

REVIEW

Law and Morality: Readings in Legal Philosophy

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Law and Morality: Readings in Legal Philosophy, edited by Arthur Ripstein and David Dyzenhaus.
Toronto: University of Toronto Press, 1996, xii + 779 pp.

THE SUBJECT OF LEGAL PHILOSOPHY arouses mixed emotions. Members of the legal community generally fall into one of four categories when asked about the merits of legal theory. Those in Camp I, mostly academic types, argue that a good understanding of jurisprudence is essential for a proper legal education and attribute many of the deficiencies of our legal system to the fact that most lawyers and judges know very little about legal theory. Those in Camp II regard legal philosophy as a hobby—enjoyable, but for the most part of no application to the actual practice of law. Camp III's constituents view the study of legal philosophy as too difficult and time consuming an undertaking to be bothered with. Finally, there is Camp IV, whose members are openly hostile. They regard legal theory as useless at best, and at worst an attempt by out-of-touch academics to impose their personal politics on impressionable minds.

It may be helpful at this stage to clarify what is meant by "theory." Theory is the means by which we order our experiences in the structure which best explains them. Good theory accurately represents our collective experiences and unifies seemingly unrelated events into a coherent story—it allows us to create history. When we speak of "legal theory" or "jurisprudence" or "legal philosophy," we mean grand theory. This includes the study of the role of law in the behaviour of citizens and their obligation to follow it. Essentially, it involves answering the following questions: What is law? How is law created? And, what should law be?

Those in Camps II, III, and IV—mostly judges, lawyers, and law students—believe that legal theory does not play a significant role in the day to day operation of the law. Camp I's membership would respond by saying that the standard

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conception of law, as a body of rules governing the conduct of citizens in a political entity, with all that this notion encompasses, is a form of theory, whether we call it theory or not. They argue that when we fail to identify an explanation of ideas and experiences as “theory” we deny ourselves the ability to analyse and criticise it as theory. Camp I believes that such is the result of contemporary legal education. For the most part, the legal community embraces a theory of non-theory—that is, a theory so successful that we fail to perceive it as one.

Some would argue this is the desired state of affairs. If the field of legal philosophy is, as courageous law students quickly discover, replete with mines and tripwires, perhaps it is best to steer clear of it altogether. Perhaps ignorance, or avoidance, is preferable to basic proficiency. After all, practising lawyers rarely, if ever, engage in open theoretical debate. Camps II, III, and IV would say legal theory is for academics, Supreme Court judges, and people with too much time on their hands.

Arthur Ripstein and David Dyzenhaus are clearly in the first camp. But unlike many of the authors writing about legal philosophy, they, wisely, do not take it for granted that the reader is also on side. Their book, *Law and Morality: Readings in Legal Philosophy*, is an anthology of articles, readings, cases, and commentaries on legal philosophy that skilfully illustrates how jurisprudence affects the way in which judges decide cases, thereby demonstrating the very real effects of legal theory on the practice and application of law. With its emphasis on contemporary social issues in Canada, the book fills a long-standing need for a text on Canadian jurisprudence that demonstrates the utility of legal philosophy for lawyers, judges, law students, and anyone interested in the application of the law to morally complex issues.

The book has many strengths, the first being choice. With 779 pages in all, it provides the reader with plenty of variety. For example, the book includes Nelson Mandela’s spectacular “Speech from the Dock,” an interesting novella by Herman Melville, and the recent decision of the Quebec Superior Court in *Bertand v. Quebec*¹ on the legality of the Quebec referendum. The articles range in topic, length, and complexity, covering traditional legal philosophy, feminist approaches to the rule of law, and the application of legal theory to five contemporary social issues in Canada: (i) defining the family; (ii) civil disobedience; (iii) the limits of legal order; (iv) free speech, hate propaganda, and pornography; and (v) abortion. Few will read the book from cover to cover, but almost anyone with an interest in law and society will find enough in it to justify the purchase. Professors of legal philosophy can pick and choose from the book in order to tailor a course syllabus to their likings, and then can change the focus of the course from year to year by making different selections.

¹ (1995) 127 D.L.R. (4th) 408 (Que. S.C.).

For a text on legal philosophy, the book is surprisingly readable. Those who are not completely comfortable with Canadian law or jurisprudence will find the book contains a very helpful overview of the Canadian legal system and a glossary of legal and philosophical terms used. The editors begin each chapter with a well-written and easy-to-understand overview, placing the theme of the chapter in the context of the book as a whole. Each individual article is also preceded by a brief introduction explaining the thrust of the article and how the thesis put forward by the author differs from the ideology of others and its contribution to legal philosophy in general. At the end of each case or article, the editors provide thought-provoking questions which test the reader's understanding of the material and its practical implications. All of this is done without resort to unnecessarily technical language, and without the oversimplification of the ideas presented.

The book's greatest asset is its ability to illustrate how the seemingly theoretical notions presented by academics translate into actual practice. In each chapter the editors have included judicial decisions where courts were forced to grapple with issues of legal theory. An excellent example is found in the chapter entitled "Feminist Approaches to the Rule of Law," which ends with a lengthy extract from the Supreme Court of Canada decision in *Lavallee v. The Queen*.² In *Lavallee*, an abused spouse killed her husband and successfully argued she was defending herself. The case is interesting in its own right, but in the context of the chapter—which includes articles by Catherine McKinnon and Martha Minow—it demonstrates how feminist legal theory is being applied to address practical concerns for Canadian women. Similarly, the chapter on "Law and Values" ends with an excerpt from the decision of the Supreme Court of Canada in *Hofer v. Hofer*.³ In *Hofer*, the issue to be tried was whether members of a Hutterite colony who were expelled for converting to another religion could claim their share of the colony's land. The decision is an excellent illustration of the debate on whether the liberties provided by Canadian law, in this case freedom of religion, are to be construed as positive or negative liberties. Another example is found in the second chapter where the editors include two very interesting cases on the law of slavery in the United States. These cases illustrate how positivism can be viewed as a theory of adjudication rather than a theory of law, and the unsatisfactory results in its application in certain situations.

For all its virtues, the book is not without its failing. Many of the excerpts from the cases are far too long for the purposes they serve. While most of the essential writings on legal positivism are reproduced—including essays by Thomas Hobbes, H.L.A. Hart, Lon L. Fuller, Ronald Dworkin, John Finnis, John Rawls, and Patrick

² [1990] 1 S.C.R. 852.

³ [1992] 3 S.C.R. 165.

Devlin—those who wish to use the book as basic introduction to jurisprudence will find it lacking in some areas. For example, the book contains very little on legal realism or critical legal studies. In light of the O.J. Simpson trial and the interest in Aboriginal justice in Canada, an article on critical race theory might also have been a worthwhile addition. As for the contemporary issues chosen for discussion, the editors might have included a section on the right to die and a section on drug use. Both these issues have received much attention in the media and provide for excellent discussion on the practical application of different theories of legal philosophy. The omission of these topics in a book on contemporary issues on law and morality is unfortunate.

Despite these deficiencies, *Law and Morality* is still a superb textbook on legal philosophy and for anyone with an interest in the relationship between law and morality in Canada. Since the introduction of the *Charter of Rights*, Canada's legal and political culture has become increasingly influenced by legal theory and philosophy. The book equips the reader with the proper philosophical underpinnings to many practical legal and social problems facing Canadian society, and illustrates how these issues are being addressed and resolved by the Canadian legal system. This is accomplished with elegance and simplicity, providing a guided tour of campsite I, where at least some readers will decide to set up tent on a permanent basis.