

Legal Philosophy: Five Questions

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

I don't really know why, so let me tell you how. My parents were both Germanists. As a schoolboy, languages were my forte. In 1982 I was admitted to study French and German at New College, Oxford. But I got cold feet within days of the offer. The other linguists I had met at my Oxford interview all seemed to be native speakers of more than one language, and racy cosmopolites, whereas I was a notably unracy Glaswegian who had laboured his way to the respectable standard of grammatical accuracy needed to impress jaded A-level examiners. I began to think that I might be more comfortable studying a subject in which my peers and I would all be clumsy beginners in the same boat, so that I would have none of the dispiriting experience of starting my university education at a disadvantage. I flirted with Philosophy, Politics and Economics but in the end I chose Law. I was cheeky enough to ask New College to switch me over into the undergraduate Law intake for 1983, and New College was unbureaucratic enough to oblige.

I turned out to be good at law, and soon lived comfortably enough on a diet of cases and statutes. In my first year I was lucky to be taught by outstanding academic lawyers, and I quickly picked up the dark arts. I was a natural advocate with a contrarian

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taste in arguments and I saw myself becoming a barrister. I only started to acquire a rival, more scholarly self-image about a year later, when Nicola Lacey arrived from London to take over as my main law tutor and mentor at New College. Niki's multidisciplinary interests and wide-ranging contributions to academic life had a lasting positive impact on me. As my jurisprudence teacher, she encouraged me to experiment with ideas. She introduced me enthrallingly to analytical philosophy of law, of which she had a formidable grasp, but she also served up tasty morsels from other philosophical traditions and indeed from other disciplines. At the start of my third year, she encouraged me to defect for a term from the Law Faculty to the Philosophy Faculty, taking a course of ethics tutorials with Jonathan Glover. Jonathan in turn worked his magic on me. Like many law students I was a card-carrying moral relativist. I thought law was somehow (how?) more real than morality. In four weeks Jonathan took me and my moral relativism to the edge of a nihilistic precipice, pointing out down below the hell that awaited me: unobjectionable mass-murderers, unimpeachable rapists, unchallengeable racists. Then he spent four weeks bringing me back from the edge, a reformed character. Never again would I flirt with any kind of relativism. Eight tutorials with Jonathan Glover is the law student's equivalent of eight weeks in rehab.

When I started graduate study in 1986 – on the Oxford BCL degree – I still took it for granted that I would head off to train as a legal practitioner the following year. Yet it seemed equally obvious that in the meantime I needed to do as much philosophy as possible, while I still had the chance. I registered to take seminar courses with Joseph Raz, John Finnis, Tony Honoré and various other jurisprudential giants of the Law Faculty. I also sat in on philosophical seminars in neighbouring faculties, such as those of Derek Parfit, Jerry Cohen, and Amartya Sen. This was a fabulous era in which to embark on a training in legal, moral and political philosophy in Oxford. The mountain was high and the

climb was steep, but the views were breathtaking and the guides were unbeatable. The atmosphere was also electric. Parfit's *Reasons and Persons*¹ and Raz's *The Morality of Freedom*² were recently published and there were so many new ideas to discuss. I was lucky enough to present my first real philosophical paper in Raz's class, and to enjoy (if that is the right word) his always eye-opening and sometimes eye-watering criticisms. Suitably revamped, this short seminar paper was to appear in 1988 as my first philosophical publication.³ I also presented a paper on causation in Honoré's class, inaugurating an enduring collaboration and friendship: Honoré and I have now co-taught legal philosophy seminars on the BCL for 18 years.

Perhaps most formatively, during my BCL year I won a Prize Fellowship at All Souls College. I was astounded. These Fellowships - lasting seven years - are awarded on the strength of comically wide-ranging examination papers set and blind-marked by the college. To succeed in these papers, what one knows is less important than how one thinks. I didn't know whether I thought well, but I certainly thought a lot. With the arrogance of youth I found the idea of being asked to write about football and Frenchness alongside family law and Frege enticing. It was all a bit of a wheeze. I certainly never thought of it as a career move. Yet it turned out to be one. My unexpected and arguably unintended success in the competition put pressure on me to do well on the BCL, but it also required me, more generally, to hold myself to high standards of scholarly self-evaluation. Cohen, Honoré, Parfit and Sen were now my colleagues as well as my teachers, and to make matters worse they treated me as such. They and other senior Fellows talked to me with enthusiasm about intellectual puzzles and listened to me as if

¹ Oxford: Oxford University Press 1984.

² Oxford: Clarendon Press 1986.

³ 'Concerning Permissive Sources and Gaps', *Oxford Journal of Legal Studies* 8 (1988), 457.

I knew what I was talking about. The only way to return the compliment was to know what I was talking about - to professionalize myself as quickly as possible.

So I worked like a demon late into the night to broaden and deepen my philosophical education, at the same time as keeping up with the official BCL curriculum in jurisprudence and related subjects. These were complementary pursuits and I did well on the BCL as well as starting to develop some research ideas of my own. Although I did go on to qualify as a barrister the following year – still with a vague plan of practising – I was then inevitably drawn back to Oxford where I started doctoral work on legal and moral responsibility, still based at All Souls. With the support of Honoré and then Raz as my university supervisors, Parfit as my college advisor, and Bernard Williams and Antony Duff as my DPhil examiners, I gradually and somewhat accidentally turned into a professional philosopher of law.

I think my work shows the influence of all the people I have mentioned. Let me pick out four. Tony Honoré helped me to be a philosopher of law who is read and appreciated by law teachers and law students. He nurtured my respect and affection for law as a discipline and my continuing interest in its technical workings. Derek Parfit helped me to see that philosophy is also a discipline with technical workings, and he taught me not to be afraid of counterintuitive propositions or unexpected inferences. Nicola Lacey helped me to engage with problems that caught the eye of people from other disciplines, especially in the social sciences. Thanks to her I have always looked for philosophical subtexts in the work of economists, psychologists, and sociologists, as well as lawyers. Intellectually, Joseph Raz has probably influenced me most of all. I have tried to follow his example in not leaving hostages to fortune, and in tackling each subject with only the degree of precision that it can bear (so that my work ranges in style from rather formal to rather narrative). I have also learnt from him not to be too locked into established ways of framing or demarcating philosophical puzzles.

2. *For which of your contributions to legal philosophy so far would you most like to be remembered, and why?*

I have worked on quite a wide range of topics. Some of my work has been in what is known as 'general jurisprudence'. It concerns the nature of law, the nature of legal reasoning, the nature of adjudication, and so forth. This work mainly spins off from my undergraduate lectures. I do not regard it as particularly original. It aims to tackle gaps in understanding caused by a mismatch between the preoccupations of professional philosophers and the preoccupations of law students. I find it by turns amusing and alarming that this work is so widely cited.

My more original work has focused on philosophical issues that underlie particular areas of law, especially but not only in Anglo-American legal systems. Some people who theorise about particular areas of law are interested in accounting for (or criticising) the outcomes of particular cases. Why did the plaintiff win in case A but lose in case B? As a lawyer I am interested in this question but as a philosopher it is not my main preoccupation. In many appellate cases, the court might reasonably have decided for either side. The dissenting judges have as much to recommend their conclusion as do the judges in the majority. The philosophical interest does not lie in backing a winner. It lies in the way that the arguments are conducted: the classifications and distinctions used by the judges, the assumptions that they make, and the logic of their inferences. Focusing on such matters, I have written about various areas of law, including anti-discrimination law, criminal law, and the law of torts. I suppose my most extensive body of work concerns criminal law, about which I have written maybe twenty papers over fifteen years. Here my most distinctive contribution has been to the theory of justification and excuse. I have done my bit (along with Jeremy Horder and others) to revive a broadly Aristotelian way of thinking about excuses, and how they differ from (but are related to) justifications. This work has attracted a lot of criticism

and resistance from all sides, which (ever the contrarian) I regard as evidence of its being broadly right!

However I think my most valuable work, philosophically speaking, is not this work in criminal law but some work focused ostensibly on the law of torts. I say ‘ostensibly’ because really it uses the law of torts as a vehicle for exploring some much broader and older puzzles in moral philosophy. I am thinking of my twin papers ‘Obligations and Outcomes in the Law of Torts’⁴ and ‘The Wrongdoing that Gets Results’⁵, in which I explore some aspects of the problem that has come to be known as the problem of ‘moral luck’. Actually, in both papers, I object to that *arriviste* way of conceptualizing the problem, which dates back only thirty years.⁶ I conceptualize it less question-beggingly as a problem about the rational salience of the way that our actions turn out. These papers are the only ones I have written where I feel that I have come close to proposing an original solution to an ancient puzzle. The first of the papers, inspired by Tony Honoré’s work⁷ on the subject, makes an affirmative argument for the counterintuitive proposal that the basic or paradigmatic reasons for action are reasons to succeed, i.e. reasons to perform actions partly constituted by their results. The second paper argues that these reasons can also be reasons of duty, so that there can be duties to succeed, and hence wrongs that are partly defined by the way they turn out. In this second paper I proceed negatively, by criticising Kant’s influential but under-scrutinised argument for the contrary view.

⁴ In Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Oxford: Hart Publishing 2001).

⁵ In *Philosophical Perspectives* 18 (2004), 53.

⁶ It stems from the eponymous debate between Bernard Williams and Thomas Nagel in *Proceedings of the Aristotelian Society Supplementary Volume* 50 (1976), 115.

⁷ Especially the papers collected in Honoré, *Responsibility and Fault* (Oxford: Hart Publishing 1999).

There is some of my work that I am particularly proud of for a different reason. I have been lucky enough to collaborate in print with various friends and colleagues over the years. My repeated collaborations with Stephen Shute and more recently with Timothy Macklem have, I think, proved particularly fruitful. When I have worked with Stephen or with Timothy the approach has been to stew over every word together, huddled side-by-side at the computer for days on end. I am not someone who likes to draft roughly, and then to improve the work gradually through successive drafts. So not for me the traditional process of exchanging drafts with a co-author. Rather I like to get each sentence right before moving on to the next one. Stephen and Timothy are like-minded in this respect, so collaboration with them has been organisationally simple as well as intellectually demanding. But they are each also a foil to me in their different ways. Stephen resists my flights of fancy. Timothy dislikes my flirtations with philosophical formality, being a more literary person. All in all, I think my work with both of them has been highly profitable. So I would like to be remembered for my ability to collaborate with scholars of this calibre, as much as for the achievements, such as they are, of my solo work.

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

I should begin by expressing my doubts about the distinctiveness of legal philosophy. It is best to think of legal philosophy as part of political philosophy, which in turn is part of moral philosophy, which in turn is part of the philosophy of practical rationality, which in turn is part of the philosophy of rationality in general (to which philosophical aesthetics and epistemology also belong). The partitioning involved in this nested structure is, however, somewhat arbitrary. Except for the purposes of designing courses, recruiting students, and hiring colleagues, it doesn't

really matter which issues are classified as belonging to the philosophy of law or to any other branch of philosophy. What matters is that good philosophers do interesting work on deep puzzles in a way which shows sufficient sensitivity to their interrelations with other deep puzzles. One of the pitfalls of attempting to demarcate different areas of philosophy (or different areas of any discipline, or indeed different disciplines) is that it encourages a bureaucratic approach to academic life: those who do primary work in moral philosophy, for example, may feel that it is legitimate to borrow ready-to-wear theories from the 'epistemology' rack, rather than tackling epistemic problems for themselves. They may look comical dressed in these borrowed theories, since they lack an original creator's sense of how the theories are supposed to be used and developed. The philosophy of law is not immune from this comedy.

When I suggested that the philosophy of law is part of political philosophy, you may have heard echoes of Ronald Dworkin. Dworkin criticises those (including me) who try to tackle conceptual problems about law in a way that leaves open what political actors, including judges, should do. He protests that we are guilty of presenting the philosophy of law as too autonomous, too divorced from political philosophy.⁸ Dworkin is right to insist that the philosophy of law cannot be autonomous of political philosophy, for it is part of it. His mistake lies in his view of political philosophy itself. Political philosophy is not exhausted or even dominated by questions about what political actors should do. Just as epistemology includes the conceptual question 'what is belief?', the answer to which does not determine or even suggest what beliefs anyone should hold, so political philosophy includes numerous conceptual questions (what is legislation? what is a state? what is an election?), the answers to which do not determine or even suggest what anyone

⁸ *Justice in Robes* (Cambridge, Mass: Harvard University Press 2006), 213–4.

should do. We need to answer these questions if we are to make sense of the proposed political principles in which the concepts in question figure (e.g. 'legislation should be a last resort', 'state power should be exercised for the common good', 'all should vote in general elections'). And we need to make sense of these proposed political principles before we can judge which of them, if any, is sound, and hence what any political actors should do. In that sense the conceptual questions are prior to the normative ones. By denying that there are any such prior conceptual questions, or at least that there are any such prior conceptual questions about law, Dworkin is not campaigning for a greater integration of legal philosophy into political philosophy. He is campaigning for those of us who already regard legal philosophy as part of political philosophy to change our understanding of political philosophy, maybe indeed philosophy as a whole.

This is an object lesson in why we should avoid demarcation disputes about what belongs to the philosophy of law. Which sub-discipline of philosophy a problem belongs to has no bearing at all on what counts as a successful solution to it. So I resist the second half of the question ('why are they distinctively issues of legal philosophy rather than some other discipline?'). I also have trouble with the first half of the question ('what are the most important issues in legal philosophy?'). I'm not sure how to judge philosophical importance, and in any event I'm not sure that it's a healthy thing to be pursuing. Personally, I'm on the lookout for interesting issues more than important ones (although I can see that interestingness is one possible criterion of importance). So once again let me answer a different question from the one set. Let me answer the more agreeable question: What are the most interesting issues in legal philosophy?

My answer to this question changes, of course, depending on what I am currently working on. But two sets of puzzles I find perennially intriguing. I encountered them as a graduate student and have struggled with them ever since - without conspicuous success. One set of puzzles concerns the moral and legal

importance of blame, and connected with that the moral and legal importance of fault. You may think that, since I have worked extensively on the theory of justifications and excuses, which are denials of fault, I would know why fault matters. But I am not sure that I do. I am not sure that I know why I should care that such-and-such a disaster was my fault, as opposed to just being my doing (with or without fault). This reverses the puzzle as it strikes many lawyers. Many lawyers think that it is obvious why I should care that such-and-such a disaster was my fault, but baffling why I should care that it was just my doing (in the absence of fault). They think that 'fault liability' is morally easy to defend while 'strict liability' is morally problematic. I learnt from the work of Bernard Williams that this is the opposite of the truth.⁹ Lawyers are happier with fault liability mainly for institutional reasons. It is easier to square fault liability with the demand for 'fair warning' that is part of the ideal of the rule of law. But morality is not bound by the rule of law. It need not and does not give fair warning. So the lawyer's gut instinct that fault liability is somehow fairer doesn't help to solve the underlying question of why, apart from questions of institutional fairness, our being at fault matters. (You may say that once it is phrased this way, it is not clear in what sense the problem belongs to legal philosophy. I reply: Who cares?)

The other cluster of puzzles that I find perennially intriguing concern what counts as my doing. I have already made clear that the most basic reasons, to my mind, are reasons to succeed. They are reasons for actions that are partly constituted by their results. But which of the many turns of events to which my actions make a causal contributions count as the results of my actions? How far down the line of repercussions should we go? This is the problem of causal responsibility and it has often been tackled

⁹ See particularly 'Moral Luck', above note 6, and 'Internal Reasons and the Obscurity of Blame' in Williams, *Making Sense of Humanity* (Cambridge: Cambridge University Press 1995).

with overconfident oversimplifications. For example, it has often been assumed that a certain turn of events should not be regarded as the result of my actions if it is the result of someone else's actions. But if this were so, there would be no complicity. I am influenced by the work of Hart and Honoré to think that there is more than one mode of causal responsibility, more than one kind of causal connection that I may have to a turn of events that may, on occasions, be morally or legally salient. In particular there is a basic moral difference, I think, between principalship and complicity as modes of causal involvement. I have tried to sketch out the explanation for this in a recent paper called 'Complicity and Causality'.¹⁰ But I must confess that the paper only makes the first few halting steps. The wider problem of causal responsibility is still very much on my mind. It is one of the deepest and most difficult puzzles of moral philosophy, and it has pervasive implications for every legal system. Maybe it is important as well as interesting? I would not like to say.

*4. What is the relationship between legal philosophy and legal practice?
Should legal philosophers be more concerned about the effect of their
scholarship on legal practice?*

The second part of this question might be asked with two quite different subtexts. Some might think that philosophers of law should be putting more effort into influencing or assisting judges, lawyers, legislators, etc. Some might think, on the contrary, that they should be putting more effort into avoiding such influence or assistance (for it will inevitably involve gross misunderstanding or misuse of ideas). Although I agree with those who say that philosophical ideas are doomed to be mangled or bowdlerised by lawyers and policymakers who try to use them, I tend to think that trying to influence the world for the better and trying to

¹⁰ *Criminal Law and Philosophy* 1 (2007), 127.

avoid influencing it for the worse are both equally misguided forms of vanity in an academic. I take an austere view of the political responsibility of intellectuals according to which we answer mainly to intellectual values in our work, barring an imminent, foreseeable and dangerous abuse of our work by others. As an intellectual, it seems to me, Marx should be more embarrassed by his frequent nonsequiturs than by the many immoralities that were later committed in his name.

Another way to put this is to say that, while I dislike the bureaucratic partitioning of academic endeavours from each other, I happily embrace a bureaucratic conception of academic life as a whole. Those who want academics to be intentionally and extensively engaged with public life are insufficiently aware, it seems to me, of the problem of counterproductivity. Of course scholars, like journalists and lawyers, have an important role in exposing political doublespeak, judicial humbug, and so on. They can be an important check on excesses of public and private power. But scholars play this role best, as a rule, when they do not try to play it. For the most part, in their academic work, they should aim at true premisses, valid arguments, clear thinking, attention to detail, avoidance of banality, and so forth, without regard to the consequences of their work, if any, for the development of public policy, world peace, human flourishing, etc. In particular, they should not confuse themselves with campaigners, pundits, advocates, or government advisers. Sticking to purely intellectual objectives is usually the best way (and is certainly the distinctive way) for them to avoid becoming corrupted by the system that they help to check.

Having said that, I have occasionally done a bit of campaigning or reforming work myself. Like anyone else I am occasionally outraged by government policies or by decisions of the courts and I do not deny myself the chance to attack them or propose improvements merely because I am also a philosopher. But I think it is important not to confuse the two roles in one's own mind. There are some political topics on which, in the

course of my academic work, I have become reasonably well-versed. As an academic, I also have access to reasonably good channels for publication of contributions to political debate. But when I write this stuff I am obviously not writing as a philosopher. If you wanted policy advice, would you look up 'philosophers' in the Yellow Pages? I certainly wouldn't. I would be interested in talking to someone with concrete policy expertise. On some issues I might choose to talk to someone with legal expertise. And of course I have a bit of that expertise myself. If I make contributions to public debate, it is my legal more than my philosophical wisdom that comes to the fore.

In short: it is not my job, as a philosopher of law, to act as a consultant or a conscience for the law industry, or for any other part of the machinery of public power. Rather, I am engaged in the scholarly study of some relatively abstract aspects of that industry and of that machinery. I am interested in understanding its nature (good or bad) and the logic of its discourse (precise or muddled). Meanwhile my main way of influencing its future development, it seems to me, should be and is indirect. I teach philosophy to many talented law students. In the process I help them (I hope) to sharpen their analytical skills, to widen their horizons, to become more thoughtful about their lives and work, and to value humanity. Many of them will later go into legal practice or other jobs carrying public responsibilities. If they take even some of their philosophical sensitivities with them, they are likely to exert a benign collective influence on public culture well beyond what I could or should hope to exert by my own clumsy public interventions.

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

I have a special interest in reparation, apology, the offering of explanations, and other reactions to wrongdoing by wrongdoers, together with the attitudes that accompany them. I do not think

that the justification for such reactions and attitudes is at all well understood, and with few exceptions I do not think that recent philosophers have really appreciated how complex and difficult they are. Partly this is because of an excessive preoccupation with the special case of punishment. Punishment is a special case because it involves deliberately adding extra suffering to the world in response to a supposed wrong. I do not underestimate how hard that is to justify. Philosophers have not made much progress with this problem either. But the extra difficulty of justifying such an apparently perverse reaction to wrongdoing has often led philosophers to underestimate the difficulty of justifying reactions that do not include this feature. I always marvel at the ease with which reparation, in particular, is portrayed as simply and basically just, without further ado. Much of the modern writing about corrective justice in the law of torts and the law of contract tends to exemplify this tendency, in spite of its highfalutin technical apparatus. Many theorists of private law seem to think that showing reparative principles to be principles of corrective justice is the same as showing them to be defensible. This is mystifying. Even when we know that reparative principles are principles of corrective justice, we still need to know what justifies the relevant principles of corrective justice. For all we know, until shown otherwise, all principles of corrective justice are indefensible.

So I would like to see more work on this topic, and I would like to do more work on this topic. It is a topic that brings the philosophy of law into direct engagement with some of the deepest problems of moral philosophy more generally. It raises in sharp relief the vexed and ancient question of what kind of attitude we should be taking to our own pasts, and why. Shouldn't we be getting on with improving the future rather than dwelling on the past? Isn't regret (and hence apology, and hence reparation) fundamentally irrational, a kind of crying over spilt milk? I don't think I yet have satisfying answers to these questions but I would like to think that further and better

answers are available, and that philosophers of law in my generation and the next will help to uncover them.

Selected publications

'Liberals and Unlawful Discrimination', *Oxford Journal of Legal Studies* 9 (1989), 1

'Rationality and the Rule of Law in Offences Against the Person', *Cambridge Law Journal* 53 (1994), 502

'Justifications and Reasons', in Andrew Simester and A.T.H. Smith (eds), *Harm and Culpability* (Oxford: Clarendon Press 1996)

'On the Ground of her Sex(uality)', *Oxford Journal of Legal Studies* 18 (1998), 167

'The Gist of Excuses', *Buffalo Criminal Law Journal* 1 (1997), 575

'The Wrongness of Rape' (co-author: Stephen Shute), in Jeremy Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (Oxford: Clarendon Press, 2000)

'Obligations and Outcomes in the Law of Torts' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré* (Oxford: Hart Publishing, 2001)

'Reasons' (co-author: Timothy Macklem) in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press 2002).

'Legal Positivism: 5½ Myths', *American Journal of Jurisprudence* 46 (2001), 199

'The Wrongdoing that Gets Results', *Philosophical Perspectives* 18 (2004), 53

'Value, Interest, and Well-Being' (co-author: Timothy Macklem),
Utilitas 18 (2006), 362