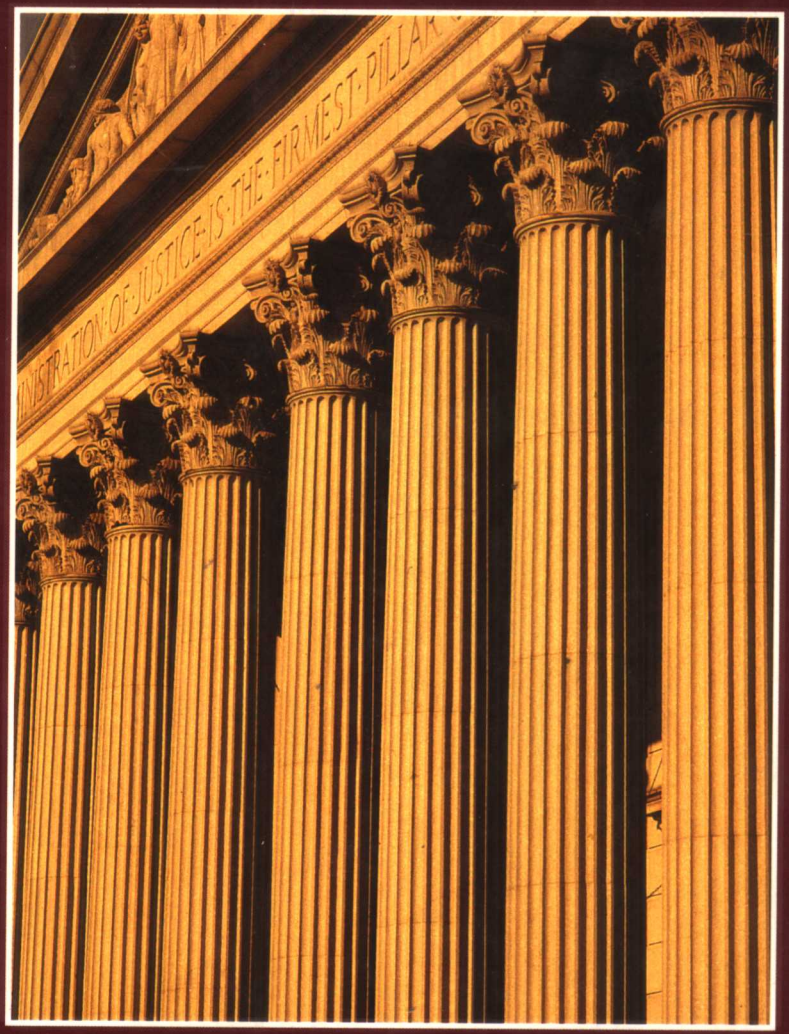
Second Edition

READINGS IN THE PHILOSOPHY OF LAW



JOHN ARTHUR • WILLIAM H. SHAW

Second Edition

READINGS IN THE PHILOSOPHY OF LAW

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Library of Congress Cataloging-in-Publication Data

Readings in the philosophy of law/[edited by] John Arthur, William Shaw.—2nd ed.
p. cm.
Rev. ed. of: Readings in philosophy of law. c1984.
ISBN 0-13-753849-9
1. Law—Philosophy. 2. Law—United States. I. Arthur, John.
II. Shaw, William H. III. Readings in philosophy of law.
K235.R39 1993
340'.1—dc20 92-42287
CIP

Acquisitions editor: Ted Bolen
Editorial/production supervision
and interior design: Mariann Murphy and Jenny Moss
Cover design: Bruce Kenselaar
Prepress buyer: Herb Klein
Manufacturing buyer: Robert Anderson
Editorial assistant: Nicole Gray

Cover photo by Jeff Spielman/The Image Bank

Acknowledgments appear on pages 617-619, which constitute a continuation of the copyright page.

Printed in the United States of America

10 9 8 7 6

ISBN 0-13-753849-9

Prentice-Hall International (UK) Limited, *London*
Prentice-Hall of Australia Pty. Limited, *Sydney*
Prentice-Hall Canada Inc., *Toronto*
Prentice-Hall Hispanoamericana, S.A., *Mexico*
Prentice-Hall of India Private Limited, *New Delhi*
Prentice-Hall of Japan, Inc., *Tokyo*
Simon & Schuster Asia Pte. Ltd., *Singapore*
Editora Prentice-Hall do Brasil, Ltda., *Rio de Janeiro*

PREFACE

The law permeates every sphere of society, and many of the challenging social, moral, and political problems facing us today are addressed primarily as legal issues. Battles over questions like euthanasia, surrogate motherhood, affirmative action, capital punishment, police behavior and defendants' rights, sexual liberty, pornography, and offensive speech are waged in terms of legal principle and fought through the courts. Inevitably, such battles also raise foundational questions about what it means to be a nation of law, about the nature of law and proper judicial reasoning, and about how we as Americans are to understand our distinctive constitutional and political framework. Because these are all philosophical questions, university courses on philosophy of law are growing in number, and research in the field is proliferating. An acquaintance with legal and constitutional philosophy is ever more widely recognized to be an important part of what it means to be an informed citizen and educated person.

Like its predecessor, the second edition of *Readings in the Philosophy of Law* reflects the conviction that legal philosophy, when set in context and related to real debates in society, is one of the most exciting subjects to which students can be exposed. Its intellectual rewards are matched only by the relevance of the insights it provides into the society that surrounds us and shapes our lives. *Readings in the Philosophy of Law* surveys the main philosophical questions concerning law and provides readers with basic conceptual and theoretical tools necessary for analyzing and debating those basic issues. This it does both through philosophical and legal essays and through an array of legal cases, which require students to think through actual debates, many of them still live in the courts.

Nearly a decade has passed since the first edition of *Readings in the Philosophy of Law.* In that time, our understanding of the field has evolved and, we think, deepened. As teachers, we have a stronger sense of what issues it is important to address in the classroom and what specific topics and readings capture the interest and imagination of students. We have revised and reorganized the book from top to bottom in light of this and to take account of recent theoretical developments (such as critical legal studies and feminist legal scholarship) and currently controversial issues (such as hate speech and racial bias in sentencing). Despite the fresh reading selections and the revamped organization, however, readers familiar with the first edition will find many continuities in the themes and issues treated, and we have retained those essays from the previous edition that have proved their worth in the classroom.

Readings in the Philosophy of Law balances traditional jurisprudential concerns and topical legal and philosophical controversies. Although we have endeavored to present the reading selections in a coherent and interrelated format, with each topic leading naturally to the next, both within and between sections, we have at the same time sought to provide a textbook with ample resources to allow a variety of different courses to be taught, in different ways, and to different student audiences. These and related editorial decisions grow out of our experience in teaching courses in philosophy of law at several colleges and universities, both private and public, to undergraduates with varying degrees of philosophical background and academic preparedness. One of us teaches philosophy of law to over two hundred mainly lower-level students each year.

The book's reception over the years has

pleased us. *Readings in the Philosophy of Law* has been through several printings, and people we respect tell us that they have found it a valuable collection and have appreciated using it in their classes. However, in addition to updating the book to reflect current developments and reorganizaing it in line with changes in our understanding of the field, we have also felt a need to enhance its pedagogical strengths and teaching effectiveness. Philosophy of law is not a subject that can be made simple, but it can be made more accessible and more engaging to undergraduates than it has been in the past. Accordingly, we have endeavored to provide readings that students will find stimulating, yet that do justice to the subtlety and complexity of the philosophical problems in this field. We provide short introductions before, and questions for review and discussion after, each selection. These should enable even beginning students to follow the major arguments, at least in broad outline. In addition, we have edited the new essays and cases with great care and abridged many of the readings from the previous edition to keep the focus sharply on the most relevant and important issues, avoiding needless technicality, immaterial digressions, and recondite issues.

INTRODUCTION

The law surrounds us from birth. It guides, restricts, and, if necessary, punishes us. It tells us what we must do in order to marry and sets our obligations to our spouses and children. It prevents people from trespassing on our property and gives us recourse against those who slander us. It tells us how rapidly we may travel and attempts to protect us from dishonest merchants, unscrupulous moneylenders, and unqualified doctors. It regulates our business transactions, often in minute detail, and monitors closely the terms and environment of our employment.

The law is an institution central to our social existence, an institution that is frequently held to be a great civilizing force. But what exactly is law? What does it mean to say that a legal system exists? What connection, if any, is there between our legal duties and the more general requirements of morality? Can a valid law enjoin us to do something immoral? What in fact determines legal validity and under what sort of obligation do valid laws place us? How does the law differ from other social institutions? How should an understanding of the nature of law shape our conception of society and of ourselves as citizens?

Part I: Understanding the Law

These and related issues about the nature of law have intrigued and troubled many thinkers throughout the ages. They are the focus of Part I of this book. As with other philosophical questions, it is possible for one to avoid thinking about them. Not all lives are reflective ones. But once one begins to think about the nature of society, about the bonds that hold its members together, and about what it is to be a citizen and the obligations that citizenship brings, one is led back to philosophical issues about law. Often this sort of speculation arises quite naturally. One wants to know what the law requires, permits, or forbids one to do in a particular circumstance; so a lawyer is hired and the answer sought. Sometimes, though, the case is hard, and the answer unclear. Lawyers and courts may disagree. Even when the Supreme Court has spoken, the disagreement may continue. Can the Supreme Court err? If so, how can this be possible when there is no further court of appeal? In a controversial case, one may well wonder what exactly is going on. What sort of thing is the law, and what are lawyers and judges trying to do when they attempt to determine what it says? It is easy to see how those involved with the law might turn to philosophy to understand better what it is they are trying to do. But all of us may be led to explore similar issues when we reflect on the nature of society and of ourselves as citizens, and on the crucial importance of legal institutions in understanding both.

Many of these issues are raised in the essays of Section 1—David Lyons on legal obligation, Lon Fuller on the grudge informer, and Ronald Dworkin on civil disobedience. These three provide a stimulating and accessible introduction to some of the basic questions in philosophy of law. Discussion of the concrete dilemmas of Section 1, especially of the appropriate response to civil disobedience, leads naturally to an examination of judicial reasoning and the question of how legal decisions are or should be made. That is, how do lawyers and judges actually reason, what sort of logic is there to the law, and what should the court be striving to do? Through essays and cases Section 2 lays out the basic elements of legal reasoning in-

volved in case law, in statutory interpretation, and in constitutional adjudication. Although the process of reasoning and argumentation used by lawyers and judges appears in some ways as a paradigm of analysis and ratiocination, it differs strikingly from the form of reasoning that characterizes philosophy on the one hand or science on the other. For example, reliance on precedent, so distinctive of law, has no counterpart in other areas of intellectual inquiry. Not only is an understanding of legal argumentation—and of the debates over its proper nature—of inherent interest, but it also provides necessary background for many of the issues explored in the rest of the book.

Section 3 presents two classic attempts to answer the question: What is the nature of law? St. Thomas Aquinas provided one of the richest and most important statements of the natural law tradition. For natural law theorists, law making is a purposive activity that must satisfy certain moral requirements. In the words of Aquinas, "law is . . . an ordinance of reason for the common good, promulgated by him who has the care of the community." In his view, the question of the existence and validity of a law cannot be separated from its moral acceptability. Although Aquinas's perspective on the law is integrated into his larger theology, his insights into its nature and his conception of the character and purpose of human communities have inspired many secular thinkers. By contrast, John Austin's *The Province of Jurisprudence Determined,* first published in 1832, provides the classic statement of legal positivism, which (thanks in large measure to his work) was to become for many years the dominant school of legal theory. In opposition to Aquinas, Austin held that "the existence of law is one thing; its merit or demerit another." He sought to determine its defining features in purely "positive" or nonmoral terms. Austin held in essence that the laws of a society are the general commands of the sovereign, that is, of a society's supreme political authority.

In the early decades of this century, legal realism emerged as a distinctive and radical school of jurisprudence in the United States, and today it continues to exert an important influence on legal philosophy and legal scholarship. Legal realism joins positivism in rejecting the metaphysical excesses of the natural law tradition. Legal realists also reacted against what they saw as the formalistic, mechanical approach of those who saw the law as a logical and consistent system of rules and principles—an approach exemplified by Langdell and Field at the beginning of Section 4. By contrast, realists like Jerome Frank adopted a more pragmatic and iconoclastic approach to law, an approach frequently informed by twentieth-century sociology and willing to acknowledge the extent to which various social forces external to the law influence its development. Realists see the law as consisting of decisions, not rules. Judges do not apply the law. They make it.

Sections 5 and 6 focus on the contributions of more recent legal theorists. Today no philosopher of law would deny the signal importance of the work of H. L. A. Hart. Hart's classic work *The Concept of Law* and related writings have provided a model of the philosophical study of law. Working within the positivist tradition, Hart has sought to vindicate its central insights while freeing them from the crudities and oversimplifications inherited from Austin. Hart's analyses of the idea of obligation, of the internal and external aspects of rules, of the law as the union of primary and secondary rules, and of the open texture of the law are marked by great insight and subtleness, and many of his distinctions have been the widely accepted starting points of further work.

Hart, however, has not been without his critics. In a book that is itself a classic, *The Morality of Law,* and in other writings, Lon Fuller has drawn attention to certain crucial ways in which morality structures law and determines its validity, ways that are commonly overlooked by positivists in their traditional effort to separate the analysis of law and legal validity from any moral notions. Ronald Dworkin, who succeeded Hart as professor of jurisprudence at Oxford, has

launched an even more ambitious attack on positivism, attempting to articulate an alternative perspective that offers a middle way between natural law and legal positivism. The final essays of Part I discuss new jurisprudential approaches that have opened up or come into their own since the first edition of *Readings in the Philosophy of Law*—in particular, the economic interpretation of the law, critical legal studies, feminist legal scholarship, and legal pragmatism. Philosophy of law is now developing in exciting and previously unanticipated directions. While the jury is not yet in on these recent developments, there is no question that the ideas being advanced are intellectually exciting, politically challenging, and philosophically important.

Part II: Philosophical Issues in Criminal Law

All legal systems aim to accomplish certain goals. But what, exactly, do we hope to get from the criminal justice component of our legal system? The answer seems reasonably clear. Its various rules and procedures are designed to serve two purposes: to ensure that a reasonable proportion of those who break the law are punished while, at the same time, respecting the rights and liberties of citizens and protecting innocent persons who stand accused of crimes. Sometimes these two goals conflict, however. Rules that are designed to respect our rights and protect the innocent can allow those who are guilty to elude punishment.

One basic feature of the criminal justice system is its adversarial character. Criminal defense lawyers, in pursuing the interest of their clients, are often called on to withhold vital information from prosecutors, to cross-examine sensitive and truthful victims of crimes in ways that make them apepar liars or worse, and to ask their own clients questions in court, the answers to which will constitute perjury. The essays by Freedman and by Gabel and Harris explore these and other dilemmas of contemporary legal practice.

We know that police are necessary for law and order, but when abused, police power can become an instrument of tyranny. Accordingly, our legal system seeks to ensure that the police do not abuse our rights or illegitimately restrict our liberties. For most of this century the courts have used the "exclusionary rule" to enforce police observance of the constitutional restrictions on interrogation, search, and seizure. Under this rule, evidence acquired in violation of defendants' constitutional rights cannot be used by prosecutors to gain conviction. Recently, however, this rule has come under attack. Its critics charge that the rule is ineffective as a deterrent of police abuse and that, as a result, adherence to it is too costly in terms of allowing guilty people to go free. This is the subject of the debate between Malcolm Richard Wilkey and Stephen H. Sachs.

Restrictions placed on police have real costs. When police are hampered by limitations on what they can do when interrogating subjects and searching for evidence, some criminals may escape justice. But where are we to draw the line? How many guilty persons are we willing to allow to go free in order to protect our rights as citizens and to avoid convicting innocent persons? Or, to put the question the other way, what further encroachments on our rights and liberties are we willing to accept in an attempt to boost the rate of criminal convictions? For example, the Fifth Amendment to the Constitution protects us from self-incrimination, and the Sixth Amendment guarantees us the right to counsel. But translating these constitutional protections into the specifics of day-to-day police practice has been controversial as is evident in the famous cases of *Miranda v. Arizona, Brewer v. Williams,* and *Rhode Island v. Innis.*

Besides serving an essential function in a democracy, the free press is generally regarded as good insurance against judicial excesses. Yet the media's influence over potential jurors can hamper the courts' efforts to provide a fair trial before an unbiased jury. Indeed, prejudicial press coverage has suc-

ceeded in convicting defendants before they even appear in court. But in high-profile political cases—like the trial of Oliver North—finding a jury uninfluenced by the media means finding a group of people who are almost wholly ignorant of important political events. This issue is explored by Joseph M. Hassett, who rejects the view that an uninformed citizen is the ideal juror. The final issue of Section 7 is that of plea bargaining, a practice in which a prosecutor agrees to a lesser criminal charge in exchange for a guilty plea by the defendant. In "Criminal Justice and the Negotiated Plea," Kenneth Kipnis argues that this common way of avoiding the costs of a trial does not serve the cause of justice because it is not consistent with giving those accused of crimes the punishment they deserve. Some defendants are coerced into accepting unwarranted convictions, whereas others receive less stiff sentences than they deserve.

Most of us take for granted the existence of courts and prisons. But punishing those guilty of breaking the law involves treating them in ways that it would normally be wrong to treat anyone. How, if at all, can we justify depriving persons of their freedom and inflicting substantial physical, psychological, and financial costs on them? The philosophical problem of how, if at all, punishment can be justified is the subject of Section 8. That problem is posed most starkly by capital punishment, and the case of *Gregg v. Georgia* reveals how a deeply divided court has wrestled with this difficult moral and constitutional issue. In his contribution to Section 8, Richard B. Brandt explains and defends the traditional utilitarian perspective on punishment. This holds that, if properly administered, punishment can serve to protect society from dangerous persons and, most importantly, to deter other potential criminals from breaking the law. Brandt rejects the retributivist view that punishement is justified simply by the fact that a criminal, having done wrong, now deserves to be punished. Herbert Morris breathes life into something like the retributivist perspective. He contrasts a system of punishment with a system that sees criminal behavior as a kind of illness that needs to be treated. To treat a criminal's actions as the manifestation of illness or as the product of forces outside his control, as many humanitarian-minded reformers have advocated, is to operate with a model of human action and responsibility that is both inaccurate and demeaning to the criminal in its implications. Criminals, Morris concludes, have a right to be punished rather than rehabilitated. By contrast, Randy E. Barnett rejects both the utilitarian and retributivist defenses of punishment in favor of a system of restitution, which, he maintains, would be a more effective and theoretically sounder approach to criminal justice.

Section 9, the final section of Part II, treats a variety of philosophical issues surrounding the problem of criminal liability. Richard B. Brandt provides an overview of the principles that guide criminal law, focusing on the various types of justification and excuse, and on the concept of *mens rea* (or "guilty mind"). H. L. A. Hart examines the importance of intention for criminal law and its relevance to attempted crimes and criminal negligence. American courts have tended to ignore *mens rea* in cases of rape. But this tendency, as Susan Estrich argues, has not been favorable to the victims of rape. It has led the courts to focus on the victim's conduct in a way that has been rife with sexism, demanding, for instance, that the victim must forcibly resist in order to prove her lack of consent. Finally, the essays by Gerber and Feinberg take up the law's treatment of the mentally ill, the evolution and rationale of the insanity defense, and the changing rules that govern insanity pleas.

Part III: Philosophical Issues in Civil Law

With newspapers full of crime reports, and with television, movies, and popular books replete with police stories and courtroom dramas, the criminal law has certainly captured our imagination. We feel familiar with

debate over capital punishment, with the difficult choices that defense attorneys can face, with controversies over the insanity defense, and with the pros and cons of the exclusionary rule. By contrast, civil law may appear less dramatic and less familiar. But this appearance is misleading. Civil law does as much or more to shape the world we live in than criminal law does, and it often has a more direct impact on the institutions in which we study and work. Property law and contract law structure our capitalist socioeconomic system, and tort law determines the obligations we owe to others not to injure them or harm their interests. As a result, civil law raises issues of great philosophical significance.

A tort is a civil wrong or harm, other than breach of contract, for which the injured party is entitled to compensation. The criminal justice system brings the power of the state to bear on those who violate the criminal law, punishing them with fines, imprisonment, and other penalties. Tort law, by contrast, enables an individual to seek civil redress for the damage that he or she has suffered at the hands of another individual or organization. Tort law concerns the standards of conduct and the rules of liability that govern civil suits between private parties over harms resulting from such things as libel, battery, trespass, nuisance, defective products, automobile accidents, and a wide range of other untoward conduct. Perhaps the most important category of torts today is that of negligence: injuries that one person unintentionally causes another. In his account of this tort, William Prosser explains the circumstances under which one can be held legally liable for negligent conduct. He clarifies what the law means by negligence and explicates such crucial concepts as that of unreasonable risk and the standard of the "reasonable man."

When it requires one person to make good the loss of another, tort law is concerned with the assigning of responsibility, and all the essays of Section 10 explore aspects of this. Tort law requires us not to subject others needlessly to a risk of harm; *Stone v. Bolton* takes this issue up as the two courts involved in the case explore the concept of foreseeability of risk. Baruch A. Brody and the famous *Palsgraf* case both deal with the nature of causation and its relevance to the tort of negligence. Arthur R. Miller discusses the related area of products liability, leading the reader step by step through a hypothetical case involving an electric steam vaporizer that burned a young child. As Miller explains, perhaps the most important legal development in this area of tort law has been the emergence and rapid triumph of the doctrine of strict liability. This doctrine does away with one of the traditional elements of tort liability: namely, fault. It imposes liability on a manufacturer whose defective product causes injury to a consumer, even if the manufacturer lived up to the reasonable-person standard and was not in any way negligent in its conduct. By contrast, Judith Jarvis Thomson focuses on those controversial cases in which a different requirement of traditional tort law appears to have been abandoned—cases in which the defendent is held liable for faulty conduct even though that conduct cannot be proved to have caused the plaintiff's injury.

Section 10 concludes with several hard cases. The first set of these concerns the nature of our legal obligation to save the lives of other people, for whom we have no prior legal responsibility. Traditionally, the common law has not required people to be good samaritans; yet to tolerate callous indifference to the lives of others seems incompatible with a civilized legal order. The final case takes up the issue of damages. Simplifying somewhat, you cannot be sued in tort if your negligent behavior causes harm to no one. To win legal compensation under tort law, a person must have suffered some loss, damage, or harm. Can life itself be a harm? *Berman v. Allan* addresses this question regarding a suit on behalf of a defective infant. The baby is alleged to have been damaged by being born, that is, to have been harmed by not having been aborted. Had their doctor not failed to inform the Bermans of amniocentesis, a procedure that would have revealed

the presence of a birth defect during gestation, the Bermans would have aborted their baby, sparing it an unhappy life.

Section 11 covers some basic philosophical issues raised by property and contract law. The reading from John Locke provides the classic defense of a natural right to property. Locke believed that the power of government is only legitimate if it derives from the consent of the governed. Prior to the formation of government, however, people have certain natural rights; among these is the right to property. According to Locke, despite the fact that the world was given to humanity in common, people can come to have private entitlements to goods, and inequalities of wealth can be justified. Morris Cohen critically assesses several justifications of private property. Although each points to an important value or interest that the legal order needs to protect, private property is only one among other human interests; it is not sacrosanct, and state interference with private property, even the confiscation or abolition of certain types of it, may be justified.

Contractual agreements between private persons play an important role in any socioeconomic system based on private property. In the final essays of this section, Morris Cohen and Charles Fried present rival perspectives on the nature of contract law. Cohen examines the institution of contract from a broad historical and philosophical perspective, emphasing the institutional aspects of contract law. He rejects "contractualism," the view that in an ideal system of law all obligations would arise from individuals contracting freely. In his view, contract law is essentially a branch of public law, in which the courts are justified in going beyond the original intentions of the contracting parties. While Cohen believes that society has a legitimate interest in imposing certain standards and shaping contracts in ways that meet its goals, Charles Fried upholds a more traditional view of contract. He sees contractual obligation as rooted in the moral force of promise rather than social or institutional utility. The conflict of these two perspectives is brought out by *In the Matter of Baby M,* which involves the legal validity of a surrogate mother contract. William Stern paid Mary Beth Whitehead to bear his child, and he sued her for breach of contract when she refused to surrender the baby to him after birth. A lower court in New Jersey sided with Stern, directing that the baby be turned over to Stern and his wife. The Supreme Court of New Jersey reversed this decision. Although the contract had been freely entered into, the higher court decided that surrogate mother contracts are in conflict with important public policy considerations.

Part IV: Philosophical Issues in Constitutional Law

Previous parts of this book have discussed the nature of constitutional adjudication and various issues of constitutional law, and several Supreme Court decisions are among the previous readings. This final part of *Readings in the Philosophy of Law,* however, gives special attention to the areas of constitutional law that are of great importance and are the focus of continuing political, moral, and legal debate.

The first of these concerns freedom of conscience and religion. In his classic essay *On Liberty,* John Stuart Mill argued that society may interfere with an individual's actions only on grounds of self-protection, that is, only to prevent individuals from harming other people. Beginning with an unequivocal defense of freedom of conscience and speech, Mill goes on to attack legal paternalism, the view that the law may justifiably compel an individual to do (or not do) something solely because society judges that it would be in the individual's own interest to do it. He also rejects legal moralism in favor of the view that law may not compel people to do what is morally right unless they are also harming others.

Mills's essay thus sets the stage for many of the readings and cases that follow in this section. Legal philosopher Joel Feinberg tests Mill's principles with an imaginary bus

ride in which, though no one is harmed, the rider must endure various extremely offensive and unpleasant situations. While freedom of speech is among our most cherished political and constitutional values, spelling out its limits in difficult cases has frequently posed a challenge to the courts, often embroiling them in political controversy—as exemplified in the excerpts from legal battles over advocacy of illegal or violent acts, joining dangerous political parties, hate speech, advocacy of nazism, campus speech codes, and obscenity.

Equally controversial questions surround the right to privacy and the limits on individual liberty, the topics of the last part of Section 12. Closely related to Mill's liberty principle is the right to privacy, and debates over the exact nature and extent of a constitutional right to privacy have loomed large in recent Supreme Court cases dealing with contraception and homosexuality. In addition to their immediate political and moral significance, these controversial cases raise deep and difficult questions about constitutional interpretation.

Section 13 begins by tracing the unhappy role of race in U.S. constitutional history. Born in political compromise, slavery established itself throughout the states though it was eventually limited to the South. The first two readings consider slave law generally; they include a selection from the only treatise on the law of slavery written by a Southerner and an example of how the law of slavery operated. The U.S. Constitution implicitly recognized the fact of slavery, and early judicial decisions, particularly the explosive case of *Scott v. Sanford,* held that the right of slaveholders to their human chattel was constitutionally guaranteed and that descendants of slaves were forever banned from citizenship. Even after the Civil War and the Thirteenth Amendment ended slavery, the courts upheld legal segregation along racial grounds until *Brown v. Board of Education* struck down the doctrine of "separate but equal" in what was probably the most important Supreme Court decision of this century. Yet in another hotly debated case the Court upheld the constitutionality of interning Japanese Americans during World War II. The final case addresses related questions of gender and equality.

Affirmative action programs intended to remedy the socioeconomic subordination of blacks and nonwhites, a subordination that is a legacy of slavery, segregation, and racism, raise difficult legal and constitutional questions about the meaning of race in our society and the nature of our commitment to equality. The book concludes with a debate about affirmative action involving the Court's most important affirmative action decision to date.

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PART I

UNDERSTANDING THE LAW