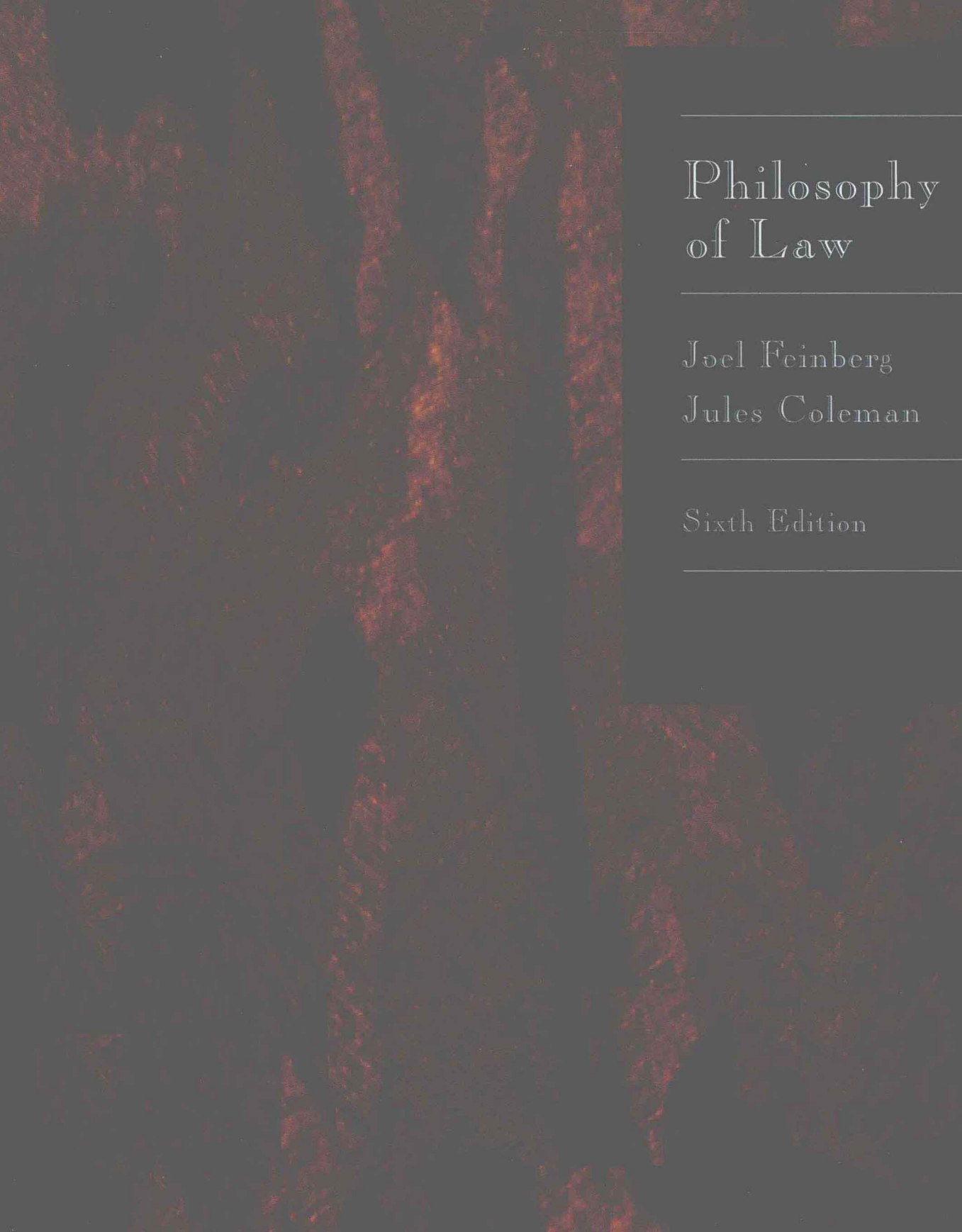

Philosophy of Law

Joel Feinberg
Jules Coleman

Sixth Edition

PHILOSOPHY OF LAW

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DEDICATION

For Joel Feinberg
my teacher and friend

PREFACE

There is currently a widespread and truly philosophical perplexity about law. That perplexity is 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 offered by philosophy departments, 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 often are 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.

This sixth edition represents an extensive and substantial revision. While it largely follows the fifth in its organization of materials, nineteen of the seventy-nine selections included here are new ones. The new selections include works by Brian Bix, Jules Coleman and Arthur Ripstein, Susan Dimock, Ronald Dworkin, Joel Feinberg, Leslie Green, Mark Kelman, Anthony T. Kronman, David Luban, Toni M. Massaro, Stephen Perry, Plato, Russ Shafer-Landau, and Ernest J. Weinrib.

We have benefited from the advice of many professors who used some or all of the earlier editions of this book. We especially wish to thank those who agreed to write formal reviews: Jerome Falmouth, Colgate University; Kenneth Baynes, SUNY-Stony Brook; Susan J. Brison, Dartmouth College; Douglas Husak, Rutgers University; and Berleigh T. Wilkins, UC Santa Barbara.

We appreciate also the helpful work of research assistants Jennifer Ryan, a graduate student in philosophy at the University of Arizona, and Eric Cavallero, a graduate student in philosophy at Yale.

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PART ONE

Law

The question "What is law?" seems at first glance hardly to deserve a philosopher's attention. Ask a lawyer about the law: if he or she is unable to give an answer on the spot, such a professional knows where to look it up or at least where to get the ingredients for a reliable opinion. Statutes, judicial opinions, administrative regulations, and constitutional provisions are all official pronouncements of law. When these texts leave the matter ambiguous, a lawyer knows the appropriate techniques to resolve the ambiguity, and in aid of that consults scholarly works of interpretation and other sources of authoritative opinion. The question "What is law?" then seems simply a request for a general definition that covers all those, and only those, items of official pronouncement that lawyers finally treat as law. It is true that even the best dictionary may leave us unsatisfied, for something more informative than a mere guide for word use is wanted. Still, at first sight nothing in the question appears to need the fine grinding of the philosopher's mill, and we conclude that we are adequately acquainted with the notion of something as familiar as law, with only the details remaining to be filled in.

Our simple belief is shattered not only by philosophical reflection but also by the common experience of those who use and are subject to the law. The late Professor H. L. A. Hart, whose work has dominated Anglo-American legal philosophy, has described this illusion of understanding with these words:

> The same predicament was expressed by some famous words of St. Augustine about the notion of time. "What then is time? If no one asks me I know: if I wish to explain it to one that asks I know not." It is in this way that even skilled lawyers have felt that, though they know the law, there is much about law and its relations to other things that they cannot explain and do not fully understand. Like a person who can get from one point to another in a familiar town but cannot explain or show others how to do it, those who press for a definition need a map exhibiting clearly the relationships dimly felt to exist between the law they know and other things.[1]

The articles in Part One present important theories about the nature of law. The articles are arranged in four subsections:

- Natural Law Theory
- The Challenge of Legal Positivism
- Law from the Perspective of the Judge
- The Moral Obligation to Obey the Law

This introduction to Part One will acquaint you with the subject matter of each section and, in many cases, discuss how particular articles have influenced the theory and practice of law.

Natural Law Theory

Any philosopher who constructs a theory about the nature of law is likely to express that theory in the form of a definition of the word *law* or, when that definition seems ambiguous, a definition of each important sense. In the long history of this subject there have been two main types of definition. The

first, chronologically speaking, goes with the natural law theory that prevailed from the time of the ancient Stoic philosophers and Roman lawyers, through the age of the medieval schoolmen, to the seventeenth- and eighteenth-century revolutionaries. The formal definition of *law* proposed by St. Thomas Aquinas in the thirteenth century is typical of definitions of this class: "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." The second type of definition is that associated with the theory called legal positivism, of which John Austin's definition in the nineteenth century is typical:

> A valid law [that is, one that exists and is in effect in a given legal jurisdiction] is a command, that is (1) an expression of a general desire that others act or forbear in certain ways (2) together with a threat of evil for noncompliance (a sanction), (3) together with the power to enforce compliance, (4) emanating from a person (or group of persons) who alone is (or are) habitually obeyed by the bulk of the society and who habitually obey no one else (that person or persons is the sovereign in that society).

There are several important differences between these classes of definitions: The natural law definitions are *normative*. They do not attempt to eliminate such terms as *rational, common good,* and *properly possessing authority*. Instead they employ these terms, using their own standards of application. The positivists, on the other hand, think of themselves as more "scientific." They are sympathetic to efforts to eliminate normative terms by defining them in turn in nonnormative terms. The positivists' key terms are words like *command, threat, power, habit,* and *obedience,* which they regard as empirical notions capable of empirical apprehension, confirmation, and even measurement. The positivists' account of law is intended to be entirely neutral in respect to moral-political controversies. The natural law theory denies that a conceptual analysis of law *can* be neutral, since some minimal principles, at least, of morality and justice are built in to the very concept of law. Moreover, the natural law theorists' definition is avowedly of the kind called functional or teleological. Like definitions of organs that function within larger organisms; and component parts of machines; and tools and instruments, jobs and professions, so-called functional terms must be defined by reference to their *telos:* what they are *for.* Legal positivists, on the other hand, seek to define *law* in terms that describe its actual functioning and structure. They will insist that as "analytic jurisprudents," they are more interested in what law *is* than in what law *ought to be*. Positivists reject the natural law theorists' claim that reference to morality (or to that part of morality called justice) is an essential part of any account of what law is. But positivists insist that their theory does not preclude them from advocating changes in an existing legal code that will make it more like what it ought to be—more just, reasonable, and humane—or from evaluating existing laws and systems as good or bad, better or worse, fair or unfair, etc.

Legal positivists, moreover, are likely to distinguish two senses of morality: (1) the conventional morality of a given community at some particular time and place (there are better and worse moralities in this sense, and some moralities that are actually immoral!) and (2) rational, critical, or "true" morality, which can be used as a standard for judging conventional moralities. The most important of the questions that divide the schools of natural law and legal positivism is the following: "Is reference to critical, rational, or true morality—as opposed to merely conventional morality—an essential part of any adequate account of what law is?"

Legal positivism answers this question categorically and negatively. It holds that law is one thing and morality another and that neither can be reduced to the other. Positivists happily concede that it is a good idea for law to conform to morality—that is, to be fair and humane—but an unfair rule is still a valid law provided only that it is made in accordance with accepted lawmaking rules of an existing legal system. As the positivist H. L. A. Hart was wont to say, there is a content-neutral test for determining (a) whether a legal system exists in a given community and (b) whether a given rule is a valid law within that system. The validity of a particular rule is determined by its *pedigree* (how it was made), not by its *content* (what it says).

Natural law theorists, as we have already seen, give an affirmative answer to our question. 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*.

Thomas Aquinas is certainly the most influential writer in the natural law tradition. However, his writings are difficult to penetrate and can prove frustrating for beginning students. In the first selection of this part, "Natural Law Theory," Brian Bix gives us a broad historical overview of the natural law tradition. Starting with Cicero and the Stoics, Bix traces the tradition through the contribution of Aquinas and on to the present day. Two of the modern natural law theorists he discusses—Lon Fuller and Ronald Dworkin —are represented elsewhere in this volume, and Bix's contribution is especially helpful in situating these modern natural law theorists in a long tradition of legal scholarship. In "The Natural Law Theory of St. Thomas Aquinas," the second selection in Part One, Susan Dimock provides an excellent commentary on the key portions of Aquinas's writings on natural law. Dimock's approach, which incorporates large portions of Aquinas's own text, yields an accessible yet rigorous introduction to Aquinas's legal theory.

The topic of natural law theory figures prominently in the third section of Part One as well. In "The Dilemmas of Judges Who Must interpret 'Immoral Laws'," Joel Feinberg considers the consequences of the positivism-natural law debate for conflicts in the political arena. He uses, as his chief example, the conflict among American abolitionist judges over the Fugitive Slave Acts of 1793 and 1850—unjust enactments if ever there were any. This article also draws on the Hart-Fuller debate, represented in the second section of Part One.

The Challenge of 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, etc. 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 a "content-neutral" way.

Various kinds of controversy over theories about the nature and validity of law are possible, but most of them are of the kind we have already anticipated: controversies over the relationship between law and morality. Those who are spoken of as positivists tend to view a legal system as having its own criteria for valid laws, and so tend to regard moral judgments about laws as important in deciding what the law *should be* (a question for legislators and voters), yet not relevant in deciding what the law *is*. Hart's famous Holmes Lecture at the Harvard Law School, "Positivism and the Separation of Law and Morals," was published in the *Harvard Law Review* about three years before Hart's book. We publish it here for the new light it shed at the time on its subject, and partly because a reply to it was published in the next issue of the *Harvard Law Review* by America's most distinguished legal philosopher at the time, Lon L. Fuller, of Harvard. (Hart spent almost thirty years as professor of jurisprudence at Oxford.) In "Positivism and Fidelity to Law," Fuller found much to admire in Hart's lecture, but as a kind of natural law theorist himself, he was in basic disagreement with Hart's position. Fuller's natural law theory was as imaginative and original a departure from the more traditional natural law theories as

Hart's theory was from the earlier forms of positivism. The debate between these towering figures was a great event in the history of legal philosophy in the twentieth century.

Among the more interesting of Fuller's innovations were his effort to construct a natural law theory without a theological foundation and his argument that morality provides criteria for the (continued) existence of a whole system of rules, not criteria for the validity of a single rule or statute. It is possible then, according to Fuller, for an unjust law to be a valid law, but if the whole network of rules and rule-making powers, or a substantial subsection thereof, is antithetical to morality (as in Nazi Germany, where a genuine legal system was corrupted and undermined), then it is no longer a functioning legal system but, at best, another method of social control—one based on arbitrary power.

Another innovation in Fuller's theory was his novel insistence that the morality that is essential to law is what he called "the internal morality of law" or "the morality that makes law possible," not the more usual prohibition of immoral *content* in rules. The internal morality of law is summed up in a handful of procedural rules requiring promulgation and understandability, and invalidating retroactivity, contradiction, and constant change. He discusses eight of these "ways" in "Eight Ways to Fail to Make Law," a chapter of his book *The Morality of Law*. That chapter is reprinted here.

One of the most important questions in jurisprudence is Can we—and if so, how—explain the possibility of legal authority without invoking the notion of legal authority itself? In "Negative and Positive Positivism," Jules Coleman argues that legal authority is made possible by a social convention among relevant officials: a decision by those individuals to have their behavior guided by a rule setting out conditions of legality. (Hart himself, in the recently published postscript to *The Concept of Law,* came to accept this line of argument and to regard it as the proper interpretation of his own position.) Coleman argues that his social convention account can meet Dworkin's complaint (in "The Model of Rules," reprinted in section three of Part One) that some legal norms cannot derive their authority from the master social convention. Coleman (like Hart to follow) claims that such norms can be conventional if the rule of recognition allows that the moral merits of a principle can be a condition of its legality. Against this view, which he calls "soft conventionalism," Dworkin has objected that the controversiality of moral principles is incompatible with the claim that their authority could rest on a convention. By drawing a distinction between disagreement in content and disagreement in application or implementation, Coleman meets this objection of Dworkin's. (While Coleman's essay properly belongs in this subsection on legal positivism, it may be helpful to read it after Dworkin's "Model of Rules.")

Law from the Perspective of the Judge

Since the retirement of Professor Hart, the person who has probably had the greatest impact on the philosophy of law in our time is Hart's successor at University College, Oxford, Ronald Dworkin, an American. (Dworkin has also been a regular faculty member for many years at the College of Law of New York University.) 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," reprinted here, he argues that there is much more to a system of law than mere 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." The formerly obscure case of *Riggs v. Palmer* has, since Dworkin's article, become quite famous. *Riggs v. Palmer* is summarized in an article in this section.

The other selection from Dworkin, "Law as Integrity," 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, that is, as a theory about the meaning of meaning in legal discourse. Meaning for Dworkin contains two elements: 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. This last idea is that the law must be understood so as to make the coercive exercise of the state's power at least plausibly justified. In answering the question What is the law on a particular matter? the judge must construct a theory of law. That theory must respect the 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." Each chapter requires respecting that which came before—suitably purged of its mistaken chapters—and only in the light of a sense of the kind of book one is writing could one fashion the current chapter. In this sense, the judge looks both to the past and to the future. It is noteworthy how much more inclusive and subtle Dworkin's theory is than those of typical (pre-Hart) positivists (one must also exclude Hart's brilliant student, Joseph Raz) and how much less vague than the typical natural law theorist at least before Fuller and, more recently, John Finnis (*Natural Law and Natural Rights, 1980*).

But if Dworkin's theory isn't exactly like traditional natural law and positivist theories, then J. L. Mackie was entirely justified in baptizing it "the third theory of law," giving it its own precise set of defining arguments and then formulating his own distinctive polemical arguments to match them. In philosophy, the more original a given set of arguments are, the more original an inevitable set of counterarguments are likely to be. In "The Third Theory of Law," Mackie effectively voices his doubts that Herculean judicial labor would produce the decision that Dworkin would prefer at least in one class of cases, the Fugitive Slave Acts cases discussed by Feinberg in his earlier essay in Part One. Mackie also concludes his discussions with some important observations about the likely effects of Dworkin's theory if it were adopted explicitly as a guide to adjudication in hard cases.

A disproportionate number of the contributors to Part One of this collection are British. But Americans too have made important contributions to the philosophy of law. 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." Read together, these two selections lead us to concentrate on the question that perhaps must precede all others in this branch of the philosophy of law: "What, exactly, is its proper subject matter?"

The tradition of legal realism represented here in the selections from Holmes and Frank has in recent years been revived and radicalized in the theoretical movement known as "critical legal studies." In what amounts to a skeptical attack on the entire mainstream of Anglo-American jurisprudence, critical legal theorists have argued that judges are inevitably and unconsciously guided in their decisions by a variety of ideological forces. The last essay in this section, "Interpretive Construction in the Substantive Criminal Law," exemplifies this critical approach. Focusing his attention on the substantive criminal law, Mark Kelman details a significant but largely unexamined feature of legal argument, namely the process by which the legally relevant facts of a concrete situation are selected and organized. Only after this often-unconscious process of "interpretive construction" has occurred can the more familiar forms of legal argumentation begin.

The Moral Obligation to Obey the Law

Most positivists agree with their natural-law rivals 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.

There are three articles in this section of Part One. It begins with Plato's dialogue, *The Crito*. Here 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 "high-law" version of natural law theory. King is the model civil disobedient. The final selection in this section, "Difference Made Legal: The Court and Dr. King," is both a defense of King and an appraisal of the role of narrative in legal argument. By contrasting the "Letter from Birmingham Jail" with the *Walker* decision (which sustained King's conviction), David Luban seeks to illustrate his contention that legal argument is often "a struggle for the privilege of recounting the past." While critical of both texts, Luban seeks ultimately to vindicate King's argument by grounding its narrative elements in the egalitarian promise of American political traditions.

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1. H. .L. A. Hart, *The Concept of Law* (Oxford University Press, 1961), pp. 13–14.

Natural Law Theory

NATURAL LAW THEORY*

Brian Bix

Natural law theory has a long and distinguished history, encompassing many and varied theories and theorists—though there are probably no points of belief or methodology common to all of them. In legal theory, most of the approaches dubbed "natural law" can be placed into one of two broad groups, which I call "traditional" and "modern" natural law theory, and will consider in turn below. Some modern natural law theorists who do not fit comfortably into either group will be noted in summary at the end.

Traditional Natural Law Theory

We take it for granted that the laws and legal system under which we live can be criticized on moral grounds: that there are standards against which legal norms can be compared and sometimes found wanting. The standards against which law is judged have sometimes been described as "a (the) higher law." For some, this is meant literally: that there are law-like standards that have been stated in or can be derived from divine revelation, religious texts, a careful study of human nature, or consideration of nature. For others, the reference to "higher law" is meant metaphorically, in which case it at least reflects our mixed intuitions about the moral status of law: on the one hand, that not everything properly enacted as law is binding morally; on the other hand, that the law, as law, does have moral weight. (If it did not, we would not need to point to a "higher law" as a justification for ignoring the requirements of our society's laws.)

"Traditional" natural law theory offers arguments for the existence of a "higher law", elaborations of its content, and analyses of what consequences follow from the existence of a "higher law" (in particular, what response citizens should have to situations where the positive law—the law enacted within particular societies—conflicts with the "higher law").

Cicero

While one can locate a number of passages in ancient Greek writers that express what appear to be natural law positions, including passages in Plato (*Laws, Statesman, Republic*) and Aristotle (*Politics, Nicomachean Ethics*), as well as Sophocles' *Antigone*, the best known ancient formulation of a Natural Law position was offered by the Roman orator Cicero.

Cicero (*Laws, Republic*), wrote in the first century bc, and was strongly influenced (as were many Roman writers on law) by the works of the Greek Stoic philosophers (some would go so far as to say

*From Dennis Patterson, ed., *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishers, Ltd. 1996), pp. 223–40.