

FOREWORD: WHY WE NEED LEGAL PHILOSOPHY

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As I see it, the object of legal philosophy is to give an effective and meaningful direction to the work of lawyers, judges, legislatures, and law teachers. If it leaves the activities of these men untouched, if it has no implications for the question of what they do with their working days, then legal philosophy is a failure.

— Lon L. Fuller¹

Do we need legal philosophy? Legal philosophy or jurisprudence, like many other areas of philosophy, is of intrinsic interest to many people. But this does not tell us whether or why we *need* it. The answer suggested by Lon Fuller is that legal philosophy has — or should have — implications for lawyers, judges, legislators and law professors. And yet in 1952 Fuller concluded that: “Judged by this standard I don’t think we can claim that the last quarter of a century has been a fruitful one for legal philosophy in this country — certainly not in terms of immediate yield.”²

Fuller’s dour observation, if it was true when made and remained true, leads to two further questions: First, in what manner does legal philosophy affect the practice of law? Second, how is it that some philosophies are useful to legal institutions and others are not? In this essay I shall briefly describe the present state of legal philosophy and, then, sketch the answers to these questions that are suggested by one particular strain of recent jurisprudential thought. We will then be in a position to address the question of why we need legal philosophy. In addressing that question, the purpose of this symposium can be better understood.

LEGAL PHILOSOPHY: THE STATE OF THE ART

American legal scholarship of the past several decades has centered primarily on justifying and advocating the expansion

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1. L. FULLER, *THE PRINCIPLES OF SOCIAL ORDER* 249-50 (K. Winston ed. 1981)
2. *Id.* at 250.

of governmental jurisdiction and power at the expense of private jurisdiction and liberty. Consequently contracts, torts and property, the private law categories that define the nature and scope of individual property rights — the key concept in the classical liberal vision of a free and just society — have been slighted in favor of such public law subjects as constitutional law, administrative law, labor law, and antitrust law, subjects that concern the nature and scope of government.

When private law is discussed, it has been fashionable to treat the rights of individuals as simply one “factor” to be “balanced” against the “public good” within a calculus of what is called a “public policy” analysis. How one attaches real weights to things that cannot be measured is never specified. Nonetheless, this theoretical approach has spawned a generation of lawyers, teachers and jurists that views the legal system as an instrument by which any aspect of human achievement and enterprise, particularly commercial enterprise, may be regulated.

It is no coincidence that a period so neglectful of the private rights of the common law has corresponded to a period where legal philosophy was mired in the twin ruts of Legal Positivism and Legal Realism. Legal Positivism is a philosophy that conceives of law as the command of the sovereign. Law is law because of *who* pronounces it, not *what* it commands. The question, “what is law” is asserted to be wholly distinct from that of “what *should* be the law.” Judges have a legal duty to follow the law as it is. To a positivist, any moral duty to refuse to follow an unjust law that might exist is an extralegal affair.

Against this view, the proponents of the natural law position argue that this positivist definition of law puts the cart before the horse. The institution of Law, they argue, has a social function (more on what this function might be below). While it is true that law oftentimes requires enforcement³ and that the proper source or sources of law must be determined if the institution of law is to fulfill its function, *what* the law requires is at least as important to this end as *who* decides on the law. In short, substance is as important as process. The private rights of the common law evolved to fulfill the proper end or function of law. Substantive scrutiny of the commands called “law” is

3. Cf. L. FULLER, *THE MORALITY OF LAW* 108-110 (rev. ed. 1969) (rejecting force as a “distinguishing mark” of law).

therefore needed to ensure that positive legal commands are truly Law, as opposed in mere "directives." Positivism denies that such scrutiny is a part of a correct concept of law. In this respect, the Natural Law position holds that Legal Positivism is fatally flawed.

To those who would assert that a judge's function is to discern and enforce the private rights of the parties to a dispute, the philosophy of Legal Realism is a useful adjunct to positivism. By asserting that judges don't mean what they say, or that the process of judicial reasoning is "nondeterminative" — meaning that it does not dictate any particular outcome in a given case — this view enables supporters of State-made law of whatever substance to ridicule any judicial effort to discern the "rights" litigants have against each other or any "rights" individuals may have against the State. If, at their root, rights are and can be nothing other than naked judicial assertions, then two views hostile to private rights arise. First, no *legal* criticism can be made when a judge declares a right or refuses to enforce one, since there is no legal standard against which the judge's action can be assessed. Second, what warrant is there for a judge to thwart the "will of the people" as expressed by their "representatives?"

The fact that Legal Positivism and Legal Realism each have valuable insights to offer us all does not diminish the truth that for decades now they both have been employed by some to expand State power in all of its guises. In recent years, however, there has arisen in graduate and law schools across the country an interest in legal philosophy, individual rights and private law that has not been witnessed since the 1930s. Although I have recently chronicled this story elsewhere at some length,⁴ in 1979, David A.J. Richards concisely noted these developments and highlighted their fledgling nature. He said:

We are in the midst of a major jurisprudential paradigm shift from the legal realist-legal positivist paradigm of the legal official as a managerial technocrat ideally seeking the utilitarian goal of the greatest happiness of the greatest number, to a natural law paradigm of rights. This shift . . . has not yet been fully and fairly articulated; therefore one cannot be

4. See Barnett, *Contract Scholarship and Reemergence of Legal Philosophy* (Book Review), 97 HARV. L. REV. 1223 (1984) (reviewing E. A. FARNSWORTH, *CONTRACTS* (1982)). In the discussion that follows, I shall not retrace the existence and resurgence of this new movement I called normative legal philosophy. I will, however, offer a new twist.

certain of the final form the paradigm will take or of the extent of its influence on thought about and the practice of law.⁵

The members of this movement reject Legal Positivism in favor of a view of law that involves morality, and they defend traditional forms of legal reasoning and adjudication from the Legal Realist critique.⁶ Since Richards wrote, however, two distinct strains of this movement appear to have emerged. While these two strains continue to share the basic jurisprudential tenets of the new normative legal philosophy, it is becoming increasingly clear that they reach these positions in fundamentally different ways.

One group of philosophers — represented by such writers as John Rawls, Ronald Dworkin and Bruce Ackerman — would be described in political terms as “modern” liberals. In philosophical terms, they might be more precisely called *Neo-Rousseauian* liberals. In a distinct and important break with the jurisprudential consensus of the last several decades, these thinkers have rejected the positivist assertion that might, in some sense, makes right. They maintain that preventing the use of State power to aggrandize a few at the expense of the many is, perhaps, the central problem of political and legal theory and, therefore, in their writings they search for constraints on this power. They also part company with the realists by recognizing that the development and refinement of legal doctrine by judges engaged in “legal reasoning” is a viable and valuable means of achieving the ends both of law and of politics.

Yet, while they believe that at times it is a legitimate part of legal analysis to judge the legality of State decrees by a normative evaluation of their substance and while they acknowledge a judge’s responsibility to strike down statutes when the legislature goes astray, the Neo-Rousseauian liberals also believe that without the State, people are in some way incomplete; that in their “private roles” people are merely selfish aggrandizers or private wealth maximizers. Therefore, their search for norma-

5. Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395-96 (1979). Richards observed this development in the writings of such diverse thinkers as Ronald Dworkin, Richard Epstein, George Fletcher, Charles Fried and Frank Michelman and traces its origin to John Rawls’, *A Theory of Justice* (1971) and the subsequent works of Robert Nozick and Alan Gewirth. *Id.* at 1395 (citations omitted). See also Barnett, *supra*, note 4 (citing additional writers that are part of this movement).

6. See Barnett, *supra* note 4, at 1230-33.

tive standards against which a political and legal order may be judged centers on identifying *public values* or, perhaps more accurately, *public virtues*. When these values are found and implemented:

The individual is thereby invested with another kind of goodness, a genuine virtue of the man who is not an isolated being but part of a great whole. Liberated from the narrow confines of his own being, he finds fulfillment in a truly social experience of fraternity and equality with citizens who accept the same ideal.⁷

To the Neo-Rousseauians the State may be necessary to protect individuals from each other, but that is not its only role. They see the State as the ultimate source of social good.

In contrast, the other group of philosophers — represented by such writers as Robert Nozick, F.A. Hayek, and Richard Epstein — would be described in political terms as “classical” liberals. In philosophical terms, they might be more accurately called *Neo-Lockean* liberals. This group shares with Locke a view of individual rights — property rights — as prior to the State. These legal thinkers join with the Neo-Rousseauian liberals in rejecting the legal positivist identification of law with the command of the pursuit of public virtue, the Neo-Lockean liberals conceive the function of a legal system as securing those private rights that are the prerequisites of social order. Their response to the Legal Realists is that what we call “legal reasoning” and adjudication is the enterprise of discerning and developing this framework of rights on a case-by-case basis.

Neo-Lockean liberals are extremely skeptical about the institution of the State. Some view the State as a necessary evil and would limit the role of the State to formulating and enforcing rights.⁸ Others view the State as an *unnecessary* evil. They question whether the State may legitimately perform even these functions.⁹ To a classical liberal, if society is to be protected from the public power, the common law bulwark against both public and private exercises of power — the rights of all

7. Grimsley, *Jean-Jacques Rousseau* in 7 THE ENCYCLOPEDIA OF PHILOSOPHY 223 (P. Edwards ed. 1967). See also B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984). There he describes a vision of “a world where the affirmation of individual freedom does not conceal the pervasive reality of social injustice, where the affirmation of communal responsibility enriches the significance of personal liberty.” *Id.* at 104 (emphasis added).

8. See, e.g., R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).

9. See, e.g., M. ROTHBARD, THE ETHICS OF LIBERTY (1982).

people to be secure in their person and possession from the forceable interference by others — must be articulated and refined by a legal system. It is probably not coincidental, then, that the renewed interest in normative legal philosophy, one strain of which is Neo-Lockean, has been accompanied by a renewed interest in the private law categories of contracts, torts and property as an alternative to and limit on public regulation.¹⁰

THE FUNCTION OF LAW

Legal philosophy, like all philosophy, cannot take its subject matter for granted. A legal philosopher must develop a theory of what he is philosophizing about.¹¹

To understand how legal philosophy affects the practice of law we must first have some idea of why we have law. The explanation of why we have law offered by the classical or Neo-Lockean liberals will help in formulating an understanding of the needs for legal philosophy.¹²

The institution of law, they say, should be viewed as an answer to a fundamental social problem: How are individuals in society, i.e., living in close proximity to other individuals, to peacefully coexist so that each of them may pursue his or her vision of the good life without getting in the way of the same pursuit by others? For example, if, in pursuit of my happiness, I desire to read a book that is in your possession and, therefore, I simply take it, there is no assurance that my taking the book will not adversely affect your pursuit of happiness. And your likely retaliation for my act will have an effect on my well-being and the well-being of others.

The fundamental problem inherent in creating a social order, then, is the necessity of discovering of a way to satisfy or

10. The recent organization of the Conference on Critical Legal Studies may be seen as reflecting a response to the two approaches to legal philosophy described in the text that is Marxist in political terms and *Neo-Hegelian* in philosophical terms. The possibility that this position is reactionary in nature is discussed in Barnett, *supra* note 4, 1233-36.

11. Moore, *The Need for a Theory of Legal Theories: Assessing Pragmatic Instrumentalism* (Book Review), 69 CORNELL L. REV. 988, 994 (1984).

12. In the discussion that follows I will only occasionally attribute the positions I describe to any particular writer or writers. For those who are interested in a more comprehensive consideration of the themes I discuss, see F. A. HAYEK, 1-2 LAW, LEGISLATION, AND LIBERTY, (1973-76); L. FULLER, THE MORALITY OF LAW (1965); L. FULLER, *supra* note 1; R. NOZICK, *supra* note 8; Epstein, *The Static Conception of the Common Law*, 9 J. LEGAL STUD. 253 (1977).

“coordinate” the varied desires and needs of each individual in a world of scarcity, where any person’s actions are likely to affect the well-being of others. In the example given, there must be a way of assuring that my use of the book will not adversely affect your well-being. Without this social coordination, we would have a society made up not of individuals living peacefully together, but of random actors intruding on one another, constantly impeding each other’s efforts to be happy. There are several approaches that might be taken to solving this problem. I shall consider just two.

One approach would be simply to delegate to one individual or group of individuals the responsibility of telling every person what he or she is supposed to do and when. This individual or group would first decide that this week I get to read the book, next week is your turn and then it would command this behavior, punishing those who violate the command. Assuming that the object of this rule is the happiness of the individuals who are the subjects of ruler(s), choices would be made by the ruler(s) to facilitate the happiness of the people competing for scarce resources.¹³ We might call this solution the “Rule of Men,” for it depends upon the discretion of certain individuals to solve the social problem of coordination. The problems with this approach are several and obvious.

First, it would be physically impossible for a person or group of persons to *administer* these directives. Every time anyone wanted to read a book or use any other resource in a way that might conflict with another’s desires, the appropriate order must be issued to the person wishing to read and to the person possessing the book. While everyone would acknowledge that such a system is not possible, it is important to note that we are not here speaking merely of imperfections created by an imperfect world. Given the virtual infinity of such choices made every day, with even the most powerful computers at the ruler’s disposal, we are describing a recipe for social disaster.

Second, the “directors” or planners would lack something so vital that such an endeavor must fail even if the technology existed for the directives to be given. They would lack *information*,

13. There are several standards by which this may be done. One might wish to “maximize” the total wealth in society; or one might wish to permit increases in individual wealth that do not make anyone else “worse off.” Much of political philosophy has been devoted to determining the “correct” version of this type of standard.

information about the needs and desires of the individuals living in society, needs and desires that are not only infinitely varied, but are constantly and forever changing. They would have no way of knowing that I want to read a book, which book I want to read or when I want to read it. No computer could provide this information because no data bank could ever contain the relevant information: the variable and ever-changing preferences of each person in society.

Another solution to this problem is not to delegate this decision-making responsibility to an individual or group of individuals, but to identify general principles and more precise rules — backed by the threat of force — that would apply to everyone equally, so that all persons would be able to discern the boundaries within which they are free to make their own decisions about what they will do. The name we might give to these general principles and more particular rules that apply to everyone (as opposed to the specific directives applying to only one individual or group in specific situations) is Law. In contrast to the Rule of Men, this approach to social order might then be called the “Rule of Law.”

A naive objection to the *concept* of the Rule of Law is that, because it must ultimately be administered by men, it is at root no different from a Rule of Men approach. It is naive because adherents to a Rule of Law position never believed or suggested otherwise¹⁴ and because it misses the fundamental difference between a Rule of Law solution and a Rule of Men solution to the problem of social order: A Rule of Men solution relies on the discretion of a subgroup of society to create social order; a Rule of Law approach discerns the principles and rules which all persons — including the “lawmakers” — must follow

14. Aquinas, for example, distinguished between men operating in the capacity of lawmakers and men operating in the capacity of judges:

As the philosopher says, “it is better that all things be regulated by law than left to be decided by judges,” and this for three reasons. First, because it is easier to find a few wise men competent to frame right laws than to find the many who would be necessary to judge rightly of each single case. Secondly, because those who make laws consider long beforehand what laws to make; but judgment on each single case has to be pronounced as soon as it arises. And it is easier for man to see what is right by taking many instances into consideration than by considering one solitary fact. Thirdly, because lawgivers judge universally and of future events while those sit in judgment judge of things present, toward which they are affected by love, hatred or some kind of cupidity, so that their judgment is perverted.

T. AQUINAS, *SUMMA THEOLOGICA* in 20 GREAT BOOKS OF THE WESTERN WORLD 227 (1980).

if social order, in a real world of scarce resources and of varied and ever-changing individuals preferences, is to be achieved.

LEGAL FORM: THE THREE DIMENSIONS OF LAW

The form that law takes is three-dimensional. The legal analyst must operate, often simultaneously, on the level of legal theory, legal doctrine, and legal practice. When any of these dimensions is missing or deficient, law cannot fulfill its function of providing a framework within which people living in society can conduct their affairs in an orderly, i.e., coordinated manner.

Legal *doctrine* is what most lay people (and first-year law students) identify as law: rules to govern the conduct of individuals. Some examples are "Contracts requires a manifestation of assent and consideration;" "To constitute consideration, a performance of a return promise must be bargained for;" "An acceptance of an offer sent through the mail is effective upon proper dispatch;" etc. And an understanding of these rules may require still other rules defining such terms as "assent," or "bargain" or "proper dispatch." The process of deciding disputes by formulating and applying such rules to the facts of individual conduct has been characterized as formalistic or mechanistic. Yet, formalist or not, law cannot perform its function without rules.

Without rules, individuals — or, more likely, their lawyers — cannot distinguish proper from improper conduct. Without rules, they cannot tell if a contemplated action is legally right or wrong. They cannot tell, in short, whether their actions will contribute to an orderly society or will instead create disorder. Without this knowledge, they are comparatively more likely to act in a way that would impede the actions of others and be adjudged "wrongful." If social order requires not only the rectification of wrongful conduct, but also the minimization or prevention of wrongful conduct, then that knowledge of what constitutes wrongful conduct must be available to individuals in society *before* they act. Legal doctrine, for all its shortcomings, is the only mechanism that will accomplish this vital social mission.

The formulation of legal doctrine is not a random process. We need some way of separating the doctrinal wheat from the chaff. Legal *theory* is devised to help us make this selection. A

theory of, say, strict liability in tort tells that people should not impose the costs of their misconduct on strangers even if they were acting with due care (and it also tells us why this is so). This theory suggests certain principles of causation, such as, "A hit B" that courts are to follow, and certain rules of conduct, such as "If the front of my car collides with the rear of yours, I am liable for the damages that result, unless I can make out a valid defense (which will show that the presumption created by this rule that I caused the accident is rebutted by other circumstances)."¹⁵

Legal theory does not do away, however, with the need for doctrine. Legal *practice*, the application of legal doctrine to given facts, must be taken into account as well. Law is useless unless it can be applied to specific fact situations. Even if they knew and understood legal theory (and most do not), the average judge or lawyer, much less the average person, could not be expected to reliably apply it to particular fact situations. This is no criticism of judges and lawyers. Theory is simply too abstract to apply directly to facts. Law will not perform its decentralizing coordinating function if individuals (or their lawyers) cannot figure out how to fit their actions into the over-all social order. So legal theory tells us which of a wide variety of possible rules we should choose, so that, through the application of these rules, the Law is capable of governing legal practice.

First-year law professors are quite right to insist that understanding rules or "black-letter law" alone is insufficient to understand the law. But they are quite wrong if they dismiss rules or black-letter law entirely or give their students the impression that they do — an impression that usually proves quite false come exam time. Legal doctrine is the absolutely vital intermediary step between theory and practice in the three-dimensional chain of legal reasoning.

THE SUBSTANCE OF THE LAW: PROPERTY RIGHTS

If we are going to coordinate social interaction, not by specific directives issued by some person or persons to others, but by principles and rules of general application that people can

15. See, e.g., Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974).

understand and follow without individual directives, *which* principles and rules will fulfill the coordinating function of a legal system? Finding the answer to this question is not easy. (That is, it would not be easy if we really had to invent the answer. Happily, much of the answer we already know.) However, before the attempt can be mounted, one additional social fact must be adduced that has until now been omitted from the analysis.

So far, our analysis has assumed that goods such as books are already in existence ready to be distributed to those who desire to use them and that the problem is how the use of these goods is to be coordinated. The truth is, however, that human effort is required to create these goods in the first place. Someone must conceive of and write the book; others must edit it, print it and advertise its existence. How we decide to solve the first two problems of distribution — the problems of administration and obtaining information about individual preferences — will have serious consequences for the problem of *production*. For if insufficient incentive exists for the productive activities of conceiving, writing, editing, printing and advertising to be carried out, books will not be produced and there will be nothing to distribute.

So the set of principles and rules we arrive at must take account of at least three basic problems: the problems of administration, information and production. The common law we have inherited provides an answer to these problems. The answer is the concept of (private) property. The common law arrived at this answer spontaneously, that is, no identifiable individual ever sat down, approximated the above analysis, and reached a particular conclusion that was then disseminated and accepted by the people who made up the common law system. No, those who have written powerful arguments in favor of property have done so in defense of a system that had already evolved. But the fact that the concept of property was the 'result of human action and not of human design' makes it no less a solution to the most fundamental problems of coordinating social interaction.¹⁶

Before discussing how the concept of property addresses the three problems of social order, it is necessary to first define the

16. For an elaboration of this grown or "spontaneous" order concept that contrasts it with designed order, see F.A. HAYEK, 1 LAW, LEGISLATION, AND LIBERTY 8-54 (1973).

concept, for the idea of property is so deeply ingrained in our consciousness that we have taken to identifying the concept with some of the things that the concept applies to. We have grown accustomed to thinking of "property" as synonymous with external possessions. So we say that this television or that piano is "our property." In truth, the concept of private property is much broader than this use of the term "property" suggests.

The concept of property describes the *moral jurisdiction*¹⁷ that people have over physical resources in the world, that is, the manner in which they may use resources in the world free from the physical interference of others. The concept of property accords to individuals the discretion to use resources as they choose. People have property rights to the extent that they may use their possessions or "property" free from the forcible interference of others (provided always that their use of their possessions must not violate the like rights of others). Herbert Spencer described as the "law of right social relationships that — *Every man has freedom to do all that he will, provided he infringes not the equal freedom of any other man.*"¹⁸

Notice that, by this definition, our bodies may also be considered "our property," because our bodies are as much physical resources as external possessions are. The term "human resources" is an illustrative perversion of this idea. It is illustrative because it acknowledges that bodies are resources, the control and benefits of which are in fact distributed to particular individuals. It is perverse because it implies that one person can be owned by another, i.e., that these rights can be redistributed.

Perhaps, the fact that the moral jurisdiction one has over one's body has become so widely regarded as inalienable explains why rights to free speech and freedom of sexual conduct, for example, have come to be called "personal" and not property rights. Perhaps, we have limited the term "property rights" to claims to external resources, because such claims are inherently more contingent and contestable. In any event, there is no reason why the concept of property must be limited in this way and many of the liberals who helped develop and refine the term — such as the abolitionists of the nineteenth

17. I thank George Smith for suggesting this term to me.

18. H. SPENCER, *SOCIAL STATICS* 95 (London 1851) (emphasis in original).

century¹⁹ — did not so limit it.²⁰

Some critics, of course, would argue that an assertion of the social primacy of property rights, puts ‘property rights above human rights,’ meaning that it somehow gives priority to possessions over people. This is a complete misunderstanding of the claim being made. Rights to possession *are* human rights; no one besides a human can have such rights. Certainly possessions themselves can have no property rights. Moreover, if, as just discussed, the concept of property also includes the human right to one’s body, what more could “human rights” mean than this? The critics’ usually unstated answer is it means a right to *someone else’s* possessions or body, which is no less a concern about possessions than the view they are attacking.

The concept of private property to this point is abstract. It requires further analysis to connect it up with human conduct. Further theoretical (as opposed to doctrinal) distinctions must be made. To better understand the concept and its application, we might, for example, find it useful to distinguish issues of property *acquisition*, from those of property *use* and property *transfer*. Not coincidentally, the common law developed a parallel set of categories known as property law, tort law and contract law.

[T]he function of the law is essentially threefold, where for each function there is an associated branch of the law. The first function is to determine the original property holdings of given individuals, including rights over one’s own body. Such is governed by the law of property, especially with the rules for the acquisition of unowned things. The second is the law of contracts (including conveyancing) which governs cooperative efforts among individuals and exchanges of things that are already owned. The third is the protection of persons and property (and their methods of transfer) from

19. Some abolitionists characterized slavery as the crime of “manstealing.” The connotation of this term is quite obviously that one’s person is one’s property. An example of this usage is found in the writings of Stephen Foster:

Man-stealing. What is it to steal a man? Is it not to claim him as your property? To call him yours? God has given to every man an inalienable right to himself— a right of which no conceivable circumstance of birth, or forms of law, can divest him; and he who interferes with the free and unrestricted exercise of that right, who, not content with the proprietorship of his own body, claims the body of his neighbor, is a manstealer.

Foster, *The Brotherhood of Thieves, or a True Picture of American Church and Clergy* (1843) in *THE ANTISLAVERY ARGUMENT* 138 (W. & J. Pease eds. 1965).

20. See, e.g., C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 137-48 (corrected ed. 1964).

the aggression of third parties; such is the traditional function of the law of torts.²¹

Once these subjects have been distinguished, our analysis is three-dimensional, consistent with the categories outlined above. First, we can then proceed to identify theories that are both externally consistent with the social function of law that generated the original inquiry and internally consistent with each other. Second, principles and rules that elaborate each theory must be identified and their consistency with the doctrines elaborating other theories must be assessed. Third, this doctrinal analysis must be applied to the facts of individual cases. Human fallibility and the constantly evolving preferences of individuals will virtually assure that we will never have a perfectly consistent set of theories and doctrine to be unerringly applied to facts. However, all that the functional approach to law imposes on us is the obligation to make the legal system as consistent with social order as possible.

How does the concept of private property — properly expressed through correct theory, doctrine and application to facts — solve the three social problems of administration, information and production? On the one hand, a complete answer would be too long to present here. On the other hand, the basic answer to this should be reasonably obvious.

Briefly, the correct theories of the private law categories of contract, tort, and property entail a decentralized administration of resource allocation. All decisions concerning the use and enjoyment of one's property can be made without external direction, provided only that the boundaries of others' rights are discernable and not violated. When a boundary is crossed, the victim of the violation is generally well-positioned to know about it. If our theories of contract, tort and property law are correctly formulated, the victim's knowledge and interest in seeking legal redress will deter conflicts over resource use, by increasing the perceived likelihood that rights violations will be defended against and rectified. Moreover, the adversary system of adjudication delegates the evidence gathering function to those who have a direct incentive to do it well.

Informational problems are reduced by the understandable nature of a well-crafted private law system of property rights.

21. Epstein, *The Static Conception of the Common Law*, *supra* note 12, at 255.

Even children know where their family's yard ends and the next family's begins. But as important as the law of property and tort is to the provision of information, the law of contract is of special significance in this regard. For, if our law of contract is done right, it will acknowledge our rights to freely alienate external possessions and this will bring about a price system that provides vital information about the highest-valued use of resources — information that can be discovered in no other way. Incentives then can exist to exchange rights to improve the well-being of the parties to the transaction.

So, to return to the example used earlier, your property right in the book forces me to obtain your consent to borrow the book, thereby inducing me to obtain your consent by, for example, offering you something in exchange for the book that you value more highly and which I value less highly than having the book. By this process of exchange, we will both be made subjectively better off and our otherwise conflicting preferences are made compatible and, in this sense, become "coordinated."²²

Finally, and perhaps most obviously, a properly worked out concept of private property will provide powerful incentives for production. Those who transform resources they own from things of little or no value to others to things of greater value to others will be encouraged (but not forced) to do so, because their ownership gives them the right to withhold the use and enjoyment of their produce, unless something they value more — their net gain being called their "profit" — is given in exchange. This means that more things of value will be produced by more people making the material wealth (and that degree of spiritual well-being which depends upon material wealth) that much more accessible to everyone.

THE NEED FOR LEGAL PHILOSOPHY AND THIS SYMPOSIUM

This account of what law is and why the private law cate-

22. All that was ever meant by the metaphor of "the invisible hand" is that the price mechanism works *like* an invisible hand to allocate property rights in a way that best coordinates the preferences of individuals in society. The charge that classical liberals put all their "faith" in an invisible hand tends to confuse the substance of their rights and market analysis with the metaphor used to elucidate the analysis for an eighteenth century audience. There is more "science" — in the sense of knowledge about the actual state of the real world — and less "faith" at work here, than in the arguments of some of those who believe in the State as an institution that is capable of addressing the fundamental problems of social order.

ries of property, torts, and contracts are so essential to the institution of law fulfilling its societal function enables us now to say why we need legal philosophy. The short answer is that the classical liberal story of law I just told *was* legal philosophy and, to the extent that legal philosophers and law professors have gotten the story wrong, it is very likely that other legal thinkers like judges, lawyers, and legislatures will produce legal rules — whether by statute or by judicial decisions — that impede rather than facilitate human well-being. Still worse, they may produce no rules at all. Indeed, as we have seen, American legal philosophy — with its twin preoccupations with Legal Positivism and Legal Realism — has had the story wrong for some time.

The longer answer is that this view of law, which is once again being taken seriously, undergirds the Western legal tradition of individual property rights and the adjudication of those rights by judges who discern and refine the idea of property by developing and applying legal theory and doctrine as consistently as possible on a case by case basis. Without legal philosophy providing this foundation, our private law rights and common law process of adjudication — the twin institutions of classical liberal legal thought — can be made to appear as empty or irrational exercises we have inherited from our ancient past and blindly continue to follow.

This perception has two pernicious consequences. First, it makes these institutions ripe for rejection by those who consider themselves to be “rational” and “progressive.” Second, without an understanding of its philosophical roots, lawyers attempting to adhere to these institutions are likely to run across intractable and seemingly insoluble problems. If so, without the insights of legal philosophy which discovers and refines first principles, practitioners will find themselves hopelessly adrift.²³

The Neo-Lockean or classical liberal legal philosophers do not have all the answers to the questions they raise. But their insights are extremely valuable in large measure because they are beginning to force the profession to again ask the right questions. As new generations of legal thinkers continue the

23. For an example of such a doctrinal problem in the contract law area, see Barnett, *supra* note 4, at 1238-1245. There I describe the tension between the bargain theory of consideration and the reliance principle of recovery embodied in § 90 of the RESTATEMENT (SECOND) OF CONTRACTS (1979) and suggest how this tension might be resolved by a more fundamental rights analysis.

task of applying the insights of legal philosophy to the evolving social problems of our age, then and only then can legal philosophy touch and guide the activities of lawyers, judges, legislators, and law teachers (as Fuller argued that it must). It does so by informing our choice of legal theories, and, through theory, informing our choice of legal doctrines, so that we might achieve the promise of a free and prosperous society.

To this end, in the 1960s the Institute for Humane Studies established a program to support young intellectuals in pursuing their interests in law and philosophy. As part of this program, in 1982, with the support of the Veritas Fund, Inc., the Institute established the Leonard B. Cassidy Summer Research Fellowships in Law and Philosophy. Cassidy Fellowships are awarded to promising law students and graduate students in philosophy to pursue their interests in legal philosophy or in private law theory. Each grant requires the production of a scholarly paper. This symposium represents the first fruits of this endeavor.

The papers that follow run the gamut from theory to doctrine to practice and back again. Each shares a common commitment to develop and refine the concept of individual rights in response to new social and technological problems. They range from Stephen Macedo's effort to put the modern liberal political vision of Ronald Dworkin into a broader classical liberal perspective, to Deborah Mathieu's examination of the rights of women and those of the fetuses they carry within them in the context of new medical technology; from Greg Temple's application of contract principles to the subject of intimate relations that is now governed by principles of status, to William Manson's suggested reformulation of nuisance law.

Of course, few ideas of importance are ever born whole. They require for their development the shaping influence of knowledgeable criticism and repair. Sometimes we learn almost as much from the insightful criticism of a flawed effort as we do from a success. In the collection that follows, each paper receives the critical attention of one of an impressive group of scholars — Henry B. Veatch, Joel Feinberg, R. H. Helmholz, and Lawrence H. White — scholars who are not easily satisfied. The ideas presented by the four authors can only benefit from this careful attention.

The many people who are associated with the Institute for

Humane Studies, the Veritas Fund, Inc., and the *Harvard Journal of Law and Public Policy* have made this symposium possible. While no view expressed in this issue (including mine) necessarily represents the views of any of these institutions, it is their common hope that this symposium will contribute, in some small way, to the development of legal thinkers who are committed to a legal philosophy that will be of use to the lawyer and to society. Again, in the words of Lon Fuller:

What we need is someone with the imagination, the patience, and the skill to work out a seating arrangement that will put us all within reach of the banquet, but will keep out elbows from knocking against one another. Only the lawyer is capable of doing this job. It is our responsibility to train him for it.²⁴

24. L. FULLER, *supra* note 1, at 281.