. We have passed over much excellent material that might have been included, though this is sure to cause some displeasure in an area of jurisprudential concern that is so marked by doctrinal partisanship. Our endeavor is not to represent every important point of view, or to represent any in a truly comprehensive way, but instead to offer a series of selections that raise sharply the most important issues. Many of these philosophical issues debated in the first part recur later in the book, where authors take up specific problems about liberty, justice, responsibility, and punishment.

Though this eighth edition continues to be organized into three distinctive parts, it represents the most extensive and substantial revision to date. Part One focuses on a range of issues organized around the traditional problems of jurisprudence. Even so, there is a new subsection on International Law, another on so-called Critical Theories of Law. Part Two is organized around central principles of political morality that are embodied in law and which limit and justify the exercise of the state's coercive authority. A new subsection on Terrorism and Torture has been added, court cases have

been updated, and the book now includes sections of the Yoo memo on torture and an edited version of *Hamdan v. Rumsfeld*. Part Three is organized around issues that arise in the philosophy of particular areas of the law. There is a new introductory subsection on general issues in the theory of responsibility, and the rest of the section has been extensively revised to reflect the most important issues currently at stake in the criminal law, tort law, contracts and property. In particular, the subsection on property has been radically revised and now includes discussions of issues pertaining to the internet and to the legality of patenting life forms.

Roughly one half of the book has been changed. These revisions are all designed to make the book more broadly accessible and to reflect pressing issues of the day. My aim was to make changes that reflect Joel Feinberg's initial vision for the book while honoring his memory. The reader will decide if I have succeeded.

I have benefited from the advice of many professors who have used some or all of the earlier editions of this book. I am especially indebted to David Londow and Bette Evan (as well as to the circle of their friends who have used the book) for invaluable suggestions and comments on the book's various revisions. I have learned more about the book from them than I have from using it in my own courses. In addition to contributing an original essay on terrorism, my colleague, Matthew Noah Smith provided invaluable guidance and support, for which I am extremely grateful. I owe a special debt of gratitude to the research assistants who have worked on this project: Gwendolyn Bradford, Christina Rulli, and Brodi Kemp. Gwen, in particular, worked tirelessly on the project. I relied heavily on her judgment in determining which essays to remove and which to include. Gwen and Tina displayed exemplary editorial skills, which I hope are reflected in this edition having far fewer typos and technical glitches than have previous editions. I could not have completed this project without the help of all of these assistants.

The most difficult aspect of this project was confronting the loss of Joel Feinberg, who in addition to being my teacher and mentor was my friend, colleague and confidant as well. I know of no one who has ever represented the academic profession with more grace and integrity. Joel taught me not only how to be a philosopher, but how to treat people. I will be forever grateful for both of these lessons in life.

Finally, we would like to thank the reviewers of this edition: Jerome Balmuth, Colgate University; Brian Bix, University of Minnesota, Minneapolis; Patrick Bolyen-Fitzgerald, Lawrence University; Susan Brison, Dartmouth College; Frank Colucci, Purdue University, Calumet; James Ford, Rogers State University; Paul M. Hughes, University of Michigan, Dearborn; Marc Joseph, Mills College; Judith Lichtenberg, University of Maryland, College Park; Michael Papazian, Berry College.

CONTENTS

PREFACE ix

PART ONE

The Nature of Law 1

1 The Natural Law Tradition 8

1 SAINT THOMAS AQUINAS: *Selections from* On Law, Morality, and Politics 8

2 LON L. FULLER: *Eight Ways to Fail to Make Law* 13

3 MARK C. MURPHY: *Natural Law Jurisprudence* 17

4 JEREMY BENTHAM: *Of Laws in General* 36

5 LON L. FULLER: *The Case of the Speluncean Explorers* 37

2 Legal Positivism 55

6 JOHN AUSTIN: *A Positivist Conception of Law* 55

7 H. L. A. HART: *Law as the Union of Primary and Secondary Rules* 68

8 JULES L. COLEMAN: *Negative and Positive Positivism* 84

9 JOSEPH RAZ: *Institutionalized Normative Systems* 101

3 Legal Realism and Skepticism 117

10 JEROME FRANK: *Legal Realism* 117

11 O. W. HOLMES, JR.: *The Path of the Law* 120

12 K. N. LLEWELLYN: *Ships and Shoes and Sealing Wax* 126

4 Principles and Legal Interpretation 134

13 RONALD DWORKIN: *Integrity in Law* 134

14 ANTONIN SCALIA: *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* 151

15 RONALD DWORKIN: *Comment* 161

5 Critical Theory 170

16 JÜRGEN HABERMAS: *Constitutional Democracy: A Paradoxical Union of Contradictory Principles?* 170

17 CATHARINE A. MACKINNON: *Difference and Dominance: On Sex Discrimination* 180

6 International Law 192

18 H. L. A. HART: *Is International Law Law?* 192

19 UNITED STATES SUPREME COURT, 2005: *Roper v. Simmons* 205

7 Is There a Moral Obligation to Obey the Law? 206

20 PLATO: *Crito* 206

21 M. B. E. SMITH: *Is There a Prima Facie Obligation to Obey the Law?* 214

22 MARTIN LUTHER KING, JR.: *Letter from Birmingham Jail* 231

PART TWO

The Political Morality of Law 241

8 Liberty 251

23 JOHN STUART MILL: *The Liberal Argument from* On Liberty 251

24 ARTHUR RIPSTEIN: *Beyond the Harm Principle* 263

25 GERALD DWORKIN: *Paternalism* 281

9 Equality 292

26 HARRY FRANKFURT: *Equality as a Moral Ideal* 292

27 JOSEPH RAZ: *Equality* 308

28 KIM LANE SCHEPPELE: *The Reasonable Woman* 322

29 COURT OF APPEALS OF MARYLAND, 1981: *State v. Rusk* 327

30 SUPREME COURT OF NEW JERSEY, 1984: *State v. Kelly* 331

31 UNITED STATES SUPREME COURT, 2003: *Grutter v. Bollinger* 336

10 Rights 347

32 JOEL FEINBERG: *The Nature and Value of Rights* 347

33 JULES L. COLEMAN AND JODY KRAUS: *Rethinking the Theory of Legal Rights* 357

34 H. L. A. HART: *Are There Any Natural Rights?* 368

11 Privacy 377

35 ROBERT H. BORK: *The Right of Privacy: The Construction of a Constitutional Time Bomb* 377

36 LESLIE GREEN: *Sexuality, Authenticity, and Modernity* 380

37 UNITED STATES SUPREME COURT, 1973: *Roe v. Wade* 392
38 UNITED STATES SUPREME COURT, 1992: *Planned Parenthood of S.E. Pennsylvania v. Casey* 397
39 UNITED STATES SUPREME COURT, 2003: *Lawrence v. Texas* 401

12 Freedom of Expression 409

40 CATHARINE A. MACKINNON: *Not a Moral Issue* 409
41 UNITED STATES SUPREME COURT, 1971: *Cohen v. California* 426
42 SUPREME COURT OF ILLINOIS, 1978: *Village of Skokie v. National Socialist Party of America* 430
43 UNITED STATES SUPREME COURT, 1980: *PruneYard Shopping Center et al. v. Robins et al.* 434
44 JOEL FEINBERG: *Offensive Nuisances* 438

13 Terrorism and Torture 456

45 MATTHEW NOAH SMITH: *The Moral Significance of Terrorism* 456
46 JOHN YOO AND ROBERT J. DELAHUNTY: *Application of Treaties and Laws to al Qaeda and Taliban Detainees* 471
47 UNITED STATES SUPREME COURT, 2006: *Hamdan v. Rumsfeld* 479
48 ALAN M. DERSHOWITZ: *Should the Ticking Bomb Terrorist Be Tortured?: A Case Study in How a Democracy Should Make Tragic Choices* 497
49 JEREMY WALDRON: *Torture and Positive Law: Jurisprudence for the White House* 509

PART THREE

Philosophy and the Law 531

14 General Principles of Responsibility 545

50 H. L. A. HART AND A. M. HONORÉ: *Causation and Responsibility* 545
51 JOEL FEINBERG: *Action and Responsibility* 558
52 TONY HONORÉ: *Responsibility and Luck: The Moral Basis of Strict Liability* 574

15 Punishment and Responsibility 590

53 SANFORD H. KADISH AND STEPHEN J. SCHULHOFER: *The Case of Lady Eldon's French Lace: A Hypothetical Decision on a Hypothetical State of Facts* 590
54 DAVID LEWIS: *The Punishment That Leaves Something to Chance* 595
55 JOHN GARDNER: *The Gist of Excuses* 604
56 NEW YORK COURT OF APPEALS, 1962: *People v. Young* 615

57 NEW JERSEY SUPREME COURT, 1963: *State v. Guido* 618
58 HOUSE OF LORDS, 1843: *The M'Naghten Rules* 620
59 AMERICAN LAW INSTITUTE: *The Insanity Defense* 621
60 JOEL FEINBERG: *The Classic Debate* 624
61 JOEL FEINBERG: *The Expressive Function of Punishment* 629
62 HERBERT MORRIS: *Persons and Punishment* 641
63 JEFFRIE MURPHY: *Forgiveness and Resentment* 655
64 STEPHEN NATHANSON: *Should We Execute Those Who Deserve to Die?* 665
65 UNITED STATES SUPREME COURT, 1972: *Furman v. Georgia* 674

16 Torts and Compensation 685

66 JOHN GARDNER: *Obligations and Outcomes in the Law of Torts* 685
67 STEPHEN R. PERRY: *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice* 706
68 JULES COLEMAN AND ARTHUR RIPSTEIN: *Mischief and Misfortune: Annual McGill Lecture in Jurisprudence and Public Policy* 722
69 SEANA VALENTINE SHIFFRIN: *Wrongful Life, Procreative Responsibility, and the Significance of Harm* 745
70 NEW YORK COURT OF APPEALS, 1928: *Palsgraf v. The Long Island Railroad Co.* 767
71 SUPREME COURT OF CALIFORNIA, IN BANK, 1948: *Summers v. Tice* 774
72 SUPREME COURT OF CALIFORNIA, 1980: *Sindell v. Abbott Laboratories* 778
73 SUPREME COURT OF MINNESOTA, 1905: *Mohr v. Williams* 795
74 COURT OF APPEALS OF NEW YORK, 1978: *Becker v. Schwartz* 799

17 Contract 809

75 ANTHONY T. KRONMAN: *Contract Law and Distributive Justice* 809
76 CHARLES FRIED: *From* Contract as Promise 829
77 RANDY E. BARNETT: *Should the "Intention to Create Legal Relations" Be a Criterion of Enforceability?* 850
78 RICHARD CRASWELL: *Contract Law, Default Rules, and the Philosophy of Promising* 856
79 SEANA VALENTINE SHIFFRIN: *Paternalism, Unconscionability Doctrine, and Accommodation* 873
80 SUPREME COURT OF NEW JERSEY, 109 N.J. 396, 537 A.2D 1227 (1987): *In RE Baby M* 892

81 SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1825: *Mills v. Wyman* 895

82 SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1973: *Sullivan v. O'Connor* 897

18 Property 902

83 A. M. HONORÉ: *Ownership* 902

84 JOHN LOCKE: *From "Of Property"* 923

85 DAVID HUME: *From* A Treatise of Human Nature 930

86 JEREMY WALDRON: *Two Worries about Mixing One's Labour* 941

87 ROBERT H. LOWIE: *Incorporeal Property in Primitive Society* 946

88 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 2001: *A&M Records, Inc. v. Napster, Inc.* 954

89 UNITED STATES SUPREME COURT, 1980: *Diamond v. Chakrabarty* 960

PART ONE

The Nature of Law

THE QUESTION "What is law?" is often understood as a request to provide a definition of the word 'law'. This is a natural mistake, but a mistake nonetheless. The aim of jurisprudence is to provide an account of the nature of law, rather than a definition of the specific term. Law is a complex social practice, and a philosophical theory of law is an account of that practice, not a definition or an account of the semantic content of a word. Of course, the meaning of the term is bound up in interesting ways with the practice to which it refers, but an account of the content of the word is the province of the philosophy of language, not the philosophy of law. What kind of account of law is a philosophical theory of law? What kinds of questions does a philosophical account of law ask and answer, and what sort of illumination or understanding does it provide?

The most important figure in contemporary legal philosophy is H. L. A. Hart. In the first chapter of his book, *The Concept of Law,* Hart suggests that a jurisprudence seeks to explain central features of legal practice by exploring the relationship of law to other social practices to which it is related and with which it might be confused. Law seeks to regulate or govern human conduct. It does this largely through rules. Morality seeks to guide human conduct as well, also through rules. Law and morality, therefore, share the feature of guiding conduct through rules. Yet many moral norms are criticized on moral grounds, and many moral norms are not legally enforceable. Law and morality are related, but different. In what ways are they different, and what is the relationship between them?

Both law and morality claim to impose obligations. One difference, however, is that the obligations the law claims to impose are independent of the content of the law. A law requiring that individuals do X purports to impose a duty to X. This is so whatever X happens to be. Thus, the duty the law purports to impose is independent of the content of its rules. Rather, that duty depends on the fact of the rules' authoritative issuance. The same is not true of the obligations morality imposes. Their force is rooted in the substance of the claims morality makes on us. This difference is sometimes put as follows: Law imposes *content-independent reasons for action* whereas morality imposes *content-dependent reasons for action.*

Some have thought that because the obligations law imposes are independent of its content, the capacity of law to guide behavior must depend on its capacity to

sanction individuals who fail to comply with its demands. Such a view suggests that law is like a sanctioning system or a pricing mechanism. However, sanctioning systems and pricing mechanisms make no claim to obligate—law does. What then is the relationship between law and sanctioning systems?

According to Hart, a jurisprudential theory should reveal both the similarities and differences between law and morality, on the one hand, and law and systems of sanctioning on the other. It would do this by picking out features common to all legal systems—properties all legal systems share, whatever their differences. These properties help explain what is distinctive of governance by law and, in doing so, provide resources adequate to explain why governance by law is an attractive way of regulating and guiding human conduct.

A significant feature of law is its institutional structure. Positive law is the product of a legal system—a system of lawmakers, enforcers, and interpreters. A theory of the nature of law must be sensitive to this fact: Positive law is posited. It is created by actions and by actors who are authorized to do so. But what is the source of the authority to create, change, enforce, and interpret law? Can it be a matter only of power or must law's authority ultimately find its own legitimacy on a moral foundation?

In the history of legal philosophy, two major schools of thought have emerged based on the answers they provide to this question. According to the *natural law* tradition, legal authority rests ultimately and necessarily on law's connection to morality. Some versions of natural law theory are said to require of each putative rule that it can be law only if it is consistent with or meets the demands of morality. Morality is a condition of legality in much the same way as a rule duly enacted by an authorizing body. On other versions of natural law theory, morality is not a condition of legality so much as a condition for the legitimacy of a legal system as a whole. Laws are the products of legal systems, provided that: (1) they are duly authorized by the procedures of a legal system, and (2) the rules of the legal system are by and large consistent with morality. Perhaps the most important version of natural law theory argues not that each law must satisfy a moral test or that the laws of a community must as a general matter do so. Rather, in this view, the ultimate ground of legal authority is morality. Law's claim to impose moral obligations or duties by acts authorized according to its rules does not depend on each law passing a moral test, but is itself made possible by the fact that the law as a system of authority is rooted in morality. Law's authority must be conferred by morality.

According to the *legal positivist* tradition, there is no such connection between law and morality. Oftentimes, legal positivism is characterized in terms that suggest that it does little more than deny what the natural lawyer claims. If the natural lawyer claims that morality and law are necessarily connected, then legal positivism should be understood as the doctrine that there is no necessary connection between law and morality. If the natural lawyer means by this that in order to be a law a rule must satisfy the demands of morality, then legal positivism is the view that morality is not necessarily a condition of legality. If the natural lawyer means that nothing can be a legal system unless the vast majority of its rules measure up to the demands of morality, then legal positivism is the view that there can be legal systems in which this is not the case. Hart famously held that every legal system must provide certain morally significant benefits for its citizens, but he did not mean to suggest that rules, individually or collectively, must pass a moral test in order to be law.

Finally, if natural law theory claims that the authority of law is ultimately conferred by morality, then legal positivism is the view that this is not true. Legal

authority is made possible, not by law's ultimate connection to morality, but by something else—a *social fact,* and not the possession of a moral authority. An example of this line of argument might be helpful. The famous nineteenth century legal positivist, John Austin, suggested that the foundation of law is power and will. Law is the command of a sovereign, someone whose commands others habitually obey, but who does not habitually obey others. The source of the habit of obedience may be the power to threaten sanctions for noncompliance, and not the moral authority of the sovereign's commands. Austin's answer has been roundly criticized not just by natural lawyers but by every important legal positivist who has followed him, most notably Hart. Much interesting writing in contemporary legal positivism has focused on offering a more plausible answer to this question than Austin's.

Whereas most legal positivists and natural lawyers have focused on whether morality is a condition of legality, they have left other important questions largely untouched. However norms become law, we still have to ask how they are to be interpreted. How is someone—typically a judge—to determine what a law means or what the law requires? There are in fact two different but related issues involved in interpreting legal rules. Let us imagine a legal system in which we can identify all the binding legal sources—statutes, judicial opinions, executive orders, and the like—in virtue of their authoritative source. The first question to ask is, what do these statutes, orders, and precedents mean? A good example is the "cruel and unusual" punishment clause of the Eighth Amendment to the U.S. Constitution. What does the term 'cruel' mean in this context? One view, sometimes referred to as 'originalism,' holds that the term 'cruel' today means exactly what the framers of the Constitution meant by it. That view does not by itself settle the matter, for we still need an account of the intentions of the framers. In other words, we might agree that 'cruel' means today whatever the framers of the Constitution meant by it, but how are we to figure out what the framers meant by 'cruel'? In using the term 'cruel,' we can agree that the framers meant to refer to some acts, but not to others. But which ones? On one view, we can suppose that the framers meant to pick out those acts that they believed were cruel at that time or those which most of their contemporaries would have identified as cruel. Alternatively, the framers were men of the Enlightenment. They possessed a notion of progress, and so we might suppose that they meant for the clause to pick out actions that, at any given time in the country's history, would count as cruel according to the best theory of cruelty at that time, or according to what most individuals would, at that point, regard as cruel. Therefore, the first project of interpretation is to determine the semantic content or the meaning of the authoritative acts that constitute the community's law. This is no easy matter, as the previous example illustrates.

But there is more to interpretation than this. Imagine now that we have identified all the binding legal standards within our hypothetical community, and have determined what each individually means. We now have to figure out what the law of our community permits and requires of us, for the law is not just the long list of all the authoritative standards and their meanings. The force or content of the law is a result of how those authoritative texts are conjoined and combined with one another. It is a function of the practices of our community for connecting the standards to one another and weighing them against one another, and of the principles that inform and regulate that practice. A judge presents a decision and opinion in a case. That opinion is an authoritative text. Another judge presents a decision and offers an opinion in another case that explicitly contradicts the decision

in the first case. What is the law on the matter as it comes before a judge in yet a third case? The answer to that question will depend in most jurisdictions on the relative levels of the courts. Was the judge in the second case sitting on a superior or inferior court? Were the two courts in distinct jurisdictions? Which decision came before the other? Now a legislature enacts a statute that supports the first judge and contradicts the second. What is the status of the law when a controversy arises before a third judge? Again, the answer will depend on whether our legal community is a democracy that defers to the legislature, whether the legislature has acted within the scope of its authority, and so on. These and other questions provide a lens through which we may look at the law from the perspective of those who apply it, and whose task it is to determine the law's content.

THE NATURAL LAW TRADITION

St. Thomas Aquinas claimed that "Law is nothing else than an ordinance of reason for the promotion of the common good, made by him who has the care of the community, and promulgated." Reference to morality (or to that part of morality called justice) is an essential part of any account of what law is. Morality is not simply a desirable feature to import into law, but rather an essential part of law as it really is. No adequate test of the validity of a legal rule, or the existence of a legal system, could possibly be content neutral, since it is usually the content of a rule that determines whether it is fair or unfair, reasonable or unreasonable. That is, simply to pronounce the obvious truth of whether or not a given rule is (say) fair depends at least in part on what sort of conduct it requires, permits, or prohibits, or in other words on its *content.* More than that, it depends not only on the law's content, but our moral assessment of its content.

LEGAL POSITIVISM

John Austin's *The Province of Jurisprudence Determined* was published in England in 1832, and it has long been regarded in the Anglo-American tradition as the leading work in opposition to natural law theory. It is an exceedingly careful work of great range and refinement. The portions reprinted here set forth only the essentials of Austin's views about the nature of law. His theory has been one of the first to be studied by English-speaking students for over a century and a half now, so it is no wonder that it has called forth more abundant criticism than any other theory.

A consensus has formed over the difficulties encountered by Austin's sort of positivism, the most authoritative statement of which is that of the leading twentieth-century positivist, H. L. A. Hart, in his seminal work, *The Concept of Law,* published in 1961. In our selection from that work, Hart analyzes the concept of a legal system as a union of two kinds of rules. The first, like an ordinary criminal statute, prohibits, requires, or permits specific kinds of conduct.

The second type of rule confers powers on persons to create, to revise, or to terminate specific legal relationships (for example, creditor–debtor, husband–wife, seller–buyer). The full statement of a power-conferring rule will function in a way similar to that of a recipe: The rule is a set of directions for changing our legal status in some respects, and doing so voluntarily. Such rules tell us how to get married, how to get divorced, how to make out a will, and so forth. Of prime interest among these secondary rules, as Hart calls them, are those telling us how to make, revise, or

revoke primary rules. Late in the selection, Hart addresses the concept of legal validity and develops a much more subtle account than Austin's of a "rule of recognition" that enables judges to distinguish legitimate from spurious claims of legality, and to do so in ways that need not depend on assessing the merits of particular rules.

After Hart, the person who has probably had the greatest impact on the philosophy of law in our time is Hart's successor in the Chair of Jurisprudence at Oxford, Ronald Dworkin, an American. Even when legal positivism was riding high at Oxford, partly because of Hart's influence, Dworkin was publishing articles meant to expose its defects. In "The Model of Rules," he argues that there is much more to a system of law than rules, even when primary rules are supplemented by secondary ones. Any full-fledged system of law will also contain what Dworkin calls principles, a miscellany that includes in its precise and narrow sense such moral precepts as "No man may profit by his own wrong." The latter principle was a part of the law, Dworkin argues, that was violated when a trial court permitted Elmer Palmer to inherit money from his grandfather, even though Elmer had been convicted of murdering the testator (before he could change his mind). Needless to say, the will was invalidated through a civil suit brought by two daughters of the testator, even though no rule (in Hart's sense) seemed to be violated. Even the dissenting opinion in this case seemed to invoke a Dworkinian principle, namely that courts have no warrant, in the absence of explicit legislative authorization, to "add to the respondent's penalties by depriving him of property."

Dworkin's important objections to Hart's legal positivism spawned a range of responses. These responses have led to a division among legal positivists. One of Dworkin's important claims is that moral principles are binding on judges in deciding hard cases. No positivist denies this point. Exclusive Legal Positivists argue that not every standard that is binding on judges is binding because it is the law of that jurisdiction. This is a common enough phenomenon. In a conflict of law case, an American judge may be required to apply the contract law of France in a particular case. That does not make the law of France part of the law of the United States. Similarly, moral principles can sometimes be binding on judges without those principles being part of the law. Inclusive Legal Positivists are prepared to accept that moral principles can be both binding on officials and part of the law of the community. In their view, what makes such moral principles part of the law is the fact that officials so treat them, not their value as moral principles. Both of these approaches to Dworkin's objections to positivism are canvassed and developed in Coleman and Leiter's essay on legal positivism.

LAW AND PRINCIPLES

"Integrity in Law" is an excerpt from Dworkin's book *Law's Empire* and develops in outline Dworkin's full theory of the nature of law. He argues first that every theory of law must be understood as an interpretive theory. An interpretation contains two elemental aspects: fit and value. A theory of law must take seriously all previous legal pronouncements in a way that makes them cohere with one another. In addition, it must see the law, so conceived, in its best light—that is, as expressing a desirable or attractive value, something that would make one's participation in law rational and grounded in reason. Answering the question "What is the law on a particular matter?" the judge must construct a theory of law. That theory must respect past political decisions, and thus the judge can be seen as authoring

the latest chapter in what we might think of as a "chain novel." Harkening back to our earlier discussion, this chapter outlines Dworkin's theory of legal content.

Hart, Dworkin, and Joseph Raz have been influential in the American legal academy, but more so among legal philosophers than among law professors more generally. American legal academics are in the main neither positivists, natural lawyers, nor interpretivists. They are realists. No single essay in Anglo-American jurisprudence has received more attention than Oliver Wendell Holmes's "The Path of the Law," first published in 1897. His famous declaration that "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law" became the cornerstone of legal realism in America. How such prophecies are best made is a matter that occupies much of Holmes's attention in the selection that is included here. The brief selection that follows next is from the writings of another distinguished American judge, Jerome Frank. Here one sees how the law appears to those who wish to use it and not simply make it the subject of a body of theory. A legal saga unfolds as the affairs of the Joneses and the Williamses are put in the hands of their lawyers, and the conception of law that emerges gives weight to Holmes's opening remark: "When we study law we are not studying a mystery but a well known profession."

Whereas most realists hold a version of the view that the law is whatever judges say it is, and that legal texts are mere sources of law, the more persuasive view is that the law has a determinate content on most matters prior to a judge's resolution of a particular case. The judge is bound by the law, and reaches her decision in light of it. But that does not mean that the job of a judge is an uncreative one. Quite the contrary, it often falls to a judge to determine what the law is; that is, as we have noted, an interpretive project. In carrying out this project it is, as we have previously noted, important to distinguish between two questions: First, what do the authoritative legal texts say, that is, what is their meaning? And second, how do those meanings, and any other relevant considerations, add up to yield the requirements of the law generally, and in any particular case? What obligations does the law impose and what rights does it confer?

The more philosophical a judge or scholarly commentator is, the more likely he or she is to pause frequently to ask just what the rules are in the game of interpretation. What makes an authoritative interpretation of a short and cryptic constitutional passage? Does the interpreter find all the clues inside the text itself? Or are there principles of justice outside the text to which he or she can legitimately refer in order to make better sense of the few clues provided by the text itself? Is evidence of the founding fathers' intentions ever relevant? Is it ever not relevant? Is anything apart from such evidence ever relevant? The Scalia-Dworkin debate is best understood in this light. Both authors treat the founders' intentions as decisive in interpreting clauses like the "cruel and unusual" clause. They disagree as to how those intentions are to be understood.

THE MORAL OBLIGATION TO OBEY THE LAW

One familiar view is that citizens in a democracy have a ***moral*** obligation—parallel to their moral obligations to keep promises, tell the truth, oppose injustice, and so on—to obey the valid laws of their country. One might similarly affirm that any individual judge in a functioning democracy whose institutions are more or less just has a moral obligation of fidelity to the law that he or she is sworn to apply impartially to others.

Each standard theory then must give some account of the basis for this moral obligation (if there is one) and some explanation of how it can fail to apply—as when, for example, ***disobedience*** (or judicial nullification) is morally justified.

In Plato's dialogue, *The Crito,* Socrates—condemned to death by the council of Athens—explains his decision to submit to that judgment. Despite his confident belief that the death sentence passed upon him is wrong, and despite the ready option of an escape aided by his friends, Socrates argues that he has a moral duty to obey the laws of the city. The powerfully eloquent "Letter from Birmingham Jail" by Martin Luther King, Jr., is another classic in the history of political action and theory, philosophy, and legal theory. King justifies his resistance even to "legal" racial segregation by appealing to a "higher law" version of natural law theory. King is the model civil disobedient. These concerns are given a more philosophically sophisticated treatment in the essay by M. B. E. Smith.