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Volume 11

Legal Philosophy in the Twentieth Century: The Common Law World

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IN MEMORIAM

A NOTE ON THE AUTHOR

Gerald J. Postema is Cary C. Boshamer Professor of Philosophy and Professor of Law at the University of North Carolina at Chapel Hill, where he served as Chair of the Department of Philosophy from 1989 to 1996. He is a Guggenheim Fellow, Rockefeller Foundation Fellow, Fellow of the Netherlands Institute for Advanced Studies, Medlin Fellow at the National Humanities Center, and Visiting Fellow at the Research School of Social Sciences, Australian National University. He served as Editor of Cambridge Studies in Philosophy and Law (1997–2006) and Special Issues Editor of *Law and Philosophy* (1996–2001). He is Associate Editor of *Treatise of General Jurisprudence and the Philosophy of Law*. He has written widely in legal and political philosophy, ethics, the history of philosophy, and the history of legal theory. His major publications include *Bentham and the Common Law Tradition* (Clarendon Press, 1986), *Philosophy and the Law of Torts* (Cambridge, 2001), *Jeremy Bentham: Moral, Political, and Legal Philosophy* (Dartmouth, 2002), "Coordination and Convention at the Foundations of Law," *Journal of Legal Studies*, (1982), "Self-Image, Integrity, and Professional Responsibility," in *The Good Lawyer* (1983), "'Protestant' Interpretation and Social Practices," *Law and Philosophy* (1987), "Implicit Law," *Law and Philosophy* (1995), "Integrity: Justice in Workclothes," *Iowa Law Review* (1997), "Objectivity Fit for Law," in *Objectivity in Morality and Law*, (2000). "Classical Common Law Jurisprudence" *Oxford University Commonwealth Law Journal* (2002, 2003), "Custom in International Law: A Normative Practice Account," in *The Nature of Customary Law: Legal, Historical and Philosophical Perspective* (2007), "A similibus ad similia: Analogical Thinking in Law" in *Common Law Theory* (2007), "Conformity, Custom and Congruence: Rethinking the Efficacy of Law" in *The Legacy of Hart* (2008), "Law's Ethos: Reflections on a Pubic Practice of Illegality," *Boston University Law Review*, (2010). He is currently preparing *On the Law of Nature, Reason, and the Common Law: Selected Jurisprudential Writings of Sir Matthew Hale*, (OUP, 2012).

GENERAL EDITOR'S PREFACE TO VOLUMES 11 AND 12 OF THE TREATISE

I am very pleased to present here Volume 11 of the *Treatise of Legal Philosophy and General Jurisprudence*. A special thanks goes to Gerald Postema for this Volume 11, which is so well integrated and complete as to offer an overview of 20th-century legal philosophy in the entire English-speaking world. This he did in addition to the invaluable work that with especial effectiveness he has done in his role as associate editor in helping to work out a series of editorial issues relative to the *Treatise* by contributing ideas, advice, and oversight.

The *Treatise* put forth its first five volumes in 2005: These are the theoretical ones, by Enrico Pattaro, Hubert Rottleuthner, Roger A. Shiner, Aleksander Peczenik, and Giovanni Sartor. After these five volumes, another five—all historical—appeared in 2007 (Volumes 6, 7, and 8) and in 2009 (Volumes 9 and 10). These five historical volumes account for the history of legal philosophy from ancient Greece to the entire 19th century, with several references to the 20th century.

With the present Volume 11 by Gerald Postema and the following Volume 12 edited by Enrico Pattaro and Corrado Roversi—which respectively present the history of legal philosophy in the 20th century in the common-law world, on the one hand, and in the civil-law world, on the other—the wheel is come full circle. Indeed, the theoretical volumes published in 2005 in a way inevitably reflected the state of research in legal philosophy at the beginning of the 21st century, and Volumes 11 and 12, in completing the diachronic treatment of legal philosophy up to the entire 20th century, take us again to the 21st century: The *Treatise* plan thus reaches its completion.[1]

My thanks go in the first place to the members of the *Treatise*'s advisory board: the late Norberto Bobbio, Ronald Dworkin, Lawrence Friedman, and Knud Haakonssen. I also wish to acknowledge my indebtedness to Peter Stein, who is the other associate editor of the *Treatise* along with Gerald Postema. A debt of gratitude is owed as well to Antonino Rotolo and Corrado Roversi for their important and effective work. Finally, I would like to thank Neil Olivier, of Springer, for the kindly and collaborative spirit with which he has followed the project in recent years.

Enrico Pattaro

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[1] On the *Treatise*'s overall framework, see the General Editor's prefaces in Volume 1, xix–xxx; Volume 6, xv–xviii; and Volume 9, xv–xvii.

PREFACE TO VOLUME 11

The story of Anglophone general jurisprudence and legal philosophy in the twentieth century can be told as a tale of two Boston lectures, separated by sixty years, and their respective legacies.

In 1897, Oliver Wendell Holmes, Jr., then Associate Justice of the Supreme Judicial Court of Massachusetts, delivered a lecture to the students of Boston University Law School, which was later published by the *Harvard Law Review* under the title, "The Path of Law." Intended largely as advice to young men embarking on the practice of law, the lecture initiated a dynamic new direction for theorizing about law. Although Holmes did not single-handedly turn the ship of American jurisprudence, the thoughts expressed in this essay launched an approach to legal theory that was bold, iconoclastic, pragmatic, and largely innocent of systematic legal philosophy and its history. In the early decades of the twentieth century it inspired progressive-minded legal academics who formed a rag-tag movement which had such a distinctively American cast that it came to be called "American legal realism."

Throughout the first half of the twentieth century, the movement Holmes sired stayed home on American soil. At the same time, the rest of the common-law world, led by England, was content to pursue mundane jurisprudential tasks within the comfortable precincts of the province John Austin determined. However, in 1952, H.L.A. Hart's inaugural lecture, "Definition and Theory in Jurisprudence," jolted English jurisprudence out of its Austinian complacency and reintroduced it to philosophy. Five years later Hart brought his revived and revised positivist theory to the United States.

In 1957, H.L.A. Hart delivered to students of the Harvard Law School his Holmes lecture, later published by the *Harvard Law Review* under the title, "Positivism and the Separation of Law and Morals." This essay, and even more its book-length sequel, the classic *Concept of Law* (1962), launched a revitalized enterprise of philosophically sophisticated jurisprudence that took hold first in Britain and not long after in the United States, Canada, and the rest of the common-law world.

In these two lectures we find the headwaters of two distinct streams of Anglophone legal theorizing in the twentieth century. The following chapters tell the story of the movement and widening of these two streams. Rather than interweaving discussions of these movements in strict chronological order, the chapters below trace developments in each stream separately and in sequence beginning with Holmes legatees, the realists. In some respects this is regrettable, but it is warranted by the fact that, for the most part, the streams did not intersect in significant ways until the last few decades of the twentieth century.

This was due in part to differences in the theoretical spirit and the practical ambitions that drove them. Holmes's path-breaking work attracted thinkers committed to a down-to-earth pragmatism that was skeptical of theory and looked to practice for inspiration. When it sought intellectual partners in the academy, it looked to the emerging social sciences. Hart's revolution, in contrast, arose from solid British empiricism, and, while no less skeptical of Grand Theory and metaphysical speculation, it looked to philosophy as practiced at the time and shunned the social sciences. Differences in the institutional settings in which these theorists worked further explain the lack of extended engagement. The Holmesian strand, initially in its realist phase and later in its critical and even law-and-economics phases, continually sought to challenge legal orthodoxy and especially its mode of teaching of law in American law schools. In consequence, it was always passionately reform-minded. Hart and his legatees, while claiming the radical, orthodoxy-challenging Bentham as their intellectual ancestor, sought largely to stand above the fray of academic politics. For these reasons and perhaps others, the two camps only rarely engaged each other, despite sharing the same language and heritage. It is possible then to tell a coherent story of Anglophone jurisprudence over the past century by following two largely distinct plot lines seriatim, noting points of intersection when they are significant. This is the story that unfolds in the ensuing chapters.

Four further features of the story herein told call for attention. First, this exploration is meant to be what might be called a "critical history" of twentieth century jurisprudence in the common-law world. The aim is not only to trace the movement of *ideas*, but also and even more importantly to trace the movement of *arguments*. Thus, while a great deal of attention will be given to careful and sympathetic exposition of the views of the writers herein discussed, we will not rest content with a grasp of these views, but rather will assess their internal workings and plausibility by looking equally carefully at the arguments offered for them, and the assessments of those arguments offered by critics. Tracing the dialectic of arguments will be as important as tracing the influence of ideas. This will take time and this, in turn, has necessitated a certain narrowing of the scope of this critical history.

This is the second significant feature of this study. It will focus only on what are regarded throughout this *Treatise* as central issues of *general jurisprudence*. General jurisprudence here is to be distinguished from both particular and special jurisprudence. It is concerned with issues, problems, concepts, and practices of law considered in general, and so not limited to any particular jurisdiction or legal system, nor any specific domain of law. Thus, although we will herein explore the work of theorists working in the common-law world who inevitably have in view the institutions and practices most familiar to them, nevertheless, it is their reflections on universal or at least generic features of law and the problems it generates that will occupy our attention, and not id-

iosyncratic features of common-law legal institutions. Likewise, features of law in general, and not features or principles of contract law, tort law, criminal law, or any other domain of law, will be the focus of our attention. Furthermore, we will not consider here developments in legal philosophy and normative political theory bearing on, for example, the nature, foundations, and scope of rights, the principles of punishment, the limits of justified legal intrusion in individual liberty, the fundamental principles of justice, or the host of other important topics that are frequently and legitimately considered part of contemporary legal philosophy. This is regrettable, because, especially since the early 1970s, there has been an explosion of interest in and high-quality writing on these topics. However, any attempt to do justice to these developments at the level of detail proposed for discussion of issues of general jurisprudence would have required a very different work. So, with regret, a critical history of discussions of these issues will not be attempted here.

Third, it will soon be obvious to readers that the respective legacies of Holmes and Hart have very different characters. Theorists following Hart were on the whole relatively well-behaved, proceeding in a disciplined way through a common philosophical agenda and sharing broadly a common philosophical approach. It is possible to see the developments over time in that stream as the more or less logical or dialectical unfolding of ideas and arguments found in Hart's own work. However, Holmes's legatees look far less homogeneous and disciplined. They were inclined, even from the beginning, to take very different paths. Even Holmes's relationship to the legal realists emerging in the early decades of the twentieth century, as we shall see, was complex, and the extent to which partisans of economic jurisprudence and the critical legal studies movement can be considered off-spring of the realists (or Holmes), is much contested, often among the partisans themselves. In sharp contrast with Hart's legacy, there is in the Holmes's legacy no common agenda and no agreement on method or approach. Thus, use of the term "legacy" in this context may be misleading, as John Finnis (2008, 17–8) reminded us. Certainly the term as typically understood by lawyers—as that which the testator chooses to pass on to others—is inapplicable. The term is used here in an extended sense to include subsequent generations who look to the ancestor for inspiration, some becoming members of this very loosely affiliated family by a kind of extended adoption, where descendents adopt the ancestor or observers associate descendents with ancestors, perhaps against the wishes of the parties, because of illuminating similarities or shared grasp of certain problems of jurisprudence. It is in this loose and tortured sense of "legacy" that we can speak of Dworkin and Waldron, as well as the feuding exclusive and inclusive positivists, as part of Hart's legacy, and of the realists, Fuller, economic jurisprudence and feminist jurisprudence as part of Holmes's legacy.

Finally, we must acknowledge that the story told here did not begin with the two lectures in Boston. Indeed, most of the problems faced by the legal

theorists we will consider below were identified and debated in earlier centuries. Common-law jurisprudence was given its classical expression in the work of Sir Edward Coke and Sir Matthew Hale in the seventeenth century and was restated by Blackstone in the eighteenth. The seventeenth century version was vigorously challenged by Hobbes and Blackstone's version was the focus of most of Bentham's most devastating critique and the opposition stimulated his most creative thinking about the nature of law. But these developments, and their culmination in the work of Austin, have been amply discussed in Michael Lobban's contribution to this *Treatise* and will not be surveyed here. However, to tell the story adequately, other work in the late nineteenth and early twentieth centuries must be considered. This includes the most important theoretical work Holmes did in the 1870s and 1880s and the work of British and Commonwealth writers in the early decades of the twentieth century who established the main outlines of analytic jurisprudence in response to dominant Austinian positivism that took root in the 1870s. Thus, our story begins with a prologue set in the 1870s first in England then in the United States.

ACKNOWLEDGEMENTS

This book was ten years in the making. Over this period, the landscape of Anglophone jurisprudence changed, as did my thoughts about its successes, failures, and future prospects. I often found it difficult to hold this moving target sufficiently in focus to construct a coherent narrative. The project often seemed daunting and it would have been impossible had it not been for the encouragement and generous assistance of a vast number of colleagues, students, and friends. Because ten years takes its toll on even the best of memories, my gratitude for their support can, in many cases, only be expressed generically. Others, however, can be named.

Many eager and expert hands aided me in the preparation of the manuscript, including Timothy Vavricek, Yaacov Ben-Shemesh, Piers Turner, Cathay Liu, Daniel Layman, John Lawless and Seth Bordner, all of the Philosophy Department of the University of North Carolina at Chapel Hill, and Allegra Sinclair, Shelly Biggs and Chris McEachran of the UNC Law School. Karen Carroll at the National Humanities Center also cast a very careful copy-editor's eye over much of the manuscript. I am grateful to my graduate and law students for their patience with, and helpful suggestions on, early drafts of several of the chapters presented in lectures and seminars on topics in the philosophy of law. A fellowship at the National Humanities Center, Research Triangle Park, North Carolina, in the middle of the decade, did much to secure the eventual if not speedy conclusion of this project. I am grateful also to the European University Institute in Florence, Italy, and the head of the law department, Wojciech Sadurski, for a memorable eight week-long retreat during which one chapter was written. I must add a special word of gratitude to the law faculty of the University of Athens, and my dear friend Konstantinos Papageorgiou, for their generosity during my stay in Athens in the autumn of 2009. There I presented the substance of nearly one-half of this work in a series of seminars, which provided me with the opportunity to stitch together into a single narrative what had hitherto been isolated patches of philosophical discussion. Throughout this whole process the editorial staff of this *Treatise*—in particular, Enrico Pattaro Antonino Rotolo, and Corrado Roversi—has been unsparing in their help and indiscriminate in their encouragement. A special debt of gratitude is owed to Enrico Pattaro for introducing me to Modesto and his culinary artistry.

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