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LAW'S EMPIRE

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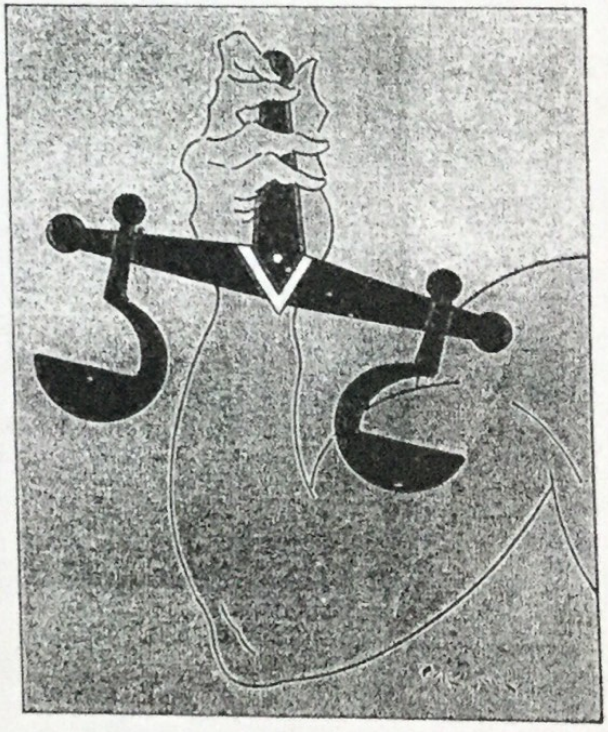

. PREFACE .

We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things. It is sword, shield, and menace: we insist on our wage, or refuse to pay our rent, or are forced to forfeit penalties, or are closed up in jail, all in the name of what our abstract and ethereal sovereign, the law, has decreed. And we *argue* about what it has decreed, even when the books that are supposed to record its commands and directions are silent; we act then as if law had muttered its doom, too low to be heard distinctly. We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do.

What sense does this make? How can the law command when the law books are silent or unclear or ambiguous? This book sets out in full-length form an answer I have been developing piecemeal, in fits and starts, for several years: that legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be. The distinctive structure and constraints of legal argument emerge, on this view, only when we identify and distinguish the diverse and often competitive dimensions of political value, the different strands woven together in the complex judgment that one interpretation makes law's story better on the whole, all things considered, than any other can. This book refines and expands and illustrates that conception of law. It

cases arising under the common law, statutes, and the Constitution.

I use several arguments, devices, and examples that I have used before, though in each case in different and, I hope, improved form. That repetition is deliberate: it allows many discussions and examples to be briefer here, since readers who wish to pursue them in greater detail, beyond the level necessary for this book's argument, may consult the references I provide to fuller treatment. (Many of these longer discussions are available in *A Matter of Principle,* Cambridge, Mass., and London, 1985.) This book touches, as any general book on legal theory must, on a number of intricate and much-studied issues in general philosophy. I have not wanted to interrupt the general argument by any excursion into these issues, and so I have, whenever possible, taken them up in long textual notes. I have also used long notes for extended discussions of certain arguments particular legal scholars have made.

I have made no effort to discover how far this book alters or replaces positions I defended in earlier work. It might be helpful to notice in advance, however, how it treats two positions that have been much commented upon. In *Taking Rights Seriously* I offered arguments against legal positivism that emphasized the phenomenology of adjudication: I said that judges characteristically feel an obligation to give what I call "gravitational force" to past decisions, and that this felt obligation contradicts the positivist's doctrine of judicial discretion. The present book, particularly in Chapter 4, emphasizes the interpretive rather than the phenomenological defects of positivism, but these are, at bottom, the same failures. I have also argued for many years against the positivist's claim that there cannot be "right" answers to controversial legal questions, but only "different" answers; I have insisted that in most hard cases there are right answers

sisted from the start that this is not what I mean), but the question whether we can have reason to think an answer right is different from the question whether it can be demonstrated to be right. In this book I argue that the critics fail to understand what the controversy about right answers is really about—what it must be about if the skeptical thesis, that there are no right answers, is to count as any argument against the theory of law I defend. I claim the controversy is really about morality, not metaphysics, and the no-right-answer thesis, understood as a moral claim, is deeply unpersuasive in morality as well as in law.

I have not tried generally to compare my views with those of other legal and political philosophers, either classical or contemporary, or to point out how far I have been influenced by or have drawn from their work. Nor is this book a survey of recent ideas in jurisprudence. I do discuss at length several fashionable views in legal theory, including "soft" legal positivism, the economic analysis of law, the critical legal studies movement, and the "passive" and "framers' intention" theories of American constitutional law. I discuss these, however, because their claims fall across the argument I am making, and I entirely neglect many legal philosophers whose work is of equal or greater importance.

Frank Kermode, Sheldon Leader, Roy McLees, and John Oakley each read a draft of a substantial part of the book and offered extensive comments. Their help was invaluable: each saved me from serious mistakes, contributed important examples, saw issues that had eluded me, and made me rethink certain arguments. Jeremy Waldron read and improved Chapter 6, and Tom Grey did that for Chapter 2. Most of the notes, though not the long textual ones, were prepared by William Ewald, William Riesman, and, especially, Roy McLees; any value the book has as a source

of references is entirely to their credit. I acknowledge the generous support of the Filomen D'Agostino and Max E. Greenberg Research Fund of New York University School of Law. I am grateful to David Erikson of Xyquest, Inc., who volunteered to make special adaptations to that firm's remarkable word-processing program, XyWrite III, so that I could use it for this book. Peg Anderson of Harvard University Press was exceptionally helpful and long-suffering in tolerating changes beyond the last moment.

I owe more diffuse debts. My colleagues in the jurisprudential community of Great Britain, particularly John Finnis, H. L. A. Hart, Neil MacCormick, Joseph Raz, and William Twining, have been patient tutors to a dense pupil, and my friends at New York University Law School, especially Lewis Kornhauser, William Nelson, David Richards, and Laurence Sager, have been a steady source of imaginative insight and advice. I am grateful, above all, to the powerful critics I have been lucky enough to attract in the past; this book might have been dedicated to them. Replying to criticism has been, for me, the most productive of all work. I hope I shall be lucky again.