CONTENTS

PREFACE xi

PART ONE: LAW 1

Natural Law Theory 7

Norman Kretzmann • Lex Iniusa Non Est Lex: Laws on Trial in Aquinas' Court of Conscience 7
Anthony D'Amato • On the Connection Between Law and Justice 19

Legal Positivism’s Challenge to Natural Law Theory 31

John Austin • A Positivist Conception of Law, from The Province of Jurisprudence Determined (1832) 31
H. L. A. Hart • A More Recent Positivist Conception of Law, from The Concept of Law (1961) 42
H. L. A. Hart • Positivism and the Separation of Law and Morals 56
Lon L. Fuller • Positivism and Fidelity to Law—A Reply to Professor Hart 73
Lon L. Fuller • Eight Ways to Fail to Make Law, from The Morality of Law (1964) 88
Joel Feinberg • The Dilemmas of Judges Who Must Interpret “Immoral Laws” 91

The Moral Obligation to Obey the Law 113

Martin Luther King, Jr. • Letter from Birmingham Jail, from Why We Can’t Wait (1963) 113
Joel Feinberg • Civil Disobedience in the Modern World 121
Other Leading Theories of the Nature of Law 134

Ronald M. Dworkin  The Model of Rules  134
Riggs v. Palmer  Court of Appeals of New York, 1889  151
Ronald M. Dworkin  Natural Law Revisited  156
J. L. Mackie  The Third Theory of Law  162
O. W. Holmes, Jr.  The Path of the Law  168
Jerome Frank  Legal Realism, from Law and the Modern Mind (1963)  174
Andrew Altman  Legal Realism, Critical Legal Studies, and Dworkin  176

PART TWO: LIBERTY 192

The Case for Self-Determination  198
John Stuart Mill  The Liberal Argument, from On Liberty (1859)  198

Challenges to Self-Determination: Legal Paternalism and Legal Moralism  209
Gerald Dworkin  Paternalism, from Morality and the Law (1971)  209
Gerald Dworkin  Paternalism: Some Second Thoughts, from Paternalism (1983)  219
Patrick Devlin  Morals and the Criminal Law, from The Enforcement of Morals (1965)  223
Patrick Devlin  Morals and Contemporary Social Reality, from The Enforcement of Morals (1965)  229

Constitutional Privacy  238
Griswold v. Connecticut  United States Supreme Court, 1965  238
Roe v. Wade  United States Supreme Court, 1973  243
Planned Parenthood of S.E. Pennsylvania v. Casey  United States Supreme Court, 1992  247
Bowers v. Hardwick  United States Supreme Court, 1986  251

Freedom of Expression and Its Limits  262
Joel Feinberg  Limits to the Free Expression of Opinion  262
Cohen v. California  United States Supreme Court, 1971  277
Texas v. Johnson • United States Supreme Court, 1989 285
Thomas C. Grey • Civil Rights Versus Civil Liberties: The Case of
Discriminatory Verbal Harassment 294

Principles of Constitutional Interpretation 311
Robert H. Bork • The Right of Privacy: The Construction of a
Constitutional Time Bomb, from The Tempting of
America (1990) 311
John Hart Ely • Discovering Fundamental Values, from Democracy and
Distrust (1980) 314
David Lyons • Constitutional Interpretation and Original Meaning 329

PART THREE: JUSTICE 344

The Machinery of Justice: Three Sample Procedural
Problems 349
John H. Langbein • Torture and Plea Bargaining 349
Kent Greenawalt • Jury Nullification, from Conflicts of Law and
Morality (1987) 359
Gerald Dworkin • The Serpent Beguiled Me and I Did Eat: Entrapment
and the Creation of Crime 364

Justice and Compensation 374
Richard Posner • The Concept of Corrective Justice in Recent Theories
of Tort Law 374
Jules Coleman • Corrective Justice and Wrongful Gain 385

Justice and Contract 397
Charles Fried • Contract As Promise, from Contract As
Promise (1981) 397
Robin Fox • Babies for Sale: Reflections on the Baby M Case 408
Bonnie Steinbock • Surrogate Motherhood as Prenatal Adoption 421

Justice, Affirmative Action, and Racial Quotas 429
Thomas Nagel • Equal Treatment and Compensatory
Discrimination 429
Thomas E. Hill, Jr. • The Message of Affirmative Action 436
Legal Injustices to Women  451

Kim Lane Scheppele · The Reasonable Woman  451
State v. Rusk · Court of Appeals of Maryland, 1981  456
Regina v. Morgan · House of Lords, 1976  459
State v. Kelly · Supreme Court of New Jersey, 1984  462
Larry May and John C. Hughes · Is Sexual Harassment Coercive? from
Moral Rights in the Workplace (1987)  466
Ellen Frankel Paul · Bared Buttocks and Federal Cases  470
Michael M. v. Superior Court of Sonoma County · United States Supreme
Court, 1981  474

PART FOUR: RESPONSIBILITY  482

Responsibility for Results  487

H. L. A. Hart and A. M. Honoré · Causation and Responsibility, from
Causation in the Law (1959)  487
Palsgraf v. The Long Island Railroad Co. · New York Court of
Appeals, 1928  499
Robert E. Keeton · The Basic Rule of Legal Cause in Negligence Cases,
from Legal Cause in the Law of Torts (1963)  505
Judith Jarvis Thomson · The Decline of Cause  512
Richard Parker · Blame, Punishment, and the Role of Result  520

Responsibility for Nonintervention  527

Thomas Babington Macaulay · Notes on the Indian Penal Code, from
Works of Lord Macaulay (1866)  527
John Kleinig · Good Samaritanism  529

Some Criminal Defenses  533

People v. Young · New York Court of Appeals, 1962  533
Lon L. Fuller · The Case of the Speluncean Explorers  535
Anthony D'Amato · The Speluncean Explorers:
Further Proceedings  549
People v. Goetz · New York Court of Appeals, 1986  554
Sanford H. Kadish and Stephen J. Schulhofer · The Case of Lady Eldon's
French Lace  557
The M'Naghten Rules · House of Lords, 1843  561
The American Law Institute · The Insanity Defense, from Model Penal
Code (1956)  563
Hyman Gross · Mental Abnormality as a Criminal Excuse, from A Theory
of Criminal Justice (1979)  566
PART FIVE: PUNISHMENT 585

What Is Legal Punishment? 592
Joel Feinberg • The Expressive Function of Punishment, from Doing and Deserving (1970) 592
Igor Primoratz • Punishment as Language 602

What, If Anything, Justifies Legal Punishment? 613
Joel Feinberg • The Classic Debate 613
C. L. Ten • Fantastic Counterexamples and the Utilitarian Theory, from Crime, Guilt, and Punishment (1987) 618
Michael S. Moore • The Moral Worth of Retribution 632
John Rawls • Punishment, from Two Concepts of Rules 654

Victims' Rights: Restitution or Vengeance? 660
Randy E. Barnett • Restitution: A New Paradigm of Criminal Justice 660
Robert Nozick • Retributive Punishment, from Philosophical Explanations (1981) 674
J. L. Mackie • Retributivism: A Test Case for Ethical Objectivity 677
Jeffrie G. Murphy • Getting Even: The Role of the Victim 685
Payne v. Tennessee • United States Supreme Court, 1990 696
David R. Dow • When Law Bows to Politics: Explaining Payne v. Tennessee 713

The Death Penalty 723
Furman v. Georgia • United States Supreme Court, 1972 723
Woodson v. North Carolina • United States Supreme Court, 1976 732
Ernest van den Haag • In Defense of the Death Penalty: A Practical and Moral Analysis 742
Stephen Nathanson • Should We Execute Those Who Deserve to Die? from An Eye for an Eye: The Morality of Punishing by Death (1987) 748