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英汉对照系列

陈忠诚 编著

原汁原味，再现精彩英文原著；英汉对照，方便读者阅读学习；
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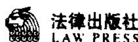

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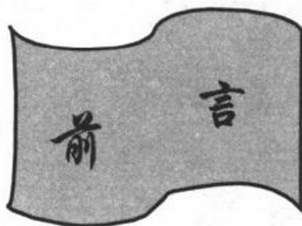


鉴于目前适合读者学习的法律英语阅读材料较为匮乏，应法律出版社之邀，特编写此书，以满足广大读者的需要。

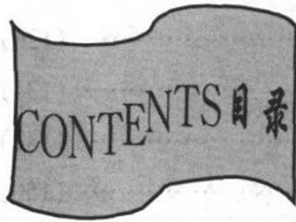
本书每篇文章主要由原文欣赏、参考译文及注释组成。与其他法律英语阅读教材相比，本书具有如下特色：(1)原汁原味。本书的文章均选自英文原著，这不仅有助于读者了解相关国家的法律规定，还能使读者在此基础上掌握比较纯正的法律英语知识。(2)采用英汉对照形式。本书采用英汉对照和篇连脚注的编排方式，更便于读者阅读、学习和查阅。(3)文章所涉内容全面丰富。在具体内容上包括法律教育、法律制度、法理学、刑法、律师、行政法、程序法等；在涉及国家上，除重点介绍英美国家法律外，还适当介绍日本、古巴、新西兰等国的法律制度。(4)文章大多短小精练，题材丰富，能让读者在最小的空间内掌握尽可能多的法律英语知识。(5)编排体例灵活自由。本书在编排体例上没有严格的前后顺序，读者可根据自己的需要和喜好，自由选择阅读，无须拘泥于目录的编排顺序。

本书适合具有一定英语基础的大学师生学习使用，也可供法官、检察官、公安人员、律师、公证人员及其他法律工作者阅读，其他喜爱法律英语的读者亦可选此书作为自学之用。

以上算是笔者的编写意图，或读者之使用须知吧。书中纰漏之处在所难免，恳请读者批评指正。

陈忠诚

2003年2月于上海



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法律英语阅读 综合法律

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☆权威翻译

☆英汉对照

☆词汇丰富

☆提高迅速

1. *Education in the Law*

Several years ago, some of us decided that something should be done about the general failure of California high schools to teach practical legal skills. How could our society ***make a dent in*** [1] ***legal illiteracy*** [2], we thought, if our schools didn't even teach kids the basics of landlord-tenant, ***domestic relations*** [3], consumer and ***business law*** [4]? Armed little more than our convictions, we approached members of the Los Angeles Times editorial staff with the idea that they should join with us to ***push for*** [5] legal education in the public schools. It was all an ***eye-opening*** [6] disappointment.

Education in the law is an absolute necessity, though I wish that it were not. As a society we need to provide more—and more creative—law teaching in our high schools. No one can ever hope to represent themselves if they are ignorant of how our laws and ***dispute resolution*** [7] systems work.

Our society was founded on liberal beliefs which included an acceptance of "natural" or "***positive***" ***law*** [8]—the idea that all men recognize and respect natural equality. The original dream was that all men would, and could, freely ***contract*** [9] with each other and that nointervention by the state would be necessary. If and when disputes occurred, a jury of twelve would hear evidence and arrive at a

---

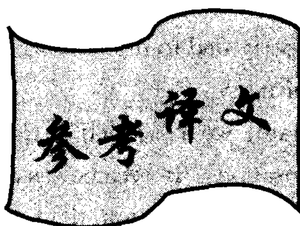
1 make a dent in:在……方面打破缺口

2 legal illiteracy:法盲

3 domestic relations:家庭法,亲属法

4 business law:商法(包括企业管理在内;如不包括,则称"commercial law")

5 push for(=press for):努力争取



法律教育

若干年前,我们中间有些人决定对加利福尼亚州的中等学校普遍未能进行任何实际法律技能教学这一情况有所作为。我们是这样想的:如果我们的中学连房东房客关系、亲属关系以及消费者法与商法等基础知识也不教给学生,我们的社会又如何能在扫除法盲方面有所突破呢? 我们就凭借着这些信念,向《洛杉矶时报》的编辑人员谈了我们的设想——他们应该同我们一起努力,推动中等学校里的法律教育。谈话的结果使我们大失所望,但却也让我们大开了眼界。

法律教育是绝对必要的——尽管我宁愿情况不是这样。作为一个社会,我们必须在中学里进行更多而且是富有创造性的法律教学。人们如果对我国各项法律和解决纠纷的制度如何运行一无所知,就决不能指望(遇事可不请律师)而自行其是。

我们社会的基石是包括接受"自然"法和"实在"法(即人人都承认并尊重自然平等的概念)在内的各种自由信念。人们原来所梦寐以求的,是大家都愿意并能够彼此自由地订立契约,而无须由国家来进行干预。一旦发生纠纷,由 12 人组成的陪审团会在公正的基础上审理

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6 eye-opening:使人开眼界的,令人大为吃惊的

7 dispute resolution:解决纠纷

8 positive law:实在法,实证法

9 contract:订立契约

verdict [10]on the basis of fairness. Education would be properly tied to moral lessons intended to produce a consensus as to what constituted fairness.

As our society grew into an urban and mechanized state, we lost much of this liberal spirit, just as we lost many of our other natural sensations. It became easier to write rules and create programs for social and economic interaction than to ***mediate*** [11]disputes as they arose. In the attempt to ***institutionalize*** [12]fairness, freedom suffered.

The rules that we have evolved can transform the simplest ***transactions*** [13]into bureaucratic nightmares. Whereas the 19th-century farmer built his home and barn as he saw fit, his 20th-century counterpart must file an ***environmental impact report*** [14], take out building permits, hire licensed contractors and build to specifications which are unrelated to his needs or concerns. The urban homeowner will find that the legal complexity of constructing a backyard shed costs more in time and money than the construction itself.

The businessman of the 19th century looked to his banker for guidance. His 20th-century counterpart requires legal assistance from an attorney specializing in tax law, an accountant familiar with mandatory insurance programs, plus a host of other ***quasi-*** [15]legal specialists. Where the 19th-century youth group could gather at the local church for a dance, today's youth must ***incorporate*** [16], and report to ***two governments*** [17], before they can rent a hall. The conditions which must be met before those same youths can be legally employed to mow a lawn or babysit often price them out of the labor market.

It seems that law has grown geometrically and the population arithmetically. The moral ***homilies*** [18]of the 19th century legal education were not sufficient tools for coping with 20th-century legal complexity, yet it is only within the last two decades that the curriculum in public schools has shown any recognition of this fact.

---

10 verdict:裁决(多指陪审团认定有罪与否的裁决)

11 mediate:调解

12 institutionalize:使制度化

13 transaction:交易,往来;法律行为

14 environmental impact report:环境影响报告书(按环保法规定某建筑对环境有何影响必须事先提出报告)

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证据并作出裁决。教育会恰当地同道德教谕结合起来；而道德教谕的目的，则在于为“公平”之内涵提供统一的认识。

随着我们的社会发展为都市化和机械化的国家，这种自由精神大都丧失了——犹如我们丧失了其他许多自然感受那样。为社会与经济的相互影响而拟定规则和规划，比起在纠纷发生后进行调解来，已经比较容易了。在企图使公平成为制度的过程中，自由遭到了损害。

我们逐步发展起来的各项规则，能把最简单的往来变成官僚制度的梦魇。19 世纪的农家可以随意地盖住宅和牲口棚；而 20 世纪的农户，就得首先提出环境影响报告、领取营造许可证、雇用领有营业执照的包工并按照同他本人的需要和心愿毫不相干的规格来营造。城市住宅的主人则会发现在后院搭一间小屋得在法律上履行的种种繁文缛节，其所需的时间和金钱比营造这间小屋的代价还要大。

19 世纪的商人求教的是同他有往来的银行家。可是，20 世纪的商人需要的却是一位擅长税法的律师、一位熟悉强制保险计划的会计划以及一群在法律上能给他帮助的准法律专门人员。19 世纪的年轻人可以聚集在当地的教堂举行舞会；而今天的青年就必须在能够租到场地之前组成法人，向两个政府打报告。这些青年在能依法受雇刈草坪或替人临时照着小孩之前所必须遵守的种种条件，往往使他们的工资标准高到劳动市场无法承受的程度。

看来，法律似乎在按几何级数发展，而人口却在按算术级数增长。19 世纪法律教育关于道德的老生常谈已不足以应付 20 世纪法律的错综复杂了；但中学课程表对这一事实有所承认，还只不过是近 20 年来才有的事。

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15 quasi-：准（××）。文中的“quasi-legal”英语中亦作“para legal”。

16 incorporate：组织法人；成立公司

17 two governments：两种政府（根据情况或为联邦政府与州政府，或为州政府与地方政府，因各级政府所管辖之事项不一）

18 homily：使人厌烦的说教

2. *Law and Morality*

It can be presumed that all or most societies distinguish legal rules from moral precepts in some fashion. The ***positivistic legal doctrine*** [1] of the nineteenth century attempted to carry this tendency to its consummation . ***John Austin*** [2] emphasized the need for eliminating ethical value judgments and moral reasoning from the application and ***enforcement*** [3] of the law. ***Hans Kelsen*** [4] bluntly declared that, in his view of the positive legal order, "the concept of law has no moral connotations whatsoever." More recently, ***Herbert Hart*** [5] has offered a defense, with some qualifications of the positivistic insistence on separation of the ***two agencies*** [6] .

The separation doctrine is generally not extended to the ***making of law*** [7]. ***Justice Holmes*** [8] , for example, who was a protagonist of the doctrine, declared that "the law is the witness and external deposit of our moral life." The ***makers of the law*** [9] are frequently influenced by traditional or novel ideas of social morality. It is not only true that the most basic tenets of this morality are almost inevitably

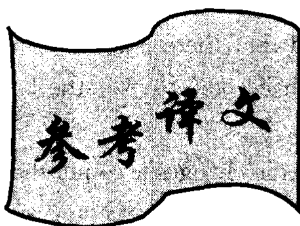
---

1 positivistic legal doctrine:实证法学说,实在法学说

2 John Austin (1790—1859):英分析法学派奠基人,1825年(一说1826年)执教于伦敦大学。所著有 The Province of Jurisprudence Determined [《法理学范围》、A plea for the Constitution (《宪法辩》)、Lectures on Jurisprudence (《法理学讲义》)]等书。

3 enforcement:执行,实施

4 Hans Kelsen (1881—1973):奥地利法学家、维也纳法学教授和奥地利宪法(1920)作者,后去英国,又在美国一些大学担任教授,所著有《国家与法的概论》等多种。他是一位重要的宪法和国际法学家,也许还是20世纪最有影响的法理学家。



法律与道德

我们不妨认为：一切或大多数社会都以某种方式把法律规则同道德规则区别开来。19世纪实证法学派学说，曾试图使这一趋势登峰造极。约翰·奥斯丁强调，有必要把种种伦理价值的判断和道德论证从法律的适用和执行中一笔勾销。汉斯·凯尔逊则按照他对实证的法律秩序的观点，直截了当地宣称："法这一概念中没有任何道德的内涵"。更近一些，赫伯特·哈特又有所保留地替实证法学派关于法律与道德两者互相独立的坚决主张提供了辩护。

这种独立论，一般不及于立法。例如，这一学说的积极主张者贺尔姆斯大法官就这样说过："法乃吾人道德生活之见证人和外壳"。立法者往往受社会道德的新旧观念的影响。诚然，这一道德最基本的原则几乎是必然被纳入法的总体的；但是也应该指出：在构成法的一部

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5 Herbert Hart (1907—)：英国法学家，曾先后任牛津等校教授，所著有《法律中的因果关系》(与Honore合作)、《法的概念》、《法的自由与道德》等书。

6 two agencies：两者(此处指 law 和 morality)

7 making of law：立法；亦作"law(-)making"

8 Justice Holmes：贺尔姆斯大法官，全名为 Oliver Wendell Holmes (1841—1935)，历任哈佛大学法学院教授、麻省最高法院大法官及法院院长。1902年起至1932年止任联邦最高法院大法官共30年，为美国最优秀的法官之一。办案期间常撰写异议书(dissenting opinion)，据说其内容极其精彩，故有"伟大的异议者"(The Great Dissenter)之称。

9 maker of the law：立法者；亦作"law(-)maker"

received into the ***body of law*** [10]. It should also be noted that there is a wavering line of demarcation between those moral principles which become part of the law and those which stand outside its orbit.

In the ***law of unfair competition*** [11], for example, some changes accomplished in recent times by courts and ***legislatures*** [12] must be attributed to a sharpening and refinement of the moral sense, accompanied by a conviction that the business community must be protected against certain reprehensible and unscrupulous trading practices by means more effective than moral disapproval.

Conversely, it may happen that certain acts previously deemed to demonstrate a degree of immorality requiring legal ***proscription*** [13] are taken out of the domain of law and relegated to the sphere of individual moral judgment. In England, for example, ***homosexual acts*** [14] between consenting adult males were removed from the ***reach of the criminal law*** [15], and similar ***legislation*** [16] was adopted in the state of Illinois.

In as much as the ***promulgation*** [17] of ascertainable standards identified as legal commands or prohibitions is an essential ingredient of the ***rule of law*** [18], there is a plausible axiological conviction behind the demand that the law and morals be kept apart in the ***administration of justice*** [19]. Yet, there are definite limits to the extent to which this demand can be realized and implemented in the ***judicial process*** [20]. Where there is ambiguity and doubt in the law, the ethical convictions of the judge as to the "rightness" or "wrongness" of a certain solution will often have a decisive bearing upon the ***interpretation*** [21] of a statute or the application of an established rule to a novel situation. A reliance on moral ideas may also occur when courts, in ***overruling*** [22] a ***precedent*** [23], depart from the doctrine of ***stare***

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10 body of law:法律的总体

11 law of unfair competition:不当竞争防治法。按:英语中法律的名称中往往不用“防治”、“反对”等词,如“Statute of Frauds”当然不是“诈欺法”而是“反诈欺法”。这里的“law of unfair competition”,自然也不是规定如何进行不正当竞争的“不当竞争法”,而是“不当竞争防治法”。这一点在理解和翻译法律英语时,宜引起重视。当然,用“反对”字样的法律亦非绝无,如“Anti-trust Law”中的“anti”。

12 legislature:立法机关

13 proscription:禁止

14 homosexual act:同性性行为

15 reach of the criminal law:刑法的范围

分的那些道德原则与处于法的轨道之外的那些道德原则之间，存在着一条游移不定的分界线。

例如，在不当竞争防治法领域中，晚近法院和立法机关所完成的某些改变，必须归因于道德观念的敏锐和精练以及下列信念——必须采取较道德上的非难更为有效的手段保护商界，使之免遭某些不择手段的和应受谴责的商业习惯之害。

反之，也可能发生这样的情况：某些先前认为是反映某种程度的不道德从而依法予以禁止的行为被挪出法的范畴而纳入由个人行使道德判断的范围中去了。比如说在英国，成年男子间经双方同意而发生的同性行为业已不在刑法范围之内；美国的伊利诺州也通过了类似的立法。

颁布有法律上的命令或禁令之称的明确标准，乃是法制的基本内容；所以，在司法不得把法律与道德混为一谈这一要求的背后，有着一个似若有理的价值论上的信念。然则，这一要求能在审判过程中得以实现和贯彻的范围，是有一定限度的。凡法律上有含混不清之处，法官关于某种解决是"是"或"非"的伦理信念，往往对一项制定法之解释或对一项既定规则之适用于新情况，都具有决定性的影响。依靠道德观念的现象也会发生于下列情况：法院背离"遵循先例"原则而推翻先

16 legislation：立法

17 promulgation：公布

18 rule of law：法治；法制（意同"legality"）〔按：汉语"法治"与"法制"为异义概念，但英语"rule of law"却可以与"legality"同义。〕

19 administration of justice：司法

20 judicial process：审判程序，司法程序

21 interpretation：解释

22 overrule：推翻

23 precedent：先例，判例

decisis [24]. Furthermore, a judge may become confronted with the moral dimension in the law when he is called upon to ***enforce*** [25]an ***enactment*** [26]which is totally repugnant to the community's ***sense of justice*** [27].

There exist, of course, broad areas of the law in which moral ideas do not play any conspicuous part. The technical ***rules of procedure*** [28], the regulation of ***negotiable instruments*** [29], the enactment of ***traffic rules*** [30], the details of the governmental organizational scheme would generally fall into this category. The guiding notions of legal policy in these areas are utility and expediency rather than moral convictions.

It appears from the foregoing exposition that the law and morality represent distinct ***normative orders*** [31]whose spheres of control ***overlap*** [32]in part. There are domains of morality which stand outside the ***jurisdictional boundaries*** [33]of the law. There are branches of law which are largely unaffected by moral valuations. But there exists a substantial body of ***legal norms*** [34]whose purpose it is to guarantee and reinforce the observance of ***moral imperative*** [35]which are deemed essential to the well-being of a society.

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24 stare decisis:(拉)遵循先例

25 enforce:执行,实施

26 enactment:立下的法,立法

27 sense of justice:法制观念,正义观念

28 rules of procedure:(诉讼)程序规则

29 negotiable instruments:流通证券,票据

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