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The Philosophy of Law

edited by
R. M. Dworkin

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INTRODUCTION

THE philosophy of law studies philosophical problems raised by the existence and practice of law. It therefore has no central core of philosophical problems distinct to itself, as other branches of philosophy do, but overlaps most of these other branches. Since the ideas of guilt, fault, intention, and responsibility are central to law, legal philosophy is parasitic upon the philosophy of ethics, mind, and action. Since lawyers worry about what law should be, and how it should be made and administered, legal philosophy is also parasitic on political philosophy. Even the debate about the nature of law, which has dominated legal philosophy for some decades, is, at bottom, a debate within the philosophy of language and metaphysics.

It follows that no limited selection of articles can represent the full range of legal philosophy. This collection includes essays about the concept of law, and essays that fall in the overlap between legal and political philosophy. It includes no essays drawn from the philosophy of mind and action and none about the important institution of punishment, because many of the most influential essays on these topics, written by H. L. A. Hart, have recently been published in a separate collection.[1] Whenever possible, essays have been chosen that have provoked direct responses from other legal philosophers. In two cases these responses are included, and in other cases they are noticed in a footnote at the beginning of the essay. Essays have also been chosen to cast doubt upon the familiar assumption that the philosophy of law is a discipline separate from the practice of law. The essays in this collection suggest that legal philosophy is not a second-order study that takes ordinary legal reasoning as its subject but is, on the contrary, itself the nerve of legal reasoning.

I

The long debate about the concept of law has different facets. Law exists in at least three different senses, each of which is problematical. (a) There is *law* as a distinct and complex type of social institution. We say that 'law'

[1] Hart, *Punishment and Responsibility* (Oxford, 1968).

is one of the proudest achievements of man, or that 'law' is an instrument through which the powerful oppress the weak, or that 'law' is more primitive in some societies than in others. (b) There are *laws*, or *rules of law*, as distinct types of rules or other standards having a particular type of pedigree. We say that Parliament passed 'a law' taxing capital gains, or that Congress has enacted a series of 'laws' providing remedies against pollution, or that the courts have developed 'rules of law' about how offers of contract are made and accepted. (c) There is *the law* as a particular source of certain rights, duties, powers, and other relations among people. We say that 'the law is' that a doctor is responsible for damages caused by his negligence, or that 'the law provides' that a person has a right to leave his property to whomever he pleases, or that 'it is a principle of the law' that no man may profit from his own wrong. I shall call propositions of this last sort 'propositions of law' to distinguish them from propositions about law as a social institution and propositions about laws or legal rules.

These three ideas of law are plainly connected, so that a philosophical problem or theory about one idea will match a problem or theory about the others. It is nevertheless useful to distinguish these different ideas, and the problems they generate.

(a) *Law as a type of social institution.* We understand the idea of law as an institution well enough to know that Great Britain and Massachussetts and Uganda all have law, and why it might be doubtful whether a primitive society, with much less complex institutions, has law or not. Lawyers and philosophers dispute, not over such borderline cases, but about whether certain features present in standard cases of law are necessary, as some philosophers claim, or simply accidental, as others insist. It is debated, for example, whether law can exist only when the population has a certain attitude towards those who govern them, and, if so, what that attitude must be. Bentham, Austin, and their followers said that law exists whenever a population has developed the habit of obedience to the commands of a person or group not similarly in the habit of obeying the commands of others. According to this view, it is the habit of obedience to those who in fact have power, not the different motives or attitudes that may have nurtured that habit, that is decisive.

Hart has been a powerful critic of this command theory. Essay I gives some of his objections, and a later book provided many more.[2] He and his supporters argue that law does not exist unless the population, or at least that part of the population that administers the law, accepts a rule that gives those who exercise power the authority to do so. They must, that is, have developed not simply a habit of deferring to power but a sense that the power

[2] Hart, *The Concept of Law* (Oxford, 1961).

is legitimate because exercised in accordance with some constitutional rule they accept. Hart and others who hold this view have not yet made sufficiently clear, however, what attitudes distinguish a habit of obedience from the acceptance of constitutional rules by a people or by subordinate officials. Is it necessary, in order to say that someone accepts the rules of a constitutional system, that he believes that that system is just, or that he would consent to the system if given any genuine choice? If this is necessary, then there is great doubt, at least, whether there was law in Nazi Germany, or whether there is now law in South Africa. If not, then it remains unclear why an official, who has developed a disposition to obey the commands of a particular group out of fear, has not in the required sense accepted the constitutional rule that that group has authority to govern; but if that is so, then the difference between the rule theory and the command theory is much narrowed.

A second and related dispute has been even more prominent in recent argument. Is it necessary, in order for a particular system of government to count as law, that the regime obey certain procedural standards of morality, or that the rules they enforce themselves have a certain moral content? Hart shows, in Essay I, how much care is necessary to disentangle this issue from others often thrown together under the title 'law and morals'. He argues that the claim that law must have a minimal moral content is true only in a much less interesting way than many legal philosophies suppose.

It might be tempting to think that these disputes about the idea of law as a type of social organization are merely linguistic; but that would be a mistake. This sense of the concept of law is in many ways built into legal principles and political attitudes, and it is important to understand how far that concept presupposes further principles of legitimacy and morality. The Nazi informer cases discussed in Essay I provide one example. The Fifth and Fourteenth Amendments to the United States Constitution, which require that state and federal governments must observe 'due process of law', provide another. Similar questions may be raised in other ways and in other institutions: for example, in courts called upon to decide whether, when a new government replaces an old one by revolution, courts are obliged to enforce the decrees of the new government as decrees of law.

(b) *Laws.* The idea of a law or a rule of law as a particular kind of rule presupposes the idea of law as a social institution, because only rules enacted or developed within such an institution can be laws. Any theory of law as an institution is likely to include or suggest a theory of what laws are. Since Austin, for example, thought that law exists when a population habitually obeys the general commands of one person or a group, he also thought that

laws are those commands. A theory about propositions of law will also include or suggest a theory about laws, because it will maintain some views about the way in which laws figure in the truth conditions of propositions of law. Recently, however, laws have become the object of a study distinct from these more general issues about law and propositions of law—the study of their logical character and structure.

Hart, among others, argues that rules of law fall into different logical categories that have distinct legal and social functions. He distinguishes primary rules, which are rules meant to guide the conduct of individuals and other legal persons, from secondary rules, which are rules about how primary rules are to be created or recognized. He also distinguishes duty-imposing rules, like the rule that taxes must be paid on capital gains, from power-conferring rules which, like the rules that allow people to make contracts, impose no duties but simply grant facilities that individuals may use or ignore.[3] In Essay I he shows how the latter distinction may be used to criticize theories about law as an institution and theories about propositions of law which provide no place for power-conferring rules. Dr. Raz, in a recent book, offers a more complex analysis.[4]

Lawyers traditionally assume that laws exist in systems of laws, which they call legal systems, and that each separate social organization that has law has a separate system of laws. There is, however, much that is unclear in that idea. Raz, among others, has called our attention to a variety of problems.[5] Can principles be laws, and members of a legal system? How do we decide where one legal system ends and another begins? How do we know that France and Britain have different legal systems, rather than sharing one legal system which has laws of different territorial application? How do we distinguish one law from another? How do we know that a particular law belongs to one legal system rather than to another? How do we know how many laws a complex statute, like the Internal Revenue Code or the Finance Act, adds to the legal system, or how many laws a system contains at any moment?

Questions like these force us to think more carefully about what laws are. Is a law constituted by a canonical verbal formulation, like the statutory words in which it is enacted, or which a court uses to formulate a new common-law rule, or which custom stipulates as the traditional form of a customary rule? Or is a law defined by the legal relations among persons that it creates, that is, the propositions of law that are true by virtue of the existence of that law? The answer we give to such problems will be different

[3] Ibid.
[4] Raz, *Practical Reason and Norms* (Hutchinson, 1975), particularly Chapter 3.
[5] Raz, *The Concept of a Legal System* (Oxford, 1970).

depending which of these two characterizations we accept. If a law is defined by its canonical verbal form, then the number of laws in a particular statute, or in the legal system as a whole, will depend upon some linguistic theory about basic sentences. If a law is defined by the propositions of law it makes true, then, since the same information about legal rights and duties can be conveyed by any number of different propositions of law of different levels of generality, the question of how many laws are contained in a particular statute, or in a legal system, will appear to be a question without an answer.

(c) *Propositions of law.* Lawyers use propositions of law to describe or declare certain relationships, particularly relationships of rights and duties, within the institution of law, and when they disagree about these relationships they argue about the truth of such propositions. They argue, for example, about whether the law, properly understood, provides that someone has a right to be compensated for economic damage he suffers because of an injury to someone else. Lawyers find difficulty, however, in setting out in any general way what such propositions mean, or, what comes to the same thing, the conditions under which they are true or false. There is a variety of theories in the field.

A group of academic lawyers who called themselves Legal Realists argued that the meaning of such propositions depends upon the context in which they are found. If a lawyer or a textbook writer asserts a proposition of law, he is simply predicting what legal officials, particularly courts, will do in particular cases. If he says, for example, that the law provides a remedy for pollution, then he is predicting that courts will hold a polluter in damages, or issue an injunction against him, if someone who is damaged so requests. If his prediction is right, then what he said was true; otherwise it was false. Of course, if a judge or some other legal official urges a proposition of law, in justification of his own decision, then he cannot be understood simply as predicting his own decision. He must be understood, instead, as expressing his approval of the state of affairs in which officials decide in the way he does. In that context, a proposition of law is neither true nor false, since it is only the expression of a political or moral opinion.

This answer to the question of what propositions of law mean is agreeably simple. But it cannot be accepted as a useful explanation of how lawyers and judges use such propositions. When a lawyer advises his client that the law taxes capital gains, he is not, or in any case not simply, predicting what the Tax Court will decide, but expressing his view that it would be right for the Court to reach that decision. When a judge says that the law allows recovery for economic damage, as he is about to order such damages paid, he means to offer a justification for his decision, not merely to say, redun-

dantly, that he approves of it. The Legal Realist position is not now widely defended.

In Essay II I describe and criticize a different and more persuasive answer, which I call the positivist theory, and which Hart shares with Austin and with another influential contemporary philosopher, Hans Kelsen. According to this theory propositions of law are true when they correctly describe the content of laws or rules of law; otherwise they are false. That theory presupposes, of course, a theory of what laws are, and of when they exist. Austin, Hart, and Kelsen provided different theories about laws, but their disputes, located in more general disputes about the nature of law as a social institution, are independent of the theory they share, that propositions of law are propositions about laws.

Essay II describes an objection to that theory. It argues that in novel cases lawyers and judges assert propositions of law that are controversial because they appeal not to rules of law, whose existence is a matter of institutional enactment, but to principles whose content and weight are often a matter of controversy. Controversial propositions of law can never be true by virtue of the existence of laws that they describe. If a proposition of law is seriously contested among reasonable lawyers after all the facts about what courts and legislatures have done in the past are known, then it is safe to conclude that no law has been enacted or adopted in virtue of which alone that proposition of law can be true. Controversial propositions of law are therefore an embarrassment to the positivist. He must argue either that all such propositions are simply false, even though lawyers constantly assert them, which seems perverse, or that they are not genuine propositions of law after all, and so need not be explained by his theory.

The second of these options seems more attractive. If he takes that option however, he must provide an alternative theory of the function of controversial propositions of law, a theory that shows why these are not simply propositions of law that are controversial, but are propositions of a very different kind. He relies for this purpose on the doctrine of judicial discretion. He argues that in common law countries judges have two relevant powers in addition to the power to decide what propositions of law are true. They have what he calls a discretion to decide for one or another of the parties to a lawsuit, if they think that justice or policy so requires, in spite of the fact that that party has no legal right to win. They also have power, in reaching such a decision, to enact a law for the future that creates that right. The positivist therefore maintains that controversial propositions are different from ordinary propositions of law, because the former are not descriptions but, in the mouths of judges, enactments.

In Essay II I criticize this doctrine of discretion. It is important to notice

a point not sufficiently brought out in my discussion. The positivist's theory of discretion is a *consequence* of his more general theory of propositions of law, not an *argument* for that theory. The theory assumes rather than supports the more general theory that controversial propositions of law cannot be true in a straightforward way. Suppose that a lawyer argues that his client, the plaintiff, has a right to recover for economic damage in tort, and counsel for the defendant disagrees. If no legal rule settles that question, then, according to the doctrine of discretion, the judge must decide whether to legislate a new rule providing for that right, and then settle the present case as if that right had already existed. But that view of the matter assumes the positivist's theory that, if no such rule already exists, then the plaintiff's proposition, that he already has the right, cannot be true. If the plaintiff's proposition *is* true, of course, then the judge has a duty to find in his favour, and no question of discretion, or of new and retroactive legislation, will arise. The theory of discretion therefore presupposes the positivist's more general theory about propositions of law, and it cannot be used to show why apparent counterexamples to that general theory may be disregarded.

The positivist therefore needs another argument to show why controversial propositions of law are not genuine propositions of law, and so may be disregarded. He may seek to find that argument in a certain philosophical theory about the concept of rights and duties. According to this theory, rights and duties exist only by virtue of commonly accepted rules of some form, either social rules, in the case of moral rights and duties, or legal rules, in the case of legal rights and duties. If this theory holds, of course, then all controversial propositions of law would be false if we took them at face value, that is, as asserting the legal rights and duties they seem to describe, and that would provide sufficient motivation for not taking them at face value.

This theory of rights and duties is important in moral and political as well as in legal philosophy, and it has been defended, not only by legal positivists, but by other philosophers whose principal interest is not law. But the grounds for the theory are nevertheless obscure.[6] It cannot be said simply to report the behaviour of those people who argue about rights and duties in morals and politics. The abolitionists argued that slaves had a right to be free, and that slave-owners had a duty to free them, when no social or legal rule existed to that effect. Civil rights groups, pacifists, vegetarians, and women's liberation groups make parallel arguments today. The rule theory of rights and duties supposes that these groups have made a philosophical mistake. But what mistake, and why is it a mistake?

The positivist cannot say that it is the mistake of supposing that non-

[6] See Dworkin, 'Social Rules and Legal Theory', 81 *Yale Law Journal* 855 (1972).

physical entities, like rights, can exist. Certain Legal Realists seemed to think that nothing can exist except physical things, and they relied upon that article of metaphysics to deny the possibility of such things as legal rights and duties and rules of law. But since the positivist believes in rules, and in rights and duties when provided by rules, he cannot rely upon crude physicalism for his view that rights and duties cannot otherwise exist.

I think that many positivists rely, more or less consciously, on an anti-realist[7] theory of meaning. They think that no sense can be assigned to a proposition unless those who use that proposition are all agreed about how the proposition could, at least in theory, be proved conclusively. Lawyers are agreed, according to positivism about how the existence of a law or a legal rule can be proved or disproved, and they are therefore agreed about the truth conditions of ordinary propositions of law that assert rights and duties created by rules. But controversial propositions of law, which assert rights that do not purport to depend upon rules, are another matter. Since there is no agreement about the conditions which, if true, establish the truth of such propositions, they cannot be assigned any straightforward sense, and must therefore be understood in some special way, if at all.

In this way a central and critical issue in the philosophy of law is also a central and critical issue in the philosophy of meaning. The anti-realist position has been defended in particular disciplines, particularly mathematics, and also as a general position. There are many enterprises, however, in which practice seems to challenge that general position. Scientists suppose that theories may be true even when they cannot be demonstrated to those who do not accept the general scheme of concepts in which the theory is drafted. Historians suppose that one explanation of events may be superior to others even though no method of demonstrating the superiority of historical positions has been agreed. Literary critics make the same assumption about competing interpretations of a novel or a play, and academics, including philosophers, make it when they mark essays or award prizes. Since the positivist offers no reason why the anti-realist position has special force in law, he seems to assume that that position must be right, and practice misconceived, in each of these enterprises.

There can be no effective reply to the positivist's anti-realist theory of meaning in law, however, unless an alternate theory of propositions of law is produced. That theory must assign a sense to controversial propositions of law comparable to the sense that controversial propositions in science, history, literature, and academic awards are supposed, by those who use

[7] I use 'anti-realist' as the term is used in the philosophy of language, not to describe a position contrary to Legal Realism. For a recent discussion of anti-realism, see Dummett, *Frege: Philosophy of Language* (London, 1973).

them, to have. It must at least show how disagreement about such propositions may seem genuine to lawyers and not, as the anti-realist position would insist, illusory. A recent article, which has not yet been tested by critical reaction, described a theory of adjudication that would have that consequence.[8] According to that theory, roughly summarized, controversial propositions of law are true just in case the political theory that supplies the best justification for non-controversial propositions of law provides for the rights or duties which the controversial proposition describes. Reasonable lawyers will differ as to which of two competing political theories provide a better justification for uncontroversial propositions of law, and no agreed test can be found to settle such disagreements. That fact accounts for the controversiality of the controversial propositions. But it also begins to explain how disagreements about such propositions can be genuine disagreements; certainly it shows how they can be as genuine as the disagreements in science, or history, or literary criticism just mentioned. This theory of propositions of law is therefore vulnerable only to anti-realist critiques so general as to include these enterprises as well as law. It remains to be seen whether any such general critique can be either made or refuted.

II

(a) *The enforcement of morals.* Legal philosophers worry not only about law as it is but also about law as it should be. This concern will, of course, have a different content at different times, because it will be aroused when the actual law, or some proposed law, seems to them unjust. One of the liveliest debates in modern legal philosophy, for example, was provoked by a recommendation of a law reform commission that the law against homosexuality should be made more lenient. In Essay III Sir Patrick Devlin, a prominent judge who later became Lord Devlin, objects to the reasoning, though not necessarily to the substance, of that recommendation. The commission argued that the criminal law should, as a matter of principle, respect John Stuart Mill's liberal theory that the only proper reason for limiting a person's liberty is that his act is likely to cause harm to others. It is never sufficient, according to Mill, that the act will harm the actor, or that it is immoral. Devlin objected that the law does not, nor should it, respect that limitation on its own authority. In Essay IV Hart replied. He conceded that the law might sometimes properly protect a man from himself, and thus far he conceded that Mill's principle was too strong. But he denied that it is ever proper to forbid an act which causes no harm either to others or to the actor, simply because the community considers the act immoral.

Liberals find Mill's doctrine attractive because it supports their view that

[8] See Dworkin, 'Hard Cases', 88 *Harv. L. Rev.* 1057 (1975).

it is wrong for the law to punish deviant sexual conduct, or to prohibit obscene books or plays, or to require religious observances. But it supports their view only on the assumption that no 'harm' to others follows if people are allowed to do what they like about sex or literature or religion. That assumption is, of course, controversial. Devlin's argument that society will fall apart without conformity in these matters is surely wrong, but the novel sexual or religious practices of any large group will have general social consequences that will change the social environment in which everyone must live, and those who regret that change will certainly suppose that they have been harmed.

It is not easy, however, to provide a definition of harm that will exclude these general social consequences and yet not prohibit, on Mill's principle, much social legislation that liberals find desirable. Many liberals argue, for example, that private schools should be abolished because the social divisions they foster are harmful to society as a whole. Is that justification consistent with Mill's principle? If we say that harm, within the meaning of that principle, is restricted to uncontroversial harm to particular people, then Mill's principle would not permit abolishing private schools. If we adopt a more generous definition of harm, such that the social consequences of permitting élitist education may count as harm within that definition, then the social consequences of permitting sexual licence may also count as harm. Mill's principle would then become, not a constitutional principle forbidding the government to decide whether a particular constraint on liberty would produce desirable consequences, but rather an invitation to government to consider just that question.

It is not only extreme egalitarian legislation, like laws forbidding private education, which raise this difficulty for Mill's principle. Much economic legislation is defended, not on the ground that it prevents direct harm to particular people, but because it creates an economic environment in which the community as a whole is able to prosper. Anti-trust laws, for example, and laws limiting production or development of scarce resources, are often defended in this way. Various forms of social legislation, including laws to improve race relations, are often justified along similar lines, and aesthetic regulations, like laws prohibiting the owners of buildings of historical interest from destroying or changing these buildings, are justified because they protect the environment or culture of the community as a whole, not because they prevent direct harm to particular individuals.

It remains for those who would support Hart's position against Devlin, therefore, to show why Mill's doctrine, or some comparable doctrine of liberty, condemns legislation against immorality but does not also condemn all legislation of this sort. Perhaps the attempt to distinguish between acts

that cause harm and those that do not should be abandoned, in favour of a different distinction between basic liberties, which should never be curtailed except to prevent direct and serious harm to particular people, and liberty in general, which may be constrained, as it often is, simply to secure what is thought to be some over-all gain in welfare. There is some support, in Mill's text, for the argument that he had some such view in mind, and the idea of basic liberties has since been defended, most notably by John Rawls.[9] If such an approach is to succeed, however, then it must be shown why a person's liberty to choose sexual partners, and to read what he likes, is a basic liberty, while the liberty to conduct his business or use his property as he wishes is not.

(b) *Civil disobedience.* Legal philosophers have also been provoked by another and much more intense political controversy. Under what circumstances is a person morally entitled to break the law of his country, and how should legal officials reply if he does? Much of the literature has been concerned to study the following distinctions. In some cases individuals break the law because they believe it would be immoral to do what the law commands, or immoral not to do what the law forbids. Pacifists, as well as those who believe that a particular war is immoral, refuse to obey the draft laws, and abolitionists refused to obey the fugitive Slave Laws, on that ground.

In other cases individuals break a law, not because what that law commands is immoral, but in order to protest against some other law, or against some policy of the government, which they believe to be unjust. Anti-war groups and civil rights demonstrators often violated laws against trespass, which they did not believe objectionable in themselves, in order to protest against war or segregation. In still other cases individuals break laws that they feel unfairly injure their own fundamental interests, not so much in order to call attention to the injustice they feel, but in order to exert political pressure for new legislation. Illegal strikes by municipal authorities and sit-ins by residents of a town to block a new airport are cases of that character. In some of these different sorts of cases the dissenters aim at a narrow reform in a structure of laws they generally approve. In others their purposes are more general, and sometimes embrace the destruction of the government, or even the form of government, that produced the law. In some of these cases those who break the law are ready, or even anxious, to be punished for their offences; in others they are unwilling to accept punishment, and attempt to evade it.

Philosophers have developed theories about how these different features of different cases affect the underlying question of when deliberate violation

[9] See Rawls, *A Theory of Justice* (Oxford, 1972).

of the law is justified, or even required. It is important to see that that underlying question may be put from two different standpoints: that of the prospective lawbreaker, who believes that the law or policy he is protesting against is unjust, and that of the legal official who generally believes that it is just. Both must take into account the fact that their views about the justice or injustice of the law or policy are controversial and disputed by others: Their answers might therefore depend, among other things, upon whether they hold an objectivist or subjectivist view about political morality. If they think that morality is simply a matter of taste, with no basis in any objective reality, then the dissenter must ask whether he is entitled to break the law, and the official whether he is entitled to prosecute, over a difference in taste. If they think that political morality is objective, then the consequences are more complex. They will no doubt think that their own views about justice are more imperative and demanding if objective, but they must also admit that if morality is objective, then anyone's views of what morality requires, including their own, may be wrong.

In Essay V John Rawls discusses the problems of civil disobedience from the standpoint of the prospective dissenter who believes that his society is on the whole (or, in Rawls's phrase 'nearly') just, but who believes that some particular act or decision is very unjust. Since Rawls discusses the general value to the community of tolerating disobedience under these circumstances, he also speaks from the standpoint of the officials who must be concerned to achieve these benefits. Rawls argues that each member of a just society has a responsibility himself to decide whether particular decisions offend the fundamental conception of justice the community shares, and therefore that each has a responsibility of disobedience, under certain circumstances, when he believes that those principles have been violated. The government's response must therefore recognize that the man or woman who disobeys the law, in the circumstances and for the reasons Rawls describes, is playing the role he or she must play as a full citizen of a well-ordered society.

In countries with a legal structure like that of Britain and the United States, the government's response lies in the hands of prosecutors, who have some discretion whether to prosecute those who have broken the law, and judges who have some discretion to vary the punishment for those found guilty. How should that discretion be exercised? If Rawls is right, prosecutors and judges should take the motives of political offenders into account, if these motives show that the offenders are playing the role in society which their fellow citizens should expect them to play. But prosecutors and judges must also take into account the competing rights of others whose rights the dissenter might deny. Their response to anti-war dissenters, who refuse to

be drafted, should be different from their response to anti-civil rights dissenters, who block the school house door to blacks, if the government believes that the second group, but not the first, is frustrating important rights of those who have a prior claim on the government's sympathy.[10]

(c) *Abortion and free speech.* The final group of essays discuss issues of political philosophy that the United States Supreme Court has recently had to consider, though these essays discuss general principles and not particular law suits. In Essay VI Judith Thomson identifies three questions. Is an unborn child a person? If so, does an unborn child have the same right to life as people already born? If so, is it always wrong for the mother of an unborn child to terminate its life in order to improve the mother's welfare? Much of the earlier debate about abortion argued over the first two of these questions. Thomson offers an ingenious (and now famous) argument designed to show that even if the first two questions are answered affirmatively, it does not follow that the third question should be answered the same way. She argues that the right to live generally conceded to those already born does not include a right that other people, who have no special responsibility for that life, provide the necessary means at the cost of great inconvenience to themselves.

John Finnis's reply is valuable, not simply because it defends the opposite view about abortion, but because it argues that it is wrong and pointless to conduct the debate about abortion as a debate about competing rights. Finnis believes that abortion is wrong, not because the balance of rights cuts against it, but because acts that take life in any circumstances, including suicide, deny the fundamental value of life, and so are wrong quite independently of any theory of rights. The issue he thus raises is of great importance, because it questions certain widespread assumptions about the justification that is needed for any constraint on liberty.

A coherent political theory, such as might be used to justify the law of a community as a whole, must be grounded at bottom either in some idea of the collective welfare of citizens, or in some conception of their political and social rights, or in some theory of their moral duties.[11] Any political theory will, of course, make use of all these ideas, but it may arrange the collective goals, individual rights, and individual duties in such a way as to make one set of these fundamental and the others derivative. It will, for example, argue that citizens must have certain duties because these are necessary to protect the rights of others or to secure a collective goal, or it may

[10] See Dworkin, On Not Prosecuting Civil Disobedience', *New York Review of Books*, 6 June 1968.

[11] For an elaboration of these distinctions, see Dworkin, 'The Original Position', 40 *U. Chi. L.R.* 500 (1973).