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Legal Philosophy – 5 Questions

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1) Why were you initially drawn to the philosophy of law?

I came to legal philosophy as such rather late after specialising, as in a way I still do, in moral and political philosophy. At the University of Glasgow in the early 1960s, I studied philosophy as a compulsory part of the 'Ordinary MA' (a first degree, in Scotland) which I was doing as a preparation for going to qualify in divinity and become a minister of the Church of Scotland. As it turned out I never escaped from the fascination of philosophy, although my subsequent BA in Oxford was in Theology and my first university position was in the Department of Politics and Sociology at Glasgow University. Traditionally the ancient Scottish universities had a department of general philosophy (with names such as Logic and Rhetoric) and a separate department of Moral Philosophy and it was the professor of Moral Philosophy, W.G. Maclagan, whose inspiring introductory lectures to a class of over 300 students, had an enormous impact on me. I still have my carefully typed notes of these lectures today. Maclagan was a staunch defender of the 'a priori synthetic' (substantive knowledge acquired independently of empirical evidence), the sort of view that was ridiculed by the dominant and sometimes domineering 'ordinary language' philosophers of the period, whose views were well represented by the younger lecturers at Glasgow. This was an exciting mixture that exposed a small but enthusiastic group of Honours students to lively debates, largely in 'meta-ethics', the received wisdom being that philosophy did not engage in moral reasoning but only in reasoning about morality. These contemporary controversies were balanced by an emphasis on the history of philosophy, which constituted at least half of the curriculum and introduced us to the major figures in the history of philosophy, with a special emphasis on the Enlightenment, although not, rather curiously, with any specific emphasis on the Scottish Enlightenment, but plenty of Hume.

Much as I enjoyed and benefited from my philosophical studies, I found, and still find, the intellectual attitudes to be found in many philosophy departments rather arid and inward looking. For this reason, I sought a position in a politics department which I saw as being more directly concerned with first order questions about issues, such as capital punishment and censorship, with meta-ethics providing no more than an important background to these practical debates. I was particularly keen to work with Glasgow University's first Professor of Politics, D. D. Raphael, whose engagement with matters of rights, justice and equality, in combination with a profound scholarly interest in the British Moralists, showed what political philosophy could be, well before the seismic impact of John Rawls, *A Theory of Justice* in the early 1970s. This proved to be a happy association, as David Raphael became my PhD supervisor (a good first degree was all that was needed for a lecturing appointment at the time) and pointed me in the direction of Adam Smith, a onetime Professor of Moral Philosophy at the University of Glasgow.

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This was prompted in part by the fact that a copy of a student's notes of Smith's Lectures in Jurisprudence, rather longer than the already published notes of another student who had attended the same lectures in another year, had been discovered in an Aberdeen bookshop and acquired by the University of Glasgow. I read the typescript of these notes only to have them withdrawn by a committee who took the view that such access prior to publication was, for some reason, inappropriate. That was no matter, I spent four rewarding years reading and rereading Smith's *The Theory of Moral Sentiments* and struggling to understand it in the light of Smith's economic, political, literary and jurisprudential work and the moral and social theory of his time and my own. Among the many things that I absorbed in this process was the interconnection in what we nowadays call 'applied philosophy' of social, political, economic and legal phenomena. Following in this tradition there was no time at which I saw myself in the study of Smith, or in my associated work on such topics as political obligation, rights, justice, equality, welfare, abortion, free speech, as moving from one branch of philosophy to another.

Nevertheless there are institutional boundaries in academia that affect career choices, and I moved on to the Department of Moral Philosophy, with Professor Robin Downie, a pioneer in bioethics, who had taught me as a student and influenced me by his writing, especially, *Respect for Persons* (with Elizabeth Telfer), and then to the Philosophy Department in the new University of Stirling, where I spent 5 years in a young and lively department, which included the now well-known philosopher of criminal law, Antony Duff. It was at this time that David Raphael and Neil McCormick (a contemporary at Glasgow and Balliol), recently appointed to the Regius Chair of Public Law and the Law of Nations at the University of Edinburgh, were involved in establishing a branch of the IVR (The International Association of Social Philosophy and Philosophy of Law) in the UK. My participation in that group undoubtedly turned my attention further towards the legal philosophy I had got to know through the debates of Hart and Devlin on the enforcement of morals and Hart and Fuller on the impact of legal positivism in evil regimes. When the opportunity arose, therefore, it felt quite natural to move back to Glasgow, into the Faculty of Law and its Department of Jurisprudence which has the responsibility for teaching the compulsory class of Jurisprudence (variously called Legal Theory or Philosophy of Law elsewhere) to third year law students.

Familiar only with the work of H.L.A.Hart, Lon Fuller and some American Legal Realists, I had some work to do to catch up on more specialist work in the area of legal reasoning, to say nothing of the basic law that I had not directly confronted before. As a Professor of Jurisprudence at Glasgow and later as Professor of Law at The Australian National University, I welcomed the opportunity to work out my own philosophy of law, a project that resulted in *The Legal Theory of Ethical Positivism* (1996), which, although as much a work in political theory as legal philosophy, represents my rather late coming of age in legal philosophy.

(2) For which of your contribution(s) to legal philosophy so far would you like to be remembered, and why?

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I would like to be seen as contributing to the resurgence of interest in the normative aspects of legal positivism, particularly the moral and political benefits of a model of law that focuses in developing and impartially following and applying a body of rules that can routinely be understood and adjudicated without recourse to adopting a particular position on controversial moral and factual matters. Within legal positivism, I suggest, the important conceptual issues regarding law, legal reasoning and legal obligation, are best tackled in the framework of either normative or empirical studies, rather than as a purely analytical exercise. In the jargon of the time, I described my position as ‘prescriptive exclusive legal positivism’ as that seemed to capture the thesis that much of the legal positivist tradition can be read as recommending that moral criteria should not be included in the ‘rule of recognition’, whereby citizens and officials can identify what is the law of a particular jurisdiction. ‘Prescriptive exclusive legal positivism’ is a bit of a mouthful, so I now tend to speak of ‘prescriptive legal positivism’ (PLP for short) to distinguish it from the alternatives of ‘conceptual legal positivism (undesirable!) and empirical legal positivism (under-developed!).

I have not been able to settle on what is the best label to put on this approach to legal positivism. I rejected the term ‘normative positivism’ because this was already used for those who understood law as a set of norms rather than commands. In *The Legal Theory of Ethical Positivism* I adopted the term ‘ethical positivism’ because I wanted to emphasise that the legal positivist ideal requires a certain type of role morality (rule-commitment) on the part of judges, legislators, public servants and citizens. However, this term generated expectations of a theory of ethics rather than of law. Also ‘ethical positivism’ does not stress sufficiently the fact that many of the important moral arguments for legal positivism are based on its commitment to the rule of positive law as a crucial part of democracy. Indeed, I toyed with the label ‘democratic legal positivism’ at one stage, but that seems too narrow to capture the full flavour of the theory which also promotes the benefits of rule-governance in non-democratic systems. So I am back with ‘PLP’, the title I gave to a recent collection of my previously published work.

All this is slightly ironic since it amounts to a non-lawyer urging that the study and practice of law should focus more on what is (now dismissively) referred to as ‘black letter law’ and recognise that the social and political value of legal institutions, and in particular lawyers, depends on them being focussed on the distinctively legal enterprise rather than merging it with methods and attitudes of the democratic political process that does (or should) inform the process of law-making. This is not to say that Law Schools should not include a concern with moral and political critiques of existing law and legal process and proposals for law reform. It is much to be welcomed that study and research concerning law involves an appreciation of the ingredients of policy making and the legal aspects of its implementation. Moreover, lawyers, as citizens have as much right and perhaps more duty than as other citizens to engage in such debates and decision-making about what the law ought to be. This should not, however, displace the distinctively legal skill and concern of maintaining a system of law in which it is possible to ask and answer the question ‘what is the law on this matter’ without engaging in a substantive moral exercise concerning what the law ought to be.

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While one of the main practical issues to which PLP is particularly relevant is the controversy over the role of courts in substantive judicial review on the basis of an entrenched or legislated bill of rights, this was not an issue of particular concern at the time I came to lay the groundwork of the theory. The book which, as a cheap paperback, was widely read at the time, *The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights* (1983), focuses on the alleged problems of utilising the apparently liberal notion of rights within political programs that were 'socialist' to the extent of supporting universal welfare provision, promoting public goods above individual property rights and exercising democratic control, directly or indirectly, over economic systems. The excitement of the Civil Rights movement in the US, dismay over the evident discrimination that led to the renewal of 'the troubles' in Northern Ireland, enthusiasm over the (successful) political campaigns for the abolition of capital punishment and the modernisation of abortion law, and later the irresistible case for equal rights for women, and the inhumanities of the war in Vietnam - on all these issues rights talk was on the progressive side. Yet there was an understandable reluctance on the part of those who were aware of the history of reactionary utilisation of the idea of individual rights to bolster an unfair and inefficient form of capitalism. It was in this context that I sought to present a theory of rights around a form of democratic rule governance which could form a consensual framework for debate and decision-making about the laws we ought to have, without committing us to the rampant individualism of some rights discourse or the coerciveness that was argued to be the defining characteristic of legal rights. This proved to be timely during the emergence of a 'third way' in politics in the UK, and may have contributed to a reconceptualisation of one area of political ideology. This position enabled me to remain a human rights enthusiast. Only later did I realise that most of my fellow travellers took this to involve a transfer of political authority from Parliaments to Courts with the consequent diminution of political rights, a short-cut to social progress of which I was, and remain, profoundly sceptical.

Encouraging 'reconceptualisation' in the service of moral goals, was, perhaps, a rebellion against the limitations of 'ordinary language philosophy' which sought philosophical truth and social understanding through a detailed analysis of 'our' use of words. When working on Adam Smith I quickly became aware of the now familiar fact that the founder of free market economics had an intensely social theory of human nature and commended egalitarian and interventionist policies well in advance of his time. Going beyond that, I realised that, despite the natural law terminology in which his social theory of moral sentiments is based, and his forceful rejection of social engineering as a dangerous form of political domination, there is ultimately a (somewhat theological) utilitarian basis to his theory, which, although largely 'contemplative' rather than activist, enables us to regard Smith as a community oriented welfare theorist (*Adam Smith's Science of Morals* 1971).

This triggered in me a penchant for conceptual reform as to the ideological affiliations of particular discourses. This is evident not only in articulating 'socialist rights' but also in my work on justice where I challenge the view, almost universally followed post-Rawls, that 'justice' is the prime or overriding political (and legal) value. An advantage of dispensing with this dogma (which, in Rawls's case was perhaps no more than a

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stipulation made for the purpose of identifying the parameters of his theory), is that it enables us to acknowledge the fact that the actual discourse of justice is closely tied to ideas of merit and desert, criteria of distribution that few reflective persons would wish to be socially and politically overriding. This set the scene for asking the question: which concept (or conception) of justice ought we to adopt? My answer was: the one which is particularly useful in the development and application of political policy. To this end, the preferred conceptual analysis should identify what is distinctive about the characteristic terminology in actual discourse, and best enables us to make clear, beyond the confines of academia, the value judgments that have to be made in making personal and political decisions.

I suggested that material 'justice' should be defined in terms of desert and formal 'justice' as conformity to authoritative rules. This does not mean, however, that material justice, and therefore desert, should be the overriding consideration in political decision-making, or that rule-conformity is beyond moral challenge. Reconceptualisation is, of course, no more than one useful strategy amongst others, with much depending on the normative or other purpose of the philosopher in question. Reconceptualisation is, however, particularly germane to legal philosophy which, in my view, ought to be deeply concerned with conceptual developments that promote the articulation of alternative positions that are intelligible and therefore more transparent to the voting public as well as to the professionals whose role it is to erect a publicly understandable and accessible legal system. In this way legal philosophy can make some sort of contribution to the promotion of a common conceptual framework without which a well-functioning democratic legal system is scarcely feasible.

Moving to more concrete examples of the sort of endeavour with which I would like to be associated, I would point primarily to the work, co-authored with the then Director of MIND (the UK mental health association, not the philosophical journal) Chris Heginbotham: *Mental Illness: Prejudice, Discrimination and the Law*, 1991, in which we seek to make out the case that public fear or mental illness has led to systematic discrimination against persons with mental illnesses when it comes to such matters as detention in the interests of other people and the provision of health and welfare services. In my case, this work grew out of my experience as a lay person on The Mental Welfare Commission for Scotland which involved me in decision-making concerning the review of civil detention and in visiting the many large residential mental health facilities that have since been greatly reduced in number and size. This experience brought me to a sharp realisation of the relevance of legal philosophy to the righting of contemporary wrongs. Other issues with which I have engaged include abortion law, euthanasia, free speech, juvenile justice, and gender discrimination. While these contributions are all marginal and ephemeral in themselves, cumulatively they make an important point as to the role of legal philosophers in society and the interrelationship of theory and practice.

Recently I have become somewhat preoccupied with critiquing the movement towards promoting human rights through bills of rights, partly because of I think this will eventually bring the human rights movement into disrepute, and partly because I am aware of the often rather poor quality of argument or affirmation in which this bill of

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rights case is presented. I do not, however, want to be remembered as someone who became obsessively concerned with negating the arguments for adopting constitutional style bills of rights or using such bills for creative adjudication. Making such criticisms may help to hold in check 'judicial activism', but it is a rather negative image to project. I still regret going along with the title *Sceptical Essays on Human Rights* (2001) when the book is in fact sceptical about the UK Human Rights Act 1988, not about human rights. I am currently seeking to turn this around by adopting a more positive approach to alternative ways of promoting human rights, emphasising a political rather than a narrowly legal theory of human rights, which is more in line with the motivation of my earlier work and the thesis expounded in *The Left and Rights*.

(3) What are the most important issues in legal philosophy, and why are they distinctively issues of legal philosophy rather than some other discipline?

The most important (but not necessarily the most interesting) issues in legal philosophy relate to the part that law should play in a good society. While these issues cannot be detached from an appreciation of the standard content of laws, they are relatively independent of what is thought to be the best law in substance, rather than form. The sort of question that needs to be answered is : why go about pursuing the morally justifiable objectives of social life in a law-governed way? This, of course, requires us to be very clear about what constitutes a law-governed way of doing things. As my answer to the previous questions indicates I do not see this principally as a conceptual question but as a moral and practical issue about what concepts we should adopt, something which has pragmatic (general intelligibility) as well as intellectual (clarity and consistency) goals. What is involved here is the capacity for understanding law as it actually operates and then developing a more specific model of law that encapsulates the more desirable aspects of the wide range of legal phenomena (here 'legal' is being used in a broad and open-ended way for the purpose of identifying the subject-matter in question).

My model here would be Lon Fuller, *The Morality of Law* (1969), excluding the later parts where he (mistakenly in my view) goes on to assert a closer connection than can be established between the aspirational 'internal' morality of law and the limitations this imposes on its content. Fuller graphically illustrates his approach by illustrating both the efficiency and the injustice of a ruler (King Rex) who, by neglecting such formalities as clarity, prospectivity, publicity and consistency, ends up simply failing to make law at all and thereby showing himself to be unjust and incompetent. This has much more in common with H. L. A. Hart's more famous *Concept of Law* (1962) than either he or Fuller were prepared to admit, for Hart in effect explains the benefits in efficiency and fairness that derive from the transition of a first order system of social norms, that apply directly to ordinary conduct, into a more complex system in which there are second order rules (that is rules that affect first order rules) which serve for the identification and implementation of a set of authoritative first order rules, a model that is morally acceptable and sociologically effective.

Inevitably this approach leads on to the centrality of judicial method in adjudicating cases on the basis of positive law. The possibilities, options and recommendations involved

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here are both distinctive and central to legal philosophy. This impacts, in turn on current debates about the rule of law, where I would say the most significant (or do I mean 'the most acceptable'?) contributions are made by Fred Schauer, Joseph Raz and Jeremy Waldron. This debate has a particular importance because of the (challengeable) assumption that such matters as are classified under 'the rule of law' should, thereby, be for purely judicial determination, so that including substantive values with the requirements of the rule of law has the effect of shifting the domain of decision-making to courts.

Distinctiveness here comes down to subject matter not method. While disagreeing with him on many issues I think Ronald Dworkin is right in so far as he sees legal philosophising as a form of normative political philosophy and that this needs to be explicitly recognised to liberate us from the bounded intellectual circle of ostensibly pure conceptual theorising. Evidently such normative theorising has to take account of all the epistemological and ontological issues that arise within philosophy more generally but there is no peculiar epistemology or ontology of law. It is a matter of subjective preference whether the boundaries of legal philosophy should be extended to cover the explanation of law as a social phenomenon. There is a danger that work of this sort done by philosophers not trained in empirical method are rather amateur and unconvincing and there are good reasons to distinguish between the empirical study of social phenomena and their normative assessment. Yet there is clearly a substantial overlap here, not only with respect to common subject matter, but to also with respect to the need to explain social phenomena partly in the light of values and the requirement of most normative approaches to consider the empirical consequences of implementing their recommendations.

(4) What is the relationship between legal philosophy and legal practice? Should legal philosophers be more concerned about the effects of their scholarship on legal practice?

Principles of the division of labour suggest that legal philosophers should neither seek to sell their wares to practitioners nor seek to outdo practitioners in their knowledge of everyday legal practice. However, the logic of my answers to the previous questions must result in the view that legal philosophy should have important implications for legal practice and indeed for the function of law in society more generally. It is a matter of regret and concern that not only legal philosophy but much scholarly work undertaken generally in laws schools is not now of much interest to practitioners, so the question is not confined to the role of philosophers within the legal academy. There is certainly work to be done within legal philosophy surrounding the more abstract and metaphysical questions that must be taken into account as part the general enterprise of arriving at an acceptable model of what law ought to be, work that no practitioner in their right mind would spend billable hours mastering.

Nevertheless, a core ingredient of legal philosophy focuses on the proper role of lawyers in society and has enormous implications for the profession in its various manifestations. This can be presented as part of legal ethics, the ethics not only of how lawyers should

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conduct themselves in advising and representing clients, but how they should conduct themselves as prosecutors, administrators, and as judges. It is particularly interesting that judicial ethics generally neglects the core issue of how judges ought to reason in determining the law and deciding cases. We know and insist that judges should not take bribes, or fall asleep on the bench, but appropriate legal method is simply left to them to sort out for themselves, a matter of their collective discretion rather than their collective morality. This situation that has resulted in part from the liberation of judges from the 'declaratory theory' according to which they discover, but do not make, and the encouragement to be purposive and 'liberal' in their reading of law which has been the dominant message of legal philosophy over the past few decades. Now that there is greater realisation of the need for laws which make it more feasible for judges to apply the law with minimal creativity, the long run effects of legal philosophy on judicial practice may change, although this can and should be something that is mediated through the democratic process. Nevertheless, legal philosophy is not a branch of practice and should be less concerned with its effect than its truth, if that is not too strong a word to use for expressing the goal a value-oriented study.

(5) To which problem, issue or broad area of legal philosophy would you most like to see more attention paid in the future?

One gaping hole in the current practice of legal philosophy is the relative neglect of legislation in favour of case-law. To be sure, much case-law is statutory interpretation. Nevertheless, insufficient attention is given to what goes into making formally 'good' law, which in terms of PLP, means law that is capable of being understood and applied without recourse to the moral choices and empirical decisions that ought to have gone in to the making of that law in the first place. Very little attention is given in legal education and legal scholarship to legislative drafting, and I would like to see legal philosophers taking the lead in remedying this neglect. This would require more engagement with the legislative process tracing it back in to the political debate and decision-making that leads up to it, and the delegated legislation and administrative application that follows.

In the constitutional area, currently a major source of interest in legal philosophy, I would like to see more attention paid to the problem of what I have called constitutional constipation, namely the difficulty that political systems with entrenched written constitutions have in bringing forth constitutional change in a democratic manner in normal times without the laxative of revolution. This blockage is one of the factors giving rise to the asserted necessity for judicial creativity in constitutional interpretation. To move from metaphor to simile, more work needs to be done in combating the 'living tree' approach to constitutionalism which, at the very least, legitimates the work of the constitutional tree surgeons with some form of democratic endorsement. While it is historically clear that constitutions do not need to be entrenched (although they can scarcely do their job if they are subject to frequent changes) we need to work out a principled basis for routinising democratic constitutional change as an important element in the right of self-determination.

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Finally, legal philosophers should be, and are, turning their attention the legal aspects of the 'war on terror' which many civil rights advocates see as a involving a 'war on the rule of law'. These events have led some legal scholars to lose faith in the capacity of courts to defend human rights under severe threat, and others to look elsewhere for the decisive action that some view as required to combat terrorism and which others see as a gross over reaction to events that are, in the grand scheme of things, relatively minor and quite normal harms. This opens up fertile ground for examining g the interaction of political constitutionalism and legal constitutionalism, a distinction that is lost in much contemporary legal philosophy.

Selected Bibliography

Adam Smith's Science of Morals, London: Allen & Unwin, 1971.

The Left and Rights: A Conceptual Analysis of the Idea of Socialist Rights, London: Routledge and Kegan Paul, 1983.

Mental Illness: Prejudice, Discrimination and the Law, Aldershot: Dartmouth, 1991. With C Heginbotham.

The Legal Theory of Ethical Positivism, Aldershot: Dartmouth, 1996.

Judicial Power, Democracy and Legal Positivism, Aldershot: Dartmouth, 2000. Edited with J. Goldsworthy

Justice, 2nd edn, London: PalgraveMacmillan, 2001

Sceptical Essays on Human Rights, Oxford University Press, 2001. Edited with Keith Ewing and Adam Tomkins.

Legal Interpretation in Democratic States, Aldershot: Dartmouth, 2001. Edited with J Goldsworthy

Protecting Human Rights: Instruments and Institutions, Oxford University Press, 2003, edited with J Goldsworthy and A Stone

Prescriptive Legal Positivism: Law, Rights and Democracy, London: UCL-Cavendish, 2004.

Protecting Rights without a Bill of Rights, Aldershot: Ashgate, 2006, Edited with J. Goldsworthy and A. Stone.

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