Foundations of Law
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CAROLINA ACADEMIC PRESS
Durham, North Carolina
To Katie and Anita
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Acknowledgements

We are grateful to many friends, teachers, mentors, and colleagues. Gerard Bradley and the late Charles Rice inspired the course that gave rise to this book. Robert George, Edith Jones, Douglas Kmiec, Tim Perrin, and many other mentors provide inspiration in the search for truth. Michael Ambrosio, Ryan Anderson, John Breen, William Brewbaker, Matthew Franck, Neil Gorsuch, Jeffrey Hammond, Collin Mangrum, Tom Parker, James Stoner, and Robert Vischer made helpful suggestions and/or directed us to reading materials. During the years since we first offered the course, we have benefitted from the feedback of our law school colleagues and many students. As the book took form we enjoyed the invaluable research and editorial assistance of Ned Swanner and Tiffany White. Carol McGeehan, Carolyn Czick, Ryland Bowman, Sara Hjelt, and the rest of the team at Carolina Academic Press demonstrated charity and professionalism in abundance as the project came to fruition.
Introduction

This book is designed to help students make sense of law in the midst of a changeful age. It is founded upon the conviction of the great English jurist William Blackstone, which we share, that law students need both technical instruction in the practice of law and liberal instruction in the history and jurisprudential concepts of law. Preparation for effectiveness in the practice of law requires careful consideration of the enduring nature of law and its relationship to equity and justice.

Blackstone explained the value of a legal education in what we would today call the Great Books. He wrote:

[E]xperience may teach us to foretell that a lawyer, thus educated to the bar, in subservience to attorneys and solicitors will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be not instructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn, *a priori*, from the spirit of the laws and the natural foundations of justice.

Our objective is to help students connect the particular rules and institutions of the jurisdictions in which they will practice with enduring truths concerning law and justice. Our pursuit of this objective invites students to join a long-running conversation. This great conversation considers in an unhurried way the big questions foundational to the law: What is law?; Is an unjust law a law?; Are rights and duties entailed in human nature, or are they simply privileges granted by the sovereign?; Do human rights exist?; Are there limits on legislative, executive, or judicial sovereignty?

Though the importance of these questions is increasingly apparent in our day, and the urgency of finding satisfying answers never more pressing, the questions themselves are not new. Many great thinkers have considered these questions over the last two and a half millennia or so. And many have offered thoughtful answers borne out of their own reading, learning, and careful reflection.

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1. “Thus is the law written.” This phrase is thought to have originated in Justinian’s Digest in the sixth century. Our experience as teachers of the law has taught us that many law students (and many others) desire to reduce law to its “black letter.” This, as we will discover in this text, is itself a tendency with ancient roots. But we will also discover many dangers in this understanding of law.
This book surveys four categories of writings:

1. time-tested books concerning law and justice — for example, the writings of Sophocles, Plato, Aristotle, and Aquinas;

2. works that explain more particularly the foundations and workings of Anglo-American legal norms and institutions — Blackstone, Bentham, Austin, Locke, the Federalists, Lincoln, Holmes, and Rawls, to name a few;

3. jurisprudents and philosophers who offer particularly helpful analytical insights — Hart, Hohfeld, Anscombe, Dworkin, and Finnis, among others; and

4. particular constitutions, declarations, statutes, cases, and other legal and political texts (even a letter from jail) that illustrate and reinforce the key lessons drawn from those great works.

Of course there is overlap here. Blackstone could belong in the first and second categories; Austin could be placed in both the second and third. And readers will no doubt find lessons in these rich readings beyond those which motivated us to include them.

The judicial decisions, statutes, proclamations, and other legal materials are included to illustrate how key foundational concepts recur in our own legal norms and institutions. This study provides a solid grounding for evaluating rapidly-changing laws and for practicing within unstable institutions. Along the way, enduring aspects of legal practice are emphasized: the role and practice of logic; the meaning and importance of conscience and of due process; different ways to understand the interpretation of legal texts; the relation of law to other normative concepts (such as morality) and to science (such as economics); and the relationships between and among law, equity, and justice.

We believe that everything in this book has practical value. We seek to equip students with the ability to be servants of the law and also masters of legal materials. This ability is increasingly important in an age when law is changing rapidly and contentiously. Our fractured era is one in which law is instrumentalized by various factions. It is an era full of competing voices contradicting each other often in shrill and unhelpful tones. We invite law students to step outside the cacophony and to participate for a time in the transcendent conversation about the foundations of law. We think that this conversation helps students make sense of the seemingly helter-skelter data of everyday legal practice. It also helps lawyers make sense of their own role as servants of law. And we hope it enables those who participate to find answers to questions they are sure to confront in their lives as practitioners as they provide legal counsel.

2. Roger Crampton, the former dean of Cornell Law School, observed that most American law schools teach law as if it were merely “an instrument for achieving social goals and nothing else.” Dean Crampton observed that the tendency to reduce law to its social utility “has the paradoxical effect of reducing the appeal of the ‘rule of law’ at precisely the time when law is most worthy of respect. Secularization has removed most of the element of mystery from law, but it may not be as effective as the older, more sacred, conception of law for commanding the respect of the people.” Crampton, The Ordinary Religion of the Law School Classroom, 29 J. Legal Ed. No. 3 at 247.