Law and Philosophy

by John Gardner
Professor of Jurisprudence
University of Oxford
http://users.ox.ac.uk/~lawf0081

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1. What is philosophy?

'BMW's design philosophy is based around authenticity: we want our car design to express what you experience when you drive our vehicles.'[1] 'Our philosophy is to use what is good from the past to create a future which is better.'[2] 'Free Cone Day reinforces the Ben and Jerry's philosophy of giving back to the community.'[3] 'Our Philosophy ... You can make money without doing evil ... Great just isn't good enough ... [etc, etc].'[4]

If you search for 'our philosophy' on the web you will find an amazing range of organisations, from estate agents to waste-disposal contractors to animal hospitals, claiming philosophies for themselves. A philosophy in this sense is a set of goals or maxims, usually the most general (and sometimes the most vacuous) ones that an organisation can muster to cheerlead itself with. Some law students seem to expect their excursions into the philosophy of law to offer them something similar for law. 'Our philosophy of law: Access to justice for all!' 'Our philosophy of law: Strict

[1] Adrian van Hooydonk (BMW Director of Design), interviewed in *Wallpaper* Magazine, September 2011.

[2] Sir Alex Douglas-Home, 'Foreword', in *Prosperity with a Purpose: Conservative Party General Election Manifesto 1964.*

[3] Jennifer Hart, franchisee of Ben and Jerry's Ice Cream in Galveston, Texas, interviewed in *The Daily News* [of Galveston], 28 March 2012.

[4] Google Inc, 'Our Philosophy' accessed on 3 May 2012 at http://www.google.co.uk/about/corporate/company/tenthings.html

construction of statutes!' Those with such hopes are doomed to be disappointed. The connection between feel-good catchphrases and political slogans on the one hand, and philosophy as an academic discipline on the other, is very remote indeed. Philosophical theses are rarely goals or maxims (although they may be theses *about* goals and maxims). Moreover, it is very rare for trained philosophers to profess that they have such a grand thing as 'a philosophy'. Those who rashly do so, perhaps in a late-career interview reflecting on a lifetime's achievements, are typically viewed with suspicion or pity by their colleagues. Why? Philosophy is not primarily a product but an activity, and those who engage in it, although occasionally interested in making sense of big sweeping mantras that fill the human heart with wonder, tend to be more widely occupied with exact and difficult theses that fill the human mind with distinctions.

That, at any rate, is the *modus operandi* of the 'analytical' philosophers that have come to dominate the English-language version of the discipline. They are 'analytical' because they like to analyse, breaking every apparently big question down into small, and sometimes apparently disconnected, sub-questions. There is also a long tradition of 'synthetical' philosophy, growing mainly out of the German Enlightenment, but nowadays more closely associated with *les grands philosophes* that populate late-night French TV. They like to synthesise, showing how many small and apparently disconnected questions can be folded into one big question. The synthesists tend to have more to offer to those who like to have their hearts filled with wonder. That may (or may not) be what the marketeers of the skincare brand Philosophy are trying to tap into when they write, bizarrely: 'philosophy: to believe is to perceive the miraculous.'[5]

[5] http://www.philosophyskincare.co.uk/about-philosophy-skin-care/about-us,default,pg.html

In this chapter I will not invite you to perceive any miracles, let alone to read such a perception into all of your beliefs. To begin with: believing is not a kind of perceiving, whether of miracles or otherwise. Perception is a possible way of coming to believe, and belief, reciprocally, can alter perception. As these pernickety remarks about a dumb example of sales gibberish give away, I was trained in the analytical school of philosophy myself, which left me with a particular allergy to hogwash of the type associated with skincare marketing, *feng shui*, and self-help books. The analytical way, not surprisingly, is the way of doing philosophy that I will mainly be telling you about.

But let me start with a classical, etymologically pure explanation of what philosophy is, one that ought to appeal to analysts and synthesists alike. Philosophy is the love (*philos*) of wisdom (*sophia*). Both parts of the name matter. First let me tell you what kind of love, then what kind of wisdom.

(a) Feel the love

Karl Marx once famously wrote: 'Philosophers have hitherto only understood the world in various ways; the point is to transform it.'[6] Those are not the words of somebody with a very philosophical temperament. Philosophers, like astronomers, aim at understanding. Sometimes their ideas, like those of astronomers, may catch on and even have transformative effects on civilizations. But those effects are not what they pursue as philosophers. If you want to see why, just consider the case of Marx himself. His efforts to transform the world were in large measure cataclysmic, even in their own terms. Marx was way out of his depths as an agitator for revolution and left a shocking legacy of human misery and oppression behind him. Ultimately,

[6] A translation from German of thesis 11 in Marx's 'Theses on Feuerbach' written in 1845 and published as an appendix to Friedrich Engels, *Ludwig Feuerbach und der Ausgang der klassischen deutschen Philosophie* (Stuttgart 1888)

in a bitter irony, the collapse from within of the alternative economic system that he naively inspired helped to prop up the ideology of unbridled capitalism that he rightly despised, and that means a new world of misery and oppression in this century (think credit crunch, war on terror, etc.) that may come to equal the misery and oppression meted out by Marx's supposed followers in the last. So Marx's record as a world-changer is far from distinguished. When he restricted himself to merely understanding the world, however, Marx did a truly first-rate job. If you love wisdom, you should read *Kapital*.[7] By an accumulation of insights it transforms the way one sees the human condition. Perhaps you could follow in these great philosophical footsteps? If you would like to transform anything other than understanding, however, you should probably abandon philosophy for another line of work.

Maybe you could become a lawyer instead? As a lawyer you could achieve all sorts of further things by *using* your understanding. As a barrister or solicitor, for example, you could use what you have learnt at law school to give advice to people in trouble, to plan and execute novel transactions, to negotiate and mediate in disputes, or to represent people in court. Later, you might become the kind of judge who, on occasions, actually gets to settle what the law is in the course of applying it. As a Law Commissioner or legal academic, meanwhile, you might help to shape the law in a different way, by influencing its development or reform. You should not be too optimistic about the scale of the changes you will help to bring about in the course of your legal career. Nor should you assume that they will all, or even mostly, be for the best (like Marx you will have to dice with unintended consequences). Nevertheless, as a lawyer you might well seek understanding mainly in order to do something else with it. Legal understanding is there, ultimately,

[7] Or possibly the abridged version edited by David McLellan (Oxford 2008).

to be put to further use, and that is because the law itself is there, ultimately, to be put to further use. Lawyers, even academic lawyers, are for this reason and in this sense practically-minded people. They want to see things done. No wonder, then, that they often find philosophers bewildering. A typical philosopher *just wants to understand*; or, in more outward-looking moments, *just wants to add to the stock of human understanding*. That is what is meant by their *love* of wisdom. It is not the mere pursuit of wisdom. It is the pursuit of wisdom for its own sake, without much regard to the strange and even perverse uses to which others, such as lawyers, politicians, priests, and marketeers, might put it.

(b) A word to the wise

But which wisdom? This is a bit harder to explain. I have spoken so far of 'understanding' but that word points to nothing special about philosophy. Mathematicians and psychologists and paleontologists and academic linguists and academic lawyers are also trying to understand things (whether just for the sake of understanding or otherwise). These other disciplines can be distinguished from each other mainly by *what* they are trying to understand. Most academic disciplines are defined by a subject-matter. Historians study the past, chemists study chemicals, demographers study populations, sociologists study social forms and trends, academic lawyers study legal doctrine, psychologists study the mind. So which subject-matter, we might ask, is the distinctive one studied by philosophers? Nothing, it seems, that belongs on the same list. Philosophers can find things to study in any of the above subject-matters, and so can raise philosophical questions bearing on each of the above disciplines. There are also philosophical questions relating to (and sometimes addressed within) astronomy, anthropology, virology, physiology, geography, and psychology. Indeed whole branches of philosophy (philosophy of law, philosophy of physics,

philosophy of social science, philosophy of maths, philosophy of psychology, etc.) have coalesced around the philosophical questions raised by the subject-matters of other disciplines.

One conclusion you could reasonably draw is that philosophy is defined not by its subject-matter, which includes absolutely everything, but by the kind of questions it asks about whatever subject-matter it engages with. Another (philosopher's) way to put the suggestion, and in the process to add more substance to it, is to say that philosophy has a *second-order* subject-matter. Physicists and historians ask (first-order) questions about particular subject-matters, respectively physical and historical events and processes. Philosophers ask (second-order) questions thrown up by those (first-order) questions, such as: 'What is an event? How does it differ from a process? Is the physical world the only world? Could history have been otherwise?' Indeed some philosophers keep going in a vaguely Monty Python way. Some of them go on to ask (third-order) questions about the (second-order) questions that they ask about the (first order) questions encountered by other disciplines: 'What kind of question,' they ask, 'is "What is an event?"?' Not surprisingly, philosophers who head this way are often the butt of jokes about disappearing into their own orifices. In the trade, their questions are known as meta-philosophy (or 'philosophy of philosophy') ones. They subject philosophy itself to the kind of interrogation to which philosophy is always subjecting everything else.

If you want a good example of a philosophical question, there is no better place to start than with what some think of as the hard core of philosophy, a specialism known as 'ontology'. Ontologists ask: What are the most elementary building blocks of reality? You may think that this question is the same one that has long been pursued in the natural sciences, especially in particle physics. We once thought fire, earth, water; later atoms; now we have worked our way down, by observation and postulation, to quarks and bosons. But 'quarks and bosons' is no answer, not even a possible answer, to the question that is posed by ontology.

Physicists assume, normally without argument, that 'reality' (in the question 'What are reality's elementary building blocks?') means physical reality. That is the specialised reality they are trained to understand, in the same way that lawyers are trained to understand legal reality and sociologists are trained to understand social reality. Philosophers, by contrast, are trained to ask whether the specialised reality of physics (or of law, sociology, etc.) is the whole of reality, or even an irreducible part of it. That, you will notice, is a second-order question: a further 'building blocks' question about the original 'building blocks' question as other disciplines, like physics, might ask it.

Ontologists contribute to answering this second-order question by distinguishing among, and establishing the relationships between, such things as entities, properties, events, states of affairs, processes, and facts. These categories (unlike those of quark and boson) are not the special preserve of natural scientists, and do not steer us automatically towards a physical interpretation of the world. Living creatures and rights are also entities; deaths and weddings are events; dying and negotiating are processes. These examples already hint at possible ontological questions: Do all events involve entities, as death involves living creatures? Are processes just successions of events, as might be suggested by thinking of death as a final event in the process of dying? No amount of new work in physics, law, or sociology – unless it veered into philosophical work – could answer these questions, because they concern the building blocks of all thought, and hence pertain equally to the foundations (or 'presuppositions') of all of these disciplines at once.

Not all philosophers, of course, are primarily ontologists (although all are expected to be aware of what are called their 'ontological commitments'). Ontology is usually regarded as a core part of a wider philosophical specialism known as 'metaphysics'. Non-philosophers sometimes use 'metaphysical' as a term of abuse. I am not sure why. Metaphysics is the study of the presuppositions of all thought, including but not limited to,

practical thought. Classic metaphysical questions include: What is causation (the very idea of it)? What is time (the very idea of it)? What is a person (the very idea of it)? And how do these ideas relate? Can persons somehow break loose from causation (by 'free will' or otherwise)? Do persons preserve their identity over time? If you do not think that these questions are important, then that probably means that you are not cut out to be a philosopher; you may love wisdom but not *this* kind of wisdom. But this time it may also suggest that you are not cut out to be a lawyer either, since the law in a mature legal system constantly grapples with questions about the nature of causation, the nature of persons, and so on. That one can practise law without being aware that one is engaging with these questions (and hence with metaphysics) only goes to show that one can practice law in many ways, including some that are decidedly unquestioning.

Metaphysics blends into all other parts of philosophy. The other parts also often blend into each other, and the divisions among them, such as they are, are mainly conventions that have emerged to chop study and research up into manageable chunks. The philosophy of mind (which explores the nature of the mental realm, including its relations with the physical, and which can also perhaps be called 'metaphysics of mind') blends into philosophical psychology (which explores the differences and relationships among types of mental states), and also blends into epistemology, the philosophy of knowledge (which concerns the role that the world can and should play in our grasp of it). The philosophy of language (which explores the nature of meaning and the relationship between language and reality) blends in one direction back into the philosophy of mind, and in another direction into what might be called practical philosophy - which here does not mean philosophy *used to do things* but rather the philosophy *of doing things*. Practical philosophy includes moral, political, and legal philosophy, and concerns itself with reasons for action, norms of action, and the evaluation of action. This is where the link with philosophy of language comes in, for norms

of language are also norms of action (of speaking, writing, etc.). Practical philosophy may also, in another direction, be allied with epistemology (which deals with reasons and norms relevant to belief) and in yet another direction with philosophical aesthetics (which is also concerned with evaluation, although, many would say, not primarily the evaluation of action).

The words 'many would say' in this last remark reveal that the links between these various areas of philosophy can also themselves emerge as topics of philosophical debate. So, for example, there are those who disagree about whether political philosophy forms part of moral philosophy, not because they are quibbling over the syllabi for different philosophy exams, but because they disagree about the relevance of moral argument to political institutions. This shows that, while the demarcations among philosophical specialisms are largely creatures of convenience, convenience is not all that is at stake in them. Philosophers can refuse to cross lines into neighbouring parts of philosophy not because those parts are unfamiliar or somehow belong to other philosophers, but (so to speak) *on principle*: because their philosophical conclusions instruct them they should not cross that line. A philosopher may say 'that's moral philosophy, not political philosophy', not as a way of sticking doggedly to her job description, but as a way of communicating a claim *in* political philosophy, namely that morality (or 'ordinary' morality) doesn't apply to politics.

Thinking about moral and political philosophy may lead you to wonder whether you have now lost sight of what is distinctive about philosophical questions. Don't moral and political philosophers ask straightforward first-order questions such as: 'Should the doctor turn off the life support machine?', 'What kinds of discrimination should we ban?' and 'Must all promises be kept?' Actually, not so much. There is a field of moral philosophy sometimes called 'applied ethics' (of which 'bioethics' is a well-known sub-field) which may sometimes look as if it is trying to provide much the same service in respect of moral

norms that lawyers sometimes provide in respect of legal norms, namely the provision of expert advice to worried lay clients, such as doctors and policymakers, who want to be told what to do next. It is very doubtful, however, whether there can be moral experts in the way that there can be legal experts, and, even if there can, it is very doubtful whether the pool of moral philosophers should be regarded as the pool from which moral experts are to be drawn. Here as with other subjects, philosophy is the natural home of second-order questions: 'How should doctors think about the question of whether to turn off the life support machine? Is it only a question of consequences?' 'What is discrimination? Does it have anything to do with inequality?' 'What does it mean to *keep* a promise – merely to do what was promised, or to do what was promised because it was promised?' Some possible answers to these second-order questions may, it is true, have more direct first-order implications than others. So it is true, for example, that some moral philosophers endorse very boiled down explanations of how morality is organised, according to which, say, everything comes down to one ultimate moral norm. If they are right then, armed with enough information about a given predicament, someone could in principle apply the proposed one ultimate moral norm to yield decisive advice about what to do in that predicament.

Should that someone be the philosopher herself? Philosophers may have first-order moral views like anyone else and perhaps, given the philosopher's training in working out what she thinks and working out why, they are particularly likely to be sensible views. Maybe so, although my personal experience of the moral judgment of moral philosophers, including my own moral judgment, leads me doubt it. But even granting that the moral philosopher could sometimes be a good moral adviser, the giving of that advice is mainly a philosophical footnote, given the huge amount of philosophical work that has to be done before we get to it. Why should anyone think that morality boils down to so little? Why expect so much determinacy? Why assume that

the morally right thing to do is also the overall right thing to do? Why suppose that quality can be quantified? And so on.

2. The School of Argument

I said that philosophy is an activity, and I hope that I have conveyed by my sample philosophical questions that it is a highly argumentative activity. Most of a philosopher's work consists in exhibiting relationships that hold between propositions and (more generally) ideas - inferences and connections that can be drawn or blocked. This is one feature that philosophy has notably and definitively in common with law, law understood both as an academic discipline and as a professional practice. Sadly, this commonality is only erratically reflected in the bureaucratic structure of universities. In many universities with groupings of faculties or departments, philosophy has been put in with the humanities, while law has been put in with the social sciences. Both disciplines tend to find these arranged disciplinary marriages problematic. There is certainly something humanistic about philosophy. Even the philosophy of physics, by and large, tries to locate physics in our world, a world where there are (or are claimed to be) things other than physics. Meanwhile there is clearly something social about law; many legal institutions are also social institutions, and at least some legal rules are also social rules. Nevertheless, and in spite of the robust belief among many law students that they are more in the 'real world' than philosophers, legal research does not consistently or straightforwardly conform to the largely empirical research agenda of social scientists (although, as the next chapter explains, there is some significant common ground).

The empirical aspects of law are the primary concern of socio-legal studies and criminology. Much of the rest of the academic study of law, in spite of some empirical aspects, could just as well be moved into the humanities division, which is where it is largely located for the purpose of allocating

government research funding in the UK. But if it were moved from social sciences into humanities, it would scarcely find more intellectual affinity with most of its new bedfellows (literature, languages, history, music, fine art) than it had with its old. Law's intellectual techniques, mainly techniques of argument, would be most continuous with those of the philosophers, who also often feel that they are out of place among the lovers of narrative and representation who share the humanities building with them.

It might well be tempting, therefore, for the two disciplines of law and philosophy to form a breakaway union, distinct from both humanities and social sciences, a School of Argument. To call it a School of Argument is not to deny, of course, that every academic discipline lives by argument. All academics argue for a living. Nevertheless both legal and philosophical training are distinctive in being training in *argument as such*, argument as a transferable skill, argument about, frankly, any subject-matter.

This comes about in the case of philosophy directly, and the case of law indirectly. As we saw, philosophy as an academic discipline has no distinctive first-order subject-matter; any subject-matter at all can give rise to philosophical questions. By contrast, law as an academic discipline does have a distinctive first-order subject matter, namely legal doctrine and its use. However, there are no limits to the range of further subject-matters to which legal doctrine may attend,[8] so by an indirect route the lawyer shares with the philosopher the ability to turn his or her argumentative hand to anything and everything. The care of children? The benefits of opera? The purpose of income tax? The justification for war? The nature of death? The value of knowledge? Just a random selection of topics about which philosophers and lawyers alike might be called upon to argue in

[8] Why? That is a philosophical question about law. For attention to it, see Joseph Raz, *The Authority of Law* (Oxford 1979), 115–121.

their professional capacities, not because they are experts on those topics, but because they are experts at arguing.

There is another, deeper commonality hidden within this one. Law students are trained not only to argue about any topic, but also to argue for any cause, no matter how unappetising. A lawyer always has to be ready to be a devil's advocate. That is not just what lawyers are paid for as practitioners. It is also an essential feature of their intellectual discipline. The extent to which, as nascent lawyers, they are expected to argue in this detached way, using premises that they personally reject, is one of the things that may lead some law students to become refugees from legal education after a year or two of law school. They find that the fun of mooting wears thin. Some of these refugees flee to philosophy courses (often available as options in a law degree) in the hope that philosophy will give more credence to their own committed views, especially on moral and political questions. They hope, perhaps, to feel less compromised.

In general, these refugees are only partially satisfied with their choice of refuge. Although it is true that moral and political philosophers enjoy more latitude to represent and defend their personal views on moral and political questions in their work than most lawyers do (even academic lawyers without clients) nevertheless much philosophical work is akin to much legal work in being more concerned with the success of arguments than with the truth of premises (except to the extent that the truth of a premise in turn depends on the success of another argument). Like much legal argument, much philosophical argument takes the following form: 'Even conceding A and B, C doesn't follow.' Philosophy, like law, requires one to look upon the 'field of pain and death'[9] with (what some people regard as) shocking *sang-froid* or dispassion. Many moral philosophers, in

[9] This memorable expression is from Robert Cover, 'Violence and the Word', *Yale Law Journal* 95 (1986), 1601.

particular, use hypothetical examples just as gruesome as any found on a criminal law exam (think massacre, torture, theft of organs, enslavement) and manage to turn them into illustrations of the great importance of where to close the brackets in a proposition, or of the distinction between a proviso and an exception, or of assorted problems in 'moral mathematics'. This can be just as alienating as anything found in a law book. Some readers of such discussions understandably don't want their opposition to war, for example, to rest on such niceties as *what exactly follows from what*, niceties which (as lawyers also know) can serve warmongers as readily as peaceniks. The dictates of logic, you will learn in our School of Argument, are not the sole preserve of the good and the true. If you simply want to stand up for the good and the true, be careful before you enrol.

Our proposed School of Argument would unite two disciplines that have very close intellectual ties, then, including a shared willingness to take potshots at attractive conclusions as well as unattractive ones. Yet serious differences between the two disciplines would surely survive their new alliance and probably give rise to some factional squabbles. I noted one difference already. Lawyers, even academic lawyers, tend to be more oriented than philosophers towards seeing their thinking put to *use* (in something other than just more thinking). This sometimes affects what qualifies as a successful argument in each of the two disciplines. However another difference between their respective modes of argumentation is perhaps more striking and pervasive. Lawyers, including academic lawyers, argue characteristically from authority. They take a proposition of law from a statute or a case, and they use it as a premise in an argument, usually an argument to another (proposed or supposed) proposition of law. This is a rather specialised argumentative activity, in which philosophers do not for the most part care to join. Indeed if you look at any list of common philosophical fallacies, you will find 'appeal to authority' (a.k.a. *argumentum ad verecundiam*) high on the list. To stand up for the

truth of any proposition in a philosophical way is to defend it on its merits, not on its sources. The fact that the proposition was uttered approvingly by another philosopher – even a very famous or clever one - simply does not qualify as part of the defence. Nor does the fact that a certain argument appeared in a famous philosophy book help to show that it is a valid argument. Law students, trained to find an authority for every proposition that they rely upon, find this fact about philosophy very hard to take. Most immediately, it leads them to mess up their legal philosophy (or 'jurisprudence') exam. Instead of telling us what the difference is between a legal right and a legal power, whether legal reasoning is a kind of moral reasoning, whether all legal systems include customary norms, and so forth – these being the questions asked by the examiners – many law students settle for summarising what such-and-such a philosopher said about these questions, and what such-and-such a rival philosopher said in reply, and so forth. One waits in vain for the argument, *provided by the student himself*, that shows one or both of these supposedly warring parties to have been thinking on the right or the wrong lines. This lacuna is a side-effect of the deferential character of legal education, the lawyer's 'bootlicking attitude to the judges'[10] ('with the very greatest respect, my Lord, it is humbly submitted that the distinguished judge's dictum is to be read more liberally' etc.) being generalised into a bootlicking attitude to all supposed grandees as far back as Plato.

Bad jurisprudence exams are the most immediate impact on law students of their yearning for the comfort of authority and the rewards of deference. But another impact runs deeper and persists longer. Lawyers tend to be a particularly sceptical bunch,

[10] A complaint about his new colleagues from the diary of legal philosopher H.L.A. Hart, written shortly after moving from Oxford's Philosophy Sub-Faculty to its Law Faculty in. Reported in Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford 2006), 157.

and I don't mean in a good way.[11] A good way of being sceptical, it seems to me, is being sceptical of authority. Alas legal education, as we just saw, tends not to breed this kind of scepticism. Instead it tends to breed an opposite kind of scepticism: reluctance to give credence to any proposition *except* to the extent that it is backed up by authority. A traditional lawyer's reaction to many propositions debated by philosophers, therefore, is to issue the totally deadening and point-missing challenge: 'Who's to say?' Or, a minor variation on the same theme: 'That's a controversial suggestion.' The correct philosophical response to such challenges is usually: 'Lawyer alert! Fallacy of *argumentum ad verecundiam* in progress!' This response, however, may well fall on deaf ears. Just wait until you have studied law for a couple of years and see if you can still make an argument that doesn't end up relying on authority, if only on the authority of a supposed widespread consensus. If not, ask a kindly philosophy student to remind you how.

3. Philosophising about law

One of the biggest philosophical problems about law, perhaps the biggest, is one we have just touched on. How can authorities play the role they are supposed to play in law? How can legal arguments proceed from authoritative pronouncements? Once you are a law student you will quite possibly take this way of proceeding so much for granted that you will not be able to see any problem here. That is one reason why typical 'jurisprudence' courses, in which this problem is in the foreground, can be so hard for law students to get into. They cannot believe that anyone is seriously querying what they now regard as totally normal. They cannot imagine why anyone would ask:

[11] The sceptics were a bunch of ancient philosophers who doubted whether anything can be known (as opposed to believed).

How are the creation, imposition, modification, and extinction of obligations and other operations on other legal entities such as rights possible? How can such things be done?[12]

This is how the problem – what we could call *the problem of how law is possible* - was formulated by H.L.A. Hart, arguably the most influential philosopher of law of modern times, at least in the English-speaking world. But what – asks many a law student – is the problem that Hart is getting at? Why is it a problem?

There are several ways to bring alive the problem of how law is possible, two of which were emphasised and explored by Hart in a famous book called *The Concept of Law*:[13]

1. How does anyone ever acquire the ability to make law? As lawyers, we always look for someone else who conferred the ability, someone who handed out the law-making powers. But who gave this 'someone else' the powers to hand out? Someone else again, presumably. Eventually we get back to something called 'the constitution', which is supposed to confer the ultimate legal powers. But how? Who made the constitution and how did *they* get the legal powers to do it? How did the whole thing ever get off the ground? 'It just did' is not an answer.

2. Human beings are fallible. Anything they make, they will sometimes make badly. That includes duties and rights and powers and so on. Any duty that gets made on a human being's say-so is liable to be a dodgy duty, one that should not exist. But duties are by their nature *binding* things. How can something be both binding and dodgy? If it should not exist, how can it still be a duty? So how can law both be a business of duties and rights and powers and so on, and yet also made by fallible human beings who will at least sometimes make a pig's ear of it?

[12] Hart, 'Legal and Moral Obligation' in A.I. Melden (ed), *Essays in Moral Philosophy* (Seattle 1958), 82 at 86.
[13] Oxford 1961.

Hart made great strides with these questions but of course his solutions are still widely debated. Some of the debates, in typical philosophical style, are debates about Hart's presuppositions, the things that he took for granted. Some people doubt, for example, whether he was right to suppose that all law really is made by human beings, or at any rate right to think that it is *simply* made by human beings. Maybe the dodgy duties, the ones that shouldn't have been made, just aren't law at all? Maybe the constitution has a moral, not a simply legal, basis, so the question of how it was made gives way to the question of whether it is wise, legitimate, or morally binding? Philosophers who head off in these directions are already starting to *idealise* law. They are starting to build into their explanation of how law is possible the thought that law is a good thing. Hart thought such idealisation was too high a price to pay for a solution to the problem of how law is possible. He thought we needed to explain how law is possible in a way that left open the possibility that some legal systems are a waste of space, or at least not worthy examples. In other words he thought we should separate the problem of how law is *possible* from the problem of when law is *defensible*. Indeed he thought that tackling the first question first would allow us to move onto the second question with a clear head.

The jurisprudence courses of many law schools reflect this way of carving up our inquiries about law. They begin with what is sometimes known as 'clarificatory' jurisprudence (in which we study what law is like, trying to make sense of various aspects of legal life and experience, the very nature of legal rights and duties and so on) and then they move onto what is known as 'justificatory' or 'evaluative' or 'critical' jurisprudence (in which we discuss how law can be defended or attacked, in particular what the appropriate standards of evaluation for law are). Although pedagogically convenient, this way of dividing the subject up is also treacherous in various ways. Not least, it tends to prejudge against the idealisers, who say that what counts as law depends, at least in part, on what is defensible, so that

jurisprudence is 'justificatory' from the word go. I personally think that these idealisers, of whom Ronald Dworkin is the leading modern light, are quite mistaken, and that Hart was right to resist their blandishments. But I am also very aware that here, as in other parts of philosophy, the lines that we draw between our topics have philosophical implications of their own. It is not only a question of convenience, but also a philosophical question in its own right, whether the 'clarificatory' questions are distinct from the 'justificatory' or 'evaluative' or 'critical' ones.

Having said that, the division of jurisprudence courses along these Hartian lines may serve, perhaps, as a bit of a corrective to the intellectual impatience of some law students, and their associated misconceptions about what the philosophy of law is and what it is supposed to be doing for them. Some people trained (or half-trained) in the dark arts of the law are dismissive of philosophical problems and of philosophers. They are practically-minded people and they want to do practically-minded things. They don't want to know about the presuppositions of their thought or their practice unless doing so will (say) help them to win cases or help them to reform the law. Some law students wishfully re-imagine philosophy of law as the part of their curriculum in which they will be liberated from doctrine to discuss law reform proposals, to debate the merits of contentious legal rules, or more generally to discuss first-order problems in legal policy. This is a misconception. It is even a misconception about the 'justificatory' or 'evaluative' or 'critical' part of jurisprudence. Philosophy asks second-order questions. Philosophers are not moral experts (because there are no moral experts) and so they can't tell you which laws are in need of reform any better than you can tell them. Indeed no course at university can (or should) teach you what to think about the moral and political issues of the day. The point is to teach you *how* to think about them, and indeed how to think more generally. Philosophers, fortunately, are experts on that. They think hard and rigorously for a living, keeping a particular eye

out for fallacy, overstatement, and muddle in the thinking of others. That expertise is what they are supposed to be bringing to your law degree, in a way that complements the closely related and yet subtly different expertise of your law teachers.

The issues in jurisprudence, or philosophy of law, that I have mentioned so far belong to what is sometimes known as 'general' jurisprudence. General jurisprudence, which for better or worse dominates many undergraduate jurisprudence courses, raises philosophical questions about law in general. How is law possible? Is all law divided into legal systems? How come? What are the basic building blocks of all law? Rules, principles, rulings? Duties, powers, rights? How are the basic building blocks themselves to be distinguished from each other? Are they also the basic building blocks of morality? Indeed are there any 'necessary connections' between law and morality? How can there be legal obligations that are not moral obligations? How can legal obligations give rise to moral obligations? Is legal reasoning a kind of moral reasoning even when its premises and conclusions are immoral? Can they be *totally* immoral? These questions straddle the divide between clarificatory and justificatory jurisprudence that I just described. But they all belong alike to general jurisprudence because they are not questions that are local to particular legal systems or traditions, or to particular areas of law that a legal system might or might not possess. These questions all arise about all legal systems – about law in general.

There are also, of course, philosophical questions lurking in particular legal systems and traditions, and in particular areas of law such as criminal law and contract law. Many philosophers of law work on these too. They work on the special features of the common law tradition, or on the idea of an unwritten constitution such as that found in the UK, or on the special features of EU legal system. They work on doctrines of legal responsibility that are specific to criminal law, or to the law of torts, or to the international law of war. They work on the differences and similarities between promising and contracting,

or between entrusting things and setting up what the law calls a trust. They interrogate the idea of the person, or the idea of causation, found in (say) American legal systems or Napoleonic legal systems. They are private law theorists, or international law theorists, or constitutional law theorists. This work may seem closer to that of doctrinal lawyers than does work in general jurisprudence. That is not, or not necessarily, because it is less philosophical. It is at least partly because law is a discipline with built-in system of specialisation. Lawyers are trained in one jurisdiction rather than another, and different areas of law are authoritatively carved up by the judges or the legislature and then studied by different academic experts. Unlike philosophy the demarcations are official, built into the subject-matter of study. Special jurisprudence submits to these demarcations and allows them to shape its own second-order questions. A lot of lawyers' everyday assumptions about what they are doing for a living are thereby allowed to pass unquestioned in most kinds of special jurisprudence. Not so in general jurisprudence. General jurisprudence tends to upset or problematize the law's own demarcations and assumptions, in fact its whole worldview, which makes the subject seem unfamiliar and remote, possibly even threatening, to lawyers, law teachers, and law students.

A brilliant lawyer and legal historian recently wrote, in a somewhat cranky memoir published after his death, that 'In my own long experience as a teacher and to some modest extent a practitioner of law I have never once been asked the question "What is law?"'[14] This was meant to be a poke at Hart, and those who have followed him into the perennial problems of general jurisprudence. But why should it be thought to point to a problem for philosophers of law? Consider this analogy.

Physicists do not for the most part encounter the question of whether reality is all of it physical. For the purposes of their work

[14] AWB Simpson, *Reflections on The Concept of Law* (Oxford 2011), 80.

they normally just assume that it is; physical reality is the only kind of reality they work on. Now along comes someone working in metaphysics who raises the question of whether reality is all of it physical. Just imagine a physicist complaining: 'In my own long experience as a teacher and researcher in physics I have never once (except by you philosophers) been asked the question 'Is reality all of it physical?' The proper response from a philosopher would surely be this: 'Exactly. Your complacent disciplinary assumptions are exactly what we have been sent to challenge.' Would it then be a good rejoinder for the physicist to say, as our cranky legal historian says, that the philosopher's concerns are 'so unrelated to the real world as to be rubbish'?[15] No it would not, and the reason is that the question of what *counts* as the real world, what *forms part* of the real world, is exactly the question that the philosopher is raising with the physicist. No less so the philosopher of law with the lawyer. To see if law is part of the 'real world' we have to find out what it really is, how it can possibly exist, and what else must exist as part of it or in tandem with it. The lawyer no less than the physicist is making philosophical assumptions about what qualifies as real. The lawyer no less than the physicist can be challenged and interrogated on those assumptions. To refuse to rise to those challenges is to embrace a kind of quietism in the face of the dominant ideology of law and legal education; it is to contribute to breeding lawyers who are skeptical in the wrong way, when one could breed lawyers who are sceptical in the right way, who can see that law's claim to authority is not only morally but also conceptually problematic, and that that law's claim to be 'in the real world' therefore rests on shaky foundations.

[15] Ibid, 140.

4. Will philosophy make you rich?

Legal learning shades into philosophical reflection. The two subjects not only have affinities. They also have continuities. That is why the word 'jurisprudence' (legal wisdom) can be used to refer to both the philosophy of law (as I have used it here) and the doctrinal thinking of the higher courts in any legal system. In spite of these affinities and continuities, many law students are alienated by their encounters with the philosophy of law. I have mentioned several factors that may contribute to this alienation. Let me end by mentioning one more.

Many law students think of themselves as training to work in the legal professions, and therefore think that every subject they study in law school should correlate to a possible professional specialization. That is how to get to be a partner in a law firm (they think) by age 35. This leads some to study, say, company law or intellectual property law on the footing that they are training to be company lawyers or intellectual property lawyers. This is not a wise way to look at legal education, or a legal career. Good lawyers can get to grips with just about any area of law as and when they need to. They can build up specialisation and expertise as they go along. They often end up specialising in things that they never contemplated specialising in as students. Recruiters know this and by and large are simply looking for people who are good at law, and good at analytical thinking more generally. You want to be good at law? Study contract, tort, property, crime, and constitutional law, and study hard. You want to be good at thinking more generally? Try taking off your stabilizers and *thinking without authority*. Learning how to do philosophy – remember, it is an activity, not a product - will help you in any analytical career.

Besides, you are at university. Take the opportunity to question every question while you still have the chance.

Further reading

Nagel, Tom, *What Does It All Mean? A Very Short Introduction to Philosophy* (Oxford 1987)
MacLean, Anne, *The Elimination of Morality: Reflections on Utilitarianism and Bioethics* (London 1993)
Wolff, Robert. P., *In Defense of Anarchism* (2nd ed, Berkeley 1998)
Lyons, David, *Ethics and the Rule of Law* (Cambridge 1984)
West, Robyn, *Normative Jurisprudence: An Introduction* (Cambridge 2011)