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0521854237 - On the History of the Idea of Law
Shirley Robin Letwin
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On the History of the Idea of Law

On the History of the Idea of Law is the first book ever to trace the development of the philosophical theory of law from its first appearance in Plato's writings to today. Shirley Robin Letwin finds important and positive insights and tensions in the theories of Plato, Aristotle, Augustine, and Hobbes. She finds confusions and serious errors introduced by Cicero, Aquinas, Bentham, and Marx. She harnesses the insights of H. L. A. Hart and especially Michael Oakeshott to mount a devastating attack on the late twentieth-century theories of Ronald Dworkin, the Critical Legal Studies movement, and feminist jurisprudence. In all of this, Dr. Letwin finds the rule of law to be the key to modern liberty and the standard of justice.

This is the final work of the distinguished historian and theorist SHIRLEY ROBIN LETWIN: a major figure in the revival of conservative thought and doctrine from 1960 onwards, Dr. Letwin died in 1993. Her principal academic publications include *The Pursuit of Certainty: David Hume, Jeremy Bentham, John Stuart Mill, Beatrice Webb* (Cambridge University Press, 1965), and *The Gentleman in Trollope: Individuality and Moral Conduct* (Harvard University Press, 1982). This manuscript has been prepared for publication by Noel B. Reynolds.

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Editor's preface

Almost six months before she died, Shirley Robin Letwin mentioned in a letter to her friend, Milton Friedman, that she had “not been well,” but that she seemed “to be mending” and was finally “able to finish the long overdue ‘law book’.”¹ This book, which she intended to be her career contribution to the academic debates about theories of law – her central intellectual passion – had been her principal project for at least a decade, but was repeatedly delayed as she took on other more urgent projects, such as her book on Margaret Thatcher (*The Anatomy of Thatcherism*, New Brunswick, NJ: Transaction, 1993).

For many years, her husband William Letwin, and her son Oliver Letwin, nurtured the hope of being able to complete the manuscript. Shirley had secured a tentative offer of publication from an American university press, but it would require some important revisions. Bill's declining health, and Oliver's ascending political career conspired to stall their project. Finally, in 2001, I took advantage of a casual encounter with Kenneth Minogue, a close Letwin family friend and London School of Economics colleague to inquire about the status of the manuscript. We shared the view that this would be an important contribution to legal philosophy, and that outside help would probably be needed to bring it to publication. By this time Oliver was completely consumed by his political career as Shadow Home Secretary, and was also managing most of his father's affairs. He welcomed Minogue's suggestion that I be asked to pick up the project, and within weeks I had received the manuscript in my office at Brigham Young University.

The importance of this manuscript was immediately obvious. In what was clearly her *magnum opus*, Shirley Letwin chose not to engage the hundreds of lesser issues that occupy the pages of the legal philosophy

¹ Letwin died June 19, 1993. Friedman quoted her January letter in the obituary he wrote for her and published in *National Review*, vol. 45, issue 14, July 19, 1993, 20. She told very few of her friends about the illness. When I arrived in Dover and called her home to set up a time that my daughter and I could stop by for a visit on our way home from a sabbatical year in Jerusalem, her husband Bill informed me that she had died just that morning.

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journals where all the twists and turns of contemporary theories are examined and criticized in discussions that soon lose their currency, but rarely address the most general questions that have motivated philosophers in every age. Rather, she addressed the same fundamental questions to every philosopher from Plato to the present who has made a substantial contribution to our understanding of the nature of law. What is law? What is the rule of law? While the book explains and criticizes the legal theories of the most important philosophers from Plato to the present, it has as its primary target those theories of the twentieth century which in one way or another reject the classical understanding of law as illusory, and treat the idea of rule of law as a conservative mantra or a misnomer for rights.

From Letwin's perspective, these recent movements have misunderstood the important issues. Since the legal realists launched their attack on the objectivity of judicial decision-making early in the twentieth century, the underlying assumption of successive movements in legal philosophy has been that unless judicial reasoning could be shown to be objective, the rule of law must be an illusion. But as Letwin clearly shows, the classical defenders of the rule of law understood the limitations of judicial decision-making, and they still championed the rule of law as the best possible regime for human beings who wished to establish and preserve the individual freedom necessary for human virtue to flourish. The waves of criticism of rule of law, based on the insight that judicial decisions are never fully predictable by objective criteria, all share the same mistake. They have focused their attack on an assumption that was never an essential plank of the case for the rule of law. The right question would be this: under what conditions would a wise and informed people choose to be governed by law, fully recognizing the limitations of judicial reasoning and other persistent sources of potential error in legal administration?

However critical Letwin might be of these twentieth-century apostasies, she is not a pessimist. For this same time period saw the rise of other theorists who did grasp and revere the achievements of the rule of law in the classic sense. While it may well have been her early exposure to F. A. Hayek at the University of Chicago that focused her attention on this question, she went on to find the most comprehensive development in understanding the rule of law ever – in the writings of the English philosopher, Michael Oakeshott, the subject of her final chapter.

Letwin's critiques of legal realism, Ronald Dworkin, Critical Legal Studies, and feminist jurisprudence were written in the mid-1980s when these writers were seen as revolutionary and controversial. Two decades later, our perspective on their positions has matured considerably, and

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the list of important representatives of these views, has evolved as well. As the 1992 peer reviewers of the manuscript had already seen, some rewriting of these chapters was required to allow readers to see Letwin's critique firmly engaged with the most significant and mature positions that had emerged out of these movements. Letwin's original manuscript will be available at the Brigham Young University Library for anyone who would like to read her 1980s treatment of these topics.

The most time-consuming part of editing Letwin's manuscript, however, has been the footnotes. It was not the author's custom to include full citations in the draft versions of her manuscript. At this point no one knows whether she had recorded full citations in a separate file, now unavailable, or whether she planned to complete them during the editing process. Of the approximately 800 citations, only a small number were complete. I mention this primarily to give credit to a series of research assistants who spent hundreds of hours searching for translations and sources that would match the text. After we had exhausted the resources of the normally very adequate Brigham Young University Library, we turned to Inter-Library Loan. But still a hundred citations remained mysterious. Finally, on an extended trip to London, with the help of my wife Sydney, who proved better than I at finding these, we combed through Letwin's personal library and the stacks of the London Library, where Letwin did much of her work. In a few cases, where we could not verify a reference, we were forced to adjust the text or use alternative translations. A very few nonessential references were simply deleted, and a couple of important ones have been left in the text with imperfect citations that we have not been able to confirm. In my judgment, this imperfection is of less consequence than the potential damage to her argument that would occur from omitting them. Certainly, our eventual success in finding 99.8 percent of her citations justifies the presumption that she did have access to the sources she cites for the handful that we could not verify. Hopefully, readers of this volume will recognize these missing sources and report them to me.

This project has benefited from the labors of numerous other individuals, including research assistants, secretaries, editors, and my wife. I wish to thank Sydney S. Reynolds, Joan L. Naumann, Ryan A. Davis, Clark D. Asay, Joseph Reed Callister, John Andrew West, Jason S. Schofield, Ari Bruning, John J. Nielsen, Alison Coutts, Adam W. Bentley, and Margene H. Jolley for their invaluable assistance. The editorial staff of Cambridge University Press has been most helpful, and, in particular, I want to thank Richard Fisher, who as group director seemed as pleased as I was to see Letwin's last book, like her first, published by Cambridge University Press. I have also benefited from the generous support of

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Brigham Young University and the Earhart Foundation in bringing this project to conclusion, and wish to state my deep appreciation for both institutions.

In conclusion, I wish to thank Oliver and William Letwin, as Shirley's literary executors, for their enthusiastic encouragement and for the free reign that they offered from the beginning of the project. While I would have been quite happy to accommodate special directions or restrictions from them, they imposed none. I am sure the author would be as pleased as I to see this volume dedicated to them.

NOEL B. REYNOLDS
OREM, UTAH