

# Foundations of Law



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*To Katie and Anita*



# Contents

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Acknowledgements	xiii
Introduction	xv
<b>PART I · WHAT IS LAW?</b>	
<b>Chapter 1 · Law and Human Inquiry</b>	<b>3</b>
<i>Crito</i> by Plato	6
<i>Antigone</i> by Sophocles	17
<i>Mere Christianity</i> by C.S. Lewis	54
<b>Chapter 2 · Law as Human Artifact &amp; Divine Command</b>	<b>59</b>
The Code of Hammurabi	61
Introduction to Ten Commandments	73
Deuteronomy — Chapters 4 & 5	74
Introduction to Modern Legal Codes	78
Nevada Revised Statutes — Chapter 104A — Uniform Commercial Code	80
<b>Chapter 3 · Law as Reason</b>	<b>87</b>
<i>Nicomachean Ethics</i> by Aristotle	90
The Practice of Reason — Introduction to “Thinking like a Lawyer”	106
<i>Buckner v. Street</i> , 4 F. Cas. 578 (E.D. Arkansas 1871)	109
<b>Chapter 4 · Law as Revelation</b>	<b>117</b>
The Gospel According to Mark	119
Chapter 12	119
Saint Paul’s Letter to the Romans	121
Chapter 1	121
Chapter 2	122
Chapter 13	123
<i>Barger v. Barringer</i> , 66 S.E. 439 (N.C. 1909)	126
<i>Awad v. Ziriox</i> , 670 F.3d 1111 (10th Cir. 2012)	136
<b>Chapter 5 · Natural Law and Justice</b>	<b>147</b>
Natural Law and Civil Rights	149
Thomas Aquinas, <i>Treatise on Law from the Summa Theologica</i>	151

Question 90: <i>Of the Essence of Law</i> (In Four Articles)	151
Question 91: <i>Of the Various Kinds of Law</i> (In Six Articles)	156
Question 92: <i>Of the Effects of Law</i> (In Two Articles)	161
Question 93: <i>Of the Eternal Law</i> (In Six Articles)	164
Question 94: <i>Of the Natural Law</i> (In Six Articles)	172
<b>Chapter 6 · The Promulgation of Human Law</b>	187
Thomas Aquinas, <i>Treatise on Law from the Summa Theologica</i>	188
Question 95: Of Human Law (In Four Articles)	188
Question 96: Of the Power of Human Law (In Six Articles)	194
Question 97: Of Change in Laws (In Four Articles)	202
Maggie Gallagher & Barbara Whitehead, <i>Debate: End No-Fault Divorce?</i>	211
<b>PART II · SOURCES OF LAW IN THE ANGLO-AMERICAN TRADITION</b>	
<b>Chapter 7 · The Common Law</b>	223
What is Common Law?	223
Change, Continuity, and Blackstone's <i>Commentaries</i>	224
Volume 1, William Blackstone, <i>Commentaries on the Laws of England</i>	226
<i>Hannah v. Peel</i> , [1945] K.B. 509 (King's Bench)	257
<b>Chapter 8 · The Common Law Mind</b>	267
Reading Questions	268
Joseph Story, <i>A Discourse Pronounced Upon The Inauguration of the</i> <i>Author as Dane Professor of Law in Harvard University</i>	268
James R. Stoner, Jr., <i>Common Law and the Law of Reason</i>	284
<i>Pierson v. Post</i> , 2 Am. Dec. 264 (N.Y. 1805)	289
<b>Chapter 9 · Positivism and Consequentialism</b>	297
The Intellectual Roots of English Positivism	298
Jeremy Bentham, <i>Principles of Morals and Legislation</i>	299
Jeremy Bentham, <i>Of Laws in General</i>	301
John Austin, <i>The Province of Jurisprudence Determined</i>	315
<b>Chapter 10 · Common Law and Positive Law</b>	335
Introduction to the Law of Wrongs: Torts and Crimes	336
<i>Bird v. Holbrook</i> , 130 Eng. Rep. 911 (1825)	338
Introduction to Law as Legislation	343
Criminal Law Codified: The Law of Federal Crimes	345
18 U.S.C. §1343. Fraud by wire, radio, or television	347
18 U.S.C. §§1693, 1696, and 1700	347
<i>Elonis v. United States</i> , 135 S. Ct. 2001 (U.S. 2015)	349



<b>Chapter 11 · Law and Equity</b>	369
Aristotle, <i>Nicomachean Ethics</i>	371
Volume 3, William Blackstone, <i>Commentaries on the Laws of England</i>	377
<i>Riggs v. Palmer</i> , 22 N.E. 188 (N.Y. 1889)	393
<i>Danos v. St. Pierre</i> , 402 So. 2d 633 (La. 1981)	398

### PART III · ANGLO-AMERICAN CONSTITUTIONALISM

<b>Chapter 12 · Natural Rights and Social Contracts</b>	409
John Locke, <i>Second Treatise on Government</i>	410
The Declaration of Independence	432
The Gettysburg Address (Bliss copy)	437
<b>Chapter 13 · The Constitution of the United States</b>	439
Introduction to American Constitutionalism	439
The Constitutional Convention	441
Constitution of the United States	443
<i>Federalist No. 1</i>	457
<i>Federalist No. 51</i>	461
Introduction to the Bill of Rights and Other Amendments	465
<b>Chapter 14 · Democracy and Republicanism</b>	475
<i>Federalist No. 10</i>	477
Emancipation Proclamation (1863)	484
<i>Evenwell v. Abbott</i> , __ U.S. __, 136 S. Ct. 1120 (2016)	487
<b>Chapter 15 · Vested Rights and Police Powers</b>	507
Reading Questions	508
<i>Calder v. Bull</i> , 3 U.S. 386 (1798)	509
Edward S. Corwin, <i>The Basic Doctrine of American Constitutional Law</i>	520
<i>Lochner v. New York</i> , 198 U.S. 45 (1905)	536
<i>Harbison v. City of Buffalo</i> , 152 N.E.2d 42 (N.Y. 1958)	545
<b>Chapter 16 · Courts, Law, and Judicial Power</b>	553
<i>Federalist No. 78</i>	557
<i>Dred Scott v. Sandford</i> , 60 U.S. 393 (1857)	564
<i>Speech on the Dred Scott Decision</i> , Abraham Lincoln	573
First Inaugural Address of Abraham Lincoln	578
Philip Hamburger, <i>Judicial Office and the Liberty Protected by Law</i>	584

### PART IV · LAW IN THE TWENTIETH CENTURY

<b>Chapter 17 · The Law as Science</b>	595
<i>The Path of the Law</i> by Oliver Wendell Holmes, Jr.	597
<i>Southern Pacific Co. v. Jensen</i> , 37 S.Ct. 524 (1917)	615
<i>Buck v. Bell</i> , 47 S. Ct. 584 (1927)	620

<b>Chapter 18 · Analytical Jurisprudence</b>	623
Wesley Hohfeld and the Scheme of Jural Relations	623
Leif Wenar, <i>Rights</i> , Stanford Encyclopedia of Philosophy	624
Introduction to Legal Realism	631
The Concept of Law as Rules	634
H.L.A. Hart, <i>The Concept of Law</i>	635
Introduction to Contracts: Promises Imposing Obligation	652
<i>J. L. McEntire &amp; Sons, Inc. v. Hart Cotton Co., Inc.</i> , 511 S.W.2d 179 (Ark. 1974)	653
<b>Chapter 19 · Rules of Recognition</b>	655
<i>Swift v. Tyson</i> , 41 U.S. 1 (1842)	655
<i>Erie Railroad Co. v. Tompkins</i> , 304 U.S. 64 (1938)	661
<i>Morissette v. United States</i> , 342 U.S. 246 (1952)	665
<b>Chapter 20 · The Inner Morality and Authority of Law</b>	683
The Inner Morality of Law	685
<i>The Inner Morality of Law</i> , by Lon Fuller (1964)	687
The Authority of Law	692
John Finnis, <i>Natural Law and Natural Rights</i>	693
Authority and the Common Good	698
Introduction to Property: Property as Owner's Dominion	701
<i>Carter v. Thomas</i> [1893] 1 Q.B. 673	703
<b>Chapter 21 · Positive Law and the Inner Morality of Law</b>	707
<i>Korematsu v. United States</i> , 323 U.S. 214 (1944)	707
<i>City of Chicago v. Morales</i> , 527 U.S. 41 (1999)	717
<b>Chapter 22 · The Integrity of Law</b>	735
Ronald Dworkin, <i>Hard Cases</i>	737
<i>Summers v. Tice</i> , 33 Cal. 2d 80 (1948)	754
<i>Skipworth v. Lead Ind. Assoc., Inc.</i> , 547 Pa. 224 (1997)	759
<b>PART V · LAW IN THE TWENTY-FIRST CENTURY</b>	
<b>Chapter 23 · Liberty and Personal Autonomy</b>	769
John Stuart Mill, <i>On Liberty</i>	770
Liberty and Personal Autonomy: Joseph Raz and <i>The Morality of Freedom</i>	783
Ted McAllister, <i>The Institutions of American Liberty</i>	787
<b>Chapter 24 · Law and Freedom</b>	797
<i>Commonwealth of Virginia v. Sebelius</i> , 728 F. Supp. 2d 768 (E.D. Va. 2010)	797
<i>West Virginia Board of Education. v. Barnette</i> , 319 U.S. 624 (1943)	807
<i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992)	817

<b>Chapter 25 · The Neutrality of Law</b>	827
Institutional Neutrality	827
Normative Neutrality	828
John Rawls and the Theory of Justice	828
Public Reasons and the Neutrality of Law	829
The Possibility of Neutrality	830
Moral Reasoning and Sexual Liberties	832
Neutrality and Marriage Law	832
<i>Obergefell v. Hodges</i> , __U.S.__, 135 S. Ct. 2071 (2015)	834
<b>Chapter 26 · The New Consequentialism: Law and Economics</b>	861
Richard A. Posner, <i>The Economic Approach to Law</i>	862
<i>MacPherson v. Buick Motor Co.</i> , 111 N.E. 1050 (N.Y. 1916)	871
<i>Escola v. Coca-Cola Bottling Co.</i> , 150 P.2d 436 (Cal. 1944)	880
<b>Chapter 27 · Pre-Moral Foundations of Law</b>	889
John Finnis, <i>Natural Law and Natural Rights</i>	891
Christine Jolls, Cass R. Sunstein, and Richard H. Thaler, <i>A Behavioral Approach to Law and Economics</i>	908
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	920
<b>Chapter 28 · Moral Foundations of Law</b>	931
Basic Requirements of Natural Law	932
Robert P. George, <i>Morality, Rationality, and Natural Law</i>	935
John Finnis, <i>Moral Absolutes: Tradition, Revision, and Truth</i>	938
<i>Gonzales v. Carhart</i> , 550 U.S. 124 (2007)	952
Index	971



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# Introduction

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This book is designed to help students make sense of law in the midst of a change-ful 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*<sup>1</sup> 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. jurists 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<sup>2</sup> 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.

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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.