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interviewed by

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Until now, in my Gresham interviews, I have spoken largely to judges and to legal practitioners. And we've even had a former criminal here as well. But our insight into law has surely been incomplete because we have had no exposure to the academic legal world. In pondering who might actually fill that gap, I thought immediately of tonight's guest, John Gardner, who is Professor of Jurisprudence at Oxford. Now, we'll be talking in greater detail about what jurisprudence is but, at this stage, I simply want to say it is one of the more academic and theoretical aspects of legal study, and so is an ideal topic, I think, for Gresham College. Indeed, it is ironic, as a college, that we haven't had an academic here sooner.

John, as I say, is the Professor of Jurisprudence at Oxford and he took up that prestigious chair, at the remarkably young age of 35. He was

educated at school in Glasgow and then studied at Oxford. He's held a variety of position, at King's College, London and at Oxford, but his academic life has been focused on legal theory. He has, therefore, been thinking deeply about a variety of legal issues, and I want to give some insight tonight into the kinds of matters that occupy a jurisprudent. John, welcome, it's great to have you with us.

Thanks very much.

Can we start off with what I know (because I used to teach jurisprudence myself) is a vexed question - what is jurisprudence?

In Oxford, we advertise our undergraduate law course under the grand title of 'the Honour School of Jurisprudence', and we mean that to be taken seriously. Literally translated, 'jurisprudence' means wisdom about law. When we teach law, we don't mainly have in mind that we'll teach people to be lawyers, although many of them do become lawyers. We have in mind that we'll teach them some legal wisdom. To acquire this legal wisdom, the students take the law of contract, and criminal law, and all those predictable things. But they also do a course called 'jurisprudence' and this is jurisprudence in a more specific sense. It means the theory or philosophy of law. What an undergraduate student would study under this heading would be

big timeless problems about law. What is law? Why do we have it? When is it legitimate? What are judges for? How should we understand what judges do? Those questions arise not just in the English legal system, not just in the common law world, but everywhere where there's a legal system, and one of the things we investigate with the students is to what extent the answers are the same everywhere, and to what extent they vary from one legal system to another.

When I was involved in jurisprudence, largely in the late 1970s until the mid-1980s, it was marvellously alive: very exciting; innumerable conflicting schools of thought; everything that one would want in philosophical debate. To some extent, I have left that world now. Has much happened in the past decade or so? Is jurisprudence still thriving? Has it peaked? Where are we?

Maybe I'm not the person to ask. Obviously I think it's at its very peak now! Seriously, the subject has moved in the last 50 years from the hands of lawyers, straight legal academics, into the hands of philosophers. Most of the people who teach and study in my area now did their doctoral research in philosophy more than in law, and that's made the whole thing in a way more technical and less accessible. But there are more people doing it nevertheless; it's a much bigger operation. In Oxford at the

moment, in a law faculty of about seventy, there are ten or twelve people who are philosophers by training rather than, or as well as, lawyers.

And you're certainly not the person to ask my next question. In my day, as it were, Oxford was the global home of jurisprudence. Is that still the case?

In the late 1980s, when I was a graduate student in Oxford, the intellectual scene was buzzing. Then in the early 90s, when I had my first teaching job there, Oxford went rather quiet as a place to study the philosophy of law. At that point, things seemed to be most alive in New York. But now we're at another point in the cycle, and Oxford is arguably the liveliest place to be again. We're certainly attracting an extraordinary number of excellent postgraduate students. These fluctuations are not mainly because of changes in personnel. In fact, some of the most important personnel have been constant for many years. Mostly the changes have been in other places, in the 'external environment'. At the moment, we're the beneficiaries of a new enthusiasm for anglophone philosophy of law among continental Europeans, as well as what seems to be a new intellectualism among Commonwealth law students.

Let's try now to create the flavour of jurisprudence. I propose we do this in two stages. First of all, we might focus on some classical jurisprudential issues, and then we can follow up with some insight into your own current research interests. One way to start is with your two immediate predecessors, both extremely eminent figures: Ronald Dworkin, and before him, Herbert Hart. There was in the world of jurisprudence, indeed there still is, something known as the Hart-Dworkin debate. Here we have two intellectual titans at cerebral war with one another for many years. And the conflict actually became quite lively. I wondered if we could chat about this.

Yes, the conflict strikes me as lively too, but then again, I'm a philosopher, and I find strange things lively. One interesting feature is that it wasn't ever clear what Hart and Dworkin were fighting about. Or at least it wasn't clear over time, because the debate moved on, and a reply would be met by a rejoinder that somewhat changed the topic. So part of the excitement was not knowing what was going to happen. It wasn't just always more of the same. It all started with what seemed like a very simple and unostentatious claim that H.L.A. Hart made in a famous book called *The Concept of Law*, which was the claim that in any legal system – this is true, he said, everywhere where you find law – you'll find there's a rule which tells you what are the ultimate sources of law in that system. In English law, for

instance, there is the rule that what the Queen in Parliament enacts is law. Hart admitted that this was a simplified version of the rule that applies in England, but he gave it as an example of the kind of rule he had in mind. He called it a Rule of Recognition. He said anywhere you find law, you'll find such a rule; every legal system has to have one. The way that it would identify law would be by identifying people, officials, who had the right to make law, and in the case of English law, it was Parliament, or 'the Queen in Parliament', which is the technical term. Dworkin - amazingly inspired, especially as a young scholar – made an attack on that idea in his very first article. He said that legal systems have another basis; it's not this Rule of Recognition. It's a domain of legal principle which nobody ever created, which isn't the work of any officials. If you want to know what the domain of principle contains, it contains an idealised version of what's going on in the courts. If you look at the courts, you'll see officials doing their mundane, humdrum things, sometimes getting it right, sometimes getting it wrong, but if you abstract from the humdrum things they are doing, you'll discover a set of guiding principles, an ideal that they're all aspiring to live up to. This ideal can't be made directly by any officials, so it can't be included in what Hart called a Rule of Recognition. And so Dworkin offered an alternative way of understanding the basis of a legal system. You can see straight

away why it is a rival approach, not a complementary one. Hart had said that all law is made by officials. Dworkin answered 'Here's some law that isn't. Every legal system has principles that are related to what the officials say, but are not themselves made by officials'. Well, so far so good. But as time went on, Dworkin's work became more ambitious and it became harder and harder to understand whether there was a difference between him and Hart, and if so, what it was. By the 1980s, Dworkin was contemplating not just the nature of judging, not just the nature of law, but the nature of concepts and the nature of philosophy. The earlier criticisms of Hart became somewhat lost in the process. Personally, I found Dworkin's earlier criticisms more fruitful.

But there was, literally, a postscript on all of this, wasn't there, because Hart's book, The Concept of Law, *was first published in 1961. However, it was after his death, wasn't it, in 1994, that a postscript to the book emerged. Can you take over the story?*

Well, it was biographically very interesting, because as time went on Hart became more and more pained by the intellectual distance between him and Dworkin. He felt it was his duty to respond to Dworkin's later work. It was never going to be the last word, because it was quite clear that Dworkin would

continue the debate after Hart's death, as indeed he did. But Hart felt that he should nevertheless offer an authoritative re-statement of his position that joined issue with Dworkin's more ambitious 1980s work. You can tell when you read the result that Hart was not enjoying the task. It doesn't hang together very nicely, and he gets some of his own earlier positions into a bit of a muddle. In fact, this was reflected in the way the writing was done. Hart died in 1992, but he wrote the postscript in the 1980s. He kept several drafts on the go, and he amended one and then forgot that he had done it and amended another one, so when the editors came to put it all together after Hart's death, they had a tricky job. There were often rival suggestions in the rival drafts and it wasn't clear which, if any, was Hart's final view. The editors did a fantastic job in the circumstances but they were editors, not authors, and they couldn't just write their own improved version to hide the obvious problems Hart had experienced in formulating his replies.

You've mentioned Hart's Rule of Recognition. More generally, a popular characterisation of Hart's position is that his is a rule-based theory of law. He talks about there being two forms of rules in a primitive society, those that confer powers and those that impose duties, and then he talks about the necessity for rules of change, which allow rules to be changed, and then he talks about rules of adjudication that

allow judges to settle disagreements. So people often say that Hart's is very much a rule-based model of the law and then along comes Dworkin, who says that to understand the law purely in terms of rules is to miss something far more fundamental.

You've already hit on a point at which Hart and Dworkin were at cross purposes. Dworkin thought his job was to be a kind of abstract legal practitioner, to give philosophical advice to judges and lawyers about how they ought to proceed. In fact he thought it was the job of all jurisprudence, including Hart's jurisprudence, to provide that kind of advice. Hart, by contrast, had no such ambition for himself. He didn't have any views, at least none that he disclosed in his work, about how judges should decide cases or lawyers should argue them. So far as we know, he wasn't in favour of judges doing what Dworkin said judges should do, but he also said nothing against it. He just didn't discuss it. He was discussing what had to be there before we got to the question of what judges should do. When people claim that's Hart's thinking was very rule-based, they often build into that claim the thought that, according to Hart, judges should spend their lives looking up rules. That's just not something that Hart ever said, or suggested, or even discussed. So far as we know from his work, he would have been as happy with a world in which there were very few rules and judges therefore had to

do a lot of creative thought, as with a world where there were many rules and therefore judges had to do very little creative thought. All he said was there have to be some rules, including a Rule of Recognition, and that's where it all begins.

But he makes it very clear, doesn't he, in his introduction to The Concept of Law *that his is a work of description whereas, as you say, Dworkin's is actually a mix of prescription and description. That's why it's quite hard to understand often…*

It can be hard to understand, because Dworkin, said (on the one hand) here's an ideal for judging, and then he said (on the other hand) that this ideal has to be present and operating wherever there's judging, even when judges are doing badly relative to it. That's quite a complicated thought, isn't it? It is a thought about the real (non-ideal) world that depends on a thought about the ideal world.

Why don't we clarify matter by focussing on one of the concrete cases that Dworkin discusses, relating to the chap who murders his grandfather to inherit under the latter's will.

Yes, good idea. So what does Dworkin have to say about that? At the time of the case, one could imagine (indeed there were)

two conflicting views about what should happen. On the one hand, you had a law of inheritance which said that the will is to be honoured – I'm simplifying, but something like that. On the other hand, you had the thought, which hadn't yet been applied to such a case but which had emerged in some other legal contexts, that nobody should profit from their own wrong. The question which arose for the court was how to go forward with a case like this. Dworkin argues that the way to do this is to take the cases that you have and see if you can come up with principles that, so far as possible, unify them, and that are also morally acceptable, and then you know the answer to the new case that comes before you. I suspect that Hart, on the other hand, would just have said this: "There's a legal conflict between the rule about honouring wills and the rule about not profiting from wrongs and somebody has to decide what to do – I (Hart) have no idea how. Somebody else has to write that book – maybe Dworkin!" So you can see how the cross-purposes infect even this example. Hart never actually discussed the case, so I don't know – I'm obviously putting words into his mouth.

I'd like to touch on something with which I always struggled. My research, broadly in this area, was to do with how you could computerise the law and legal reasoning, and so I was naturally sympathetic to an approach to the law which could actually break it down into rules that

could then be processed. That was one of my key interests. And sometimes, when I read Dworkin's work, it seemed to me that he would have thought that kind of rule processing would be absolutely incorrect while, on other occasions, I thought he might concede that, yes, you've got to have a go with rules first of all, before you find out, or can find out, that there is a need for some kind of further reasoning, say, about principle or purpose.

Your predicament is a very common predicament, and many of my doctoral students today struggle with a similar thought. To see why it's difficult, let me re-conceptualise this as a cultural problem. Dworkin came to Oxford from Yale, and from an American tradition of law school education. The debates that flourished in Britain were debates of quite a rarefied kind compared to the ones that flourished in America. In America, it was the job of a law school professor to make a difference to the law, and the big debates in the American law schools had been not about, not really about, the nature of a legal system, but about the thinking and the functions and the purposes of judge and lawyers. Going back before Dworkin, there had been a really major debate about this, which hadn't just afflicted trained philosophers of law, but every law school Professor. Do we think of the law as a sort of autonomous discipline which contains all the material needed to answer all its own questions?

Or do we think of the law as really just a sort of sugar coating for a lot of material that's borrowed from outside – a bit of economics, a bit of psychology, here's some morality, you stir it all all together, and then you put some legal icing on top. The "legal formalists" were the people who said "it's our discipline, it's special, you come to law school and you learn a different and autonomous intellectual discipline with us – it's not psychology, it's not morality, it's not economics." The "legal realists" were those who said, "hah, law school, that's just a way of providing the sugar coating for all those other materials that are really supplying the nutrional value."

Dworkin is a fantastic hybrid character in that debate. On the one hand, he stands with the formalist tradition in saying that the law can answer all of its own questions. The answers are all to be found in the law. You'll find them if you look deep enough behind the cases to the principles that justify them, and those principles are part of the law already – you don't need an official to tell you that, they're already there. So that's a formalist instinct. On the other hand, he has a legal realist instinct, which is to say that those same principles answer to political morality. They're not *only* legal, they come into the law using moral argument, and judges therefore have to engage in moral argument. Law is not an autonomous discipline in the way that

the formalists hoped, and law schools therefore have to provide a moral education. So Dworkin's at the junction of those two traditions. A fantastically original set of ideas, as everyone can agree. The problem is that, in a move that history will I think come to regard as bizarre, Dworkin superimposes all these amazing ideas on a completely different and almost entirely unrelated set of philosophical puzzles that had intrigued Hart. These other philosophical puzzles tend to seem unimportant to an American law school professor because they don't have pay-offs for how lawyers, or anyone else, should behave. They don't make and aren't intended to make a difference to the way that any court should decide any case. In the UK, we have a different intellectual tradition in the law schools, with nothing anlogous to the historic struggle between the realists and the formalists. That's probably because we have nothing remotely like the American Supreme Court, and people don't spend all their nights awake worrying about the legitimacy of the Lord Chief Justice or the question of whether the next judge to be appointed will be a Democrat or a Republican.

Let's lead from that, quite naturally I think, to the question of judges and jurisprudence, because one of the main preoccupations of jurisprudence, and we've touched on this already, is, on the one hand, to seek to describe and explain how it is that judges as a matter of fact go

about making their decisions and, on the other hand, to prescribe, to recommend a particular methodology or approach. What fascinates me is the extent to which this theoretical thinking actually has impact on judges. I was listening to Radio 4 one day and Lord Bingham, who's sat in the Gresham interview seat in the past, was on the programme, as indeed you were, alongside another jurisprudence expert and another judge, as I recall. Clive Anderson was conducting proceedings. It was a rather bizarre discussion, because the other jurisprudence expert seemed to be saying, actually to real judges, that no matter what you think about how you go about your judicial decision making, here is actually (a) how you do do it, and (b) how you ought to do it. They seemed rather flummoxed by this. In fact, it seemed to me that that legal theorist was speaking a different language from the judges.

I think that's true. Compared with the picture Dworkin paints of the Herculean judge, most judging, at least in the UK, is less self-conscious and less ambitious about what it's for and what justifies or legitimates it. One of the questions that you have to think about if you're a philosopher of any subject is to what extent you trust the appearances, to what extent you take the practices you are analysing at face value. On one view, you should normally trust the appearances. People make mistakes, but if you look closely enough at exactly what they are doing and how they interrelate with what they are doing, you will be able to

understand their mistakes in their own terms, without imposing a whole new scheme. At the other extreme, some think that we are all blighted by false consciousness. Nothing we think about anything can be trusted to be free of self-deception and pathological delusion. Now, it's a general problem when you study a subject: to what extent do you take things as they seem? Personally, I tend to veer towards trusting the appearances. When somebody asks me about judges, I tend to look at the way judges themselves articulate their own work when they are doing it, so I take seriously categories that judges themselves us, like "overruling" and "distinguishing". A judge says "I overrule another judge", and I think to myself "That's interesting. What's that all about? How is that possible? What sort of rules do there need to be to make that possible?" But Dworkin is more inclined to think that what meets the eye isn't most of what there is to it and that one should go behind categories like "overruling" and "distinguishing" and replace them with other categories. In the end, he replaced almost every category with the category "interpretation", which is such a big category it could cover everything, he thought. But it's not in fact what judges think they're doing all the time. Judges know they do interpretation sometimes: sometimes they have to interpret a statute, sometimes they have to interpret another case, sometimes they have to interpret a whole body of law. But often they do

other things, like make decisions, overrule old decisions, and so on. But Dworkin thought, in the end, that one could really understand all of that in terms of interpretation, and it is a huge shock to somebody who does this for a living to discover that what they thought was just part of their job is now supposed to be, according to some philosophers, the whole of their job. I am sceptical about that Dworkinian reconstruction of the subject in terms of interpretation, as was Lord Bingham on the radio programme you mentioned. In fact on that occasion, in my view, Lord Bingham was being more philosophical about his work as a judge than was my colleague Stephen Guest, who was standing up for the reconstructed Dworkinian view. But I would naturally say that, wouldn't I, because of the respect that I think philosophers should give to the self-understanding of practitioners.

Discretion. That's a subject, certainly at undergraduate level, that's discussed a lot. And I've asked a number of judges here to what extent they feel they have discretion. Perhaps you might just give some insight into the jurisprudential debate here; the point being that judges face enormously difficult decisions, and the question being whether they are more or less constrained by the law in the decisions they reach.

Yes. Well, there's no general answer to that because it depends on how much law there is. On some subjects, there's a lot, and on some subjects, there's only a little. But there is a philosophical question underlying it, which you have to begin by thinking about in these terms: you have to ask "what do you mean by discretion?" Now, one way to think about discretion is just to think that there's discretion whenever the law doesn't settle the case, and that happens whenever there's a conflict between two legal doctrines, and that in turn happens most days in most courts, because on most subjects, you have conflicting material from different legal sources, none of them more authoritative than any other. There's no way to decide between them just by asking the question 'Which one is the law?' The answer is they are all part of the law, and the question is which one you are going to follow, and that's, relative to the law, a kind of discretion. But it doesn't follow that the way to proceed is just do what you want or what you fancy, because of course there's lots of reasoning to be done still about what would be the best way for the law to go, and that reasoning can be informed by moral considerations. It can also be informed by other legal considerations, for example, attempting to create a form of harmony with another area of law by analogising. That's an important sort of consideration as well. Judges work with all these considerations in these cases involving conflict to provide a

new resolution. Now, that's discretion in the sense that it means deciding a case that wasn't already decided for them by the law, but it doesn't mean arbitrariness; it means thoughtful, deliberative judgement. And so if the word discretion implies arbitrariness, then it's a libel against most judges to use it in connection with them, but if the word discretion implies thoughtful, deliberate judgement about how to take the law from here, then it's not libellous to use it, and that's where the problems come from. People think of discretion in a way that straddles the two implications.

Before we discuss your own work, let's just cover just touch one other old chestnut in the jurisprudential world, and that's the relationship between law and morality. It is a vast subject so why don't you cherry-pick.

Well, I already touched on something there, which is that legal reasoning is often a kind of moral reasoning because it involves using legal materials in combination with moral considerations to arrive at a new legal ruling. I use moral there in a broad sense to include what lawyers sometimes like to call policy considerations. Lawyers prefer to talk of policy considerations rather than moral considerations; philosophers prefer to talk of moral considerations rather than policy considerations. We shouldn't care about that; the point is that legal reasoners use

considerations that are not themselves legal considerations in combination with legal considerations to generate new law, and that's a connection between legal and moral life. We could sum it up, as I just summed it up, by saying that a lot of legal reasoning is moral reasoning. It's also legal, because you need to use legal materials.

Of course, this is not the only issue that people fight about under the heading of the relationship between law and morality; there are plenty of others. One which has preoccupied people, really going right back, to before Aristotle, to before Plato, is the question of whether the law is morally binding – whether the law binds in conscience, to use the Thomist phrase. You can see how it might be tempting to think that it always does. Many people who believe that the law is always morally binding will present you with an alternative, which is a world of terrible disorder, and they'll say 'Look what happens when people aren't morally bound by the law', to which I always reply this: "The people who are creating all this disorder aren't very interested in morality, and they're not very interested in their moral obligations. Why should you think that they would be interested in their moral obligations to obey the law? So why do you think that their having a moral obligation to obey the law would make the world a better place?" That line of thought

forces us to start thinking about the bindingness of the law, not on delinquents who don't care about morality any more than they care about law, but on people who do care about what they should do morally. For them, the problem is really rather the opposite. It's not that without law there's going to be disorder. They're going to be very orderly. What they're worried about is the way that the law impinges on their judgement. Here they are, morally well motivated people trying to do the best for the world, and here comes a silly law that says to them 'Stand on your head for ten minutes every morning or you'll be locked up', and they say to themselves, 'What could possibly be morally binding about that? In ten minutes, think of all the good things I could do!' And that does rather change the dynamic of the debate, if you think about these conscientious people instead of the delinquents as the object of the debate about the obligation to obey the law. The real question is not 'Why should we prefer people obeying the law to people doing the morally *wrong* thing?' The real question is: 'Why should we prefer people obeying the law to people doing the morally *right* thing?'

There are some perplexing questions here, aren't there? For example, whether Nazi law was really law. If the content of some legal provision seems so abhorrent, can it really be law? Is it part of the definition of law that its content must be morally acceptable and, if so, to whom; and if

the content of the law is morally unacceptable, does that then mean that the obligation to obey the law is thereby withdrawn?

Yes. There's also that debate. I find it hard to understand how somebody could ask the question 'Is Nazi law really law?' when they just describe it as Nazi law, and they clearly thought it was law when they described it that way, and two words later, change their minds or raise some doubt about it! I also have a similar puzzle with the famous expression, the famous claim, attributed to Aquinas 'Lex injusta non est lex' – an unjust law is not a law. How could that possibly be true? It's an unjust law, isn't it? Of course it's a law. It can't be an unjust law unless it is a law. Now, you may say that's just word play, but I'm not guilty of it; the people that I'm talking about are guilty of it. They're messing around with the concept of law for some other purpose that I don't understand. Nazi law is law because it's Nazi law. Then there's the question whether it's unjust and should be defied, to which the answer is often "yes", and that just helps to reinforce my previous thought that we shouldn't really be taken in by the claim that generally there is a moral obligation to obey the law.

Okay. Let's move onto your own thinking then. What are you working on just now?

Just now – today I was working on complicity.

Go on!

I should say, first of all, that I don't work mostly on those topics that we've just been discussing. A lot of people working in my field, in the philosophy of law, are interested in those general questions, and those are the ones that we teach undergraduates. But I tend to work on particular philosophical problems that arise in particular areas of the law, and quite a lot of my work has been about problems about criminal responsibility and compensation for accidents, what are called torts by lawyers. I'm interested in responsibility in general, and just lately, I've been thinking about an area of criminal law, which is about accomplices – that's the law of complicity. It's about the wrongs that people do by contributing to other people's wrongs. So, a simple scenario would be where I supply a crowbar to somebody whom I know to be a suspicious type that assists with breaking into somebody else's house. The primary wrong here, the wrong committed by the person that lawyers call 'the principal' is the wrong of burglary. I'm an accomplice to burglary by providing the crowbar. There are lots of interesting philosophical puzzles about that. One question that is very

interesting is whether there's a general principle that, all else being equal, accomplices are less blameworthy than principals. The law has tended to make that its working assumption, although it's not by any means without exceptions, but in fact, it's easy to see that it's a silly assumption. After all, the Krays in gangland East London were mainly accomplices to murders committed on their instructions by their henchmen, and their henchmen were mainly the principals. But would we think of the Krays as less blameworthy than their henchmen? To take an even more extreme case, there are cases in which terrorists use duress to get innocent people to carry bombs for them; the people carrying the bombs are the principals, and the terrorists are the accomplices. It would be a far-fetched idea that across even those cases, the accomplice is to be regarded as, at least presumptively, less culpable than the principal. So that's one area of discussion that interests me.

Another question is: why have the distinction between principals and accomplices at all? Couldn't you just say that people who cause death are murderers? Quite a lot of accomplices cause death, even though they do it through other people, so why don't we just think of them as murderers too? Why do we need this convoluted and complex idea that they're murderers at one remove, that is to say accomplices to murder, because they

commit the wrong of contributing to somebody else's murder? Why not just say, no that was murder to begin with? In some jurisdictions, and indeed in some cases in this jurisdiction, that's been the direction in which the law has gone. Some courts have started to think that the law of complicity is an unnecessary spare wheel that could be abandoned, because really you could cope with all of this just by thinking about these people as murderers themselves, under the normal rules. I tend to think that this view is wrong, that the distinction between principals and accomplices remains morally and legally important. But why? That's quite an interesting problem too. These are some of the things I've been working on.

When we have chatted in the past, you mentioned an interesting case study of the chap in the jungle. That would be a useful one to tell us about.

Yes, I could tell you about that one. There are lots of relevant cases that are not legal cases - they are invented by philosophers or that are found in the history books - that help us to think about complicity as a moral problem rather than a legal problem. I'll give you two. One of them is a case that's invented by a philosopher, and the other one is a real case from history.

The case invented by a philosopher is known as Jim in the Jungle. It was invented by a wonderful moral philosopher called Bernard Williams, who died in 2003. In Jim in the Jungle, we have a backpacker in some South American country torn by civil war, and he treks across the jungle and finds himself in a village where the militia are about to execute ten villagers as a collective punishment for some protection that the village has given to some rebels. Jim, who's a highly moralistic type, explains to the militia commander that exacting collective punishments is quite immoral, and the militia commander, who's no fool, replies to Jim 'You're quite right, and we won't do it, on the condition that you kill one person for us and you decide who it is going to be'. Jim doesn't want to be the one who pulls the trigger, and he doesn't want to be the one who makes the choice. Is this disinclination reasonable? This example serves lots of purposes, and it served a different purpose for Bernard Williams from the purpose it serves for me. The purpose it serves for me is a purpose connected with complicity. You might think the problem Jim is faced with is a no-brainer – ten killings to one, of course he should do it! He is just being squeamish when he shows reluctance. But one way to interpret his reluctance is that he prefers to be an accomplice to ten killings than a principal in just one. He's an accomplice because he fails to prevent the ten killings when he could. Now, some people say that just failing to

prevent something that you could prevent is not a way of being an accomplice to it, to which I reply, well it is if Jim *should* prevent the killings. His reluctance is, in a way, a reluctance to get his hands dirty, and if the correct answer is that he should get his hands dirty and shouldn't allow the ten people to be killed, then allowing the ten people to be killed is a kind of complicity in their deaths. So it is, once you see it that way, a straight choice between being a principal in one death and being an accomplice in ten. You can see why, if you thought about it for a while, that might lead you to think that it's better to be an accomplice than to be a principal, or worse to be a principal than to be an accomplice. You might think that the reason why Jim feels reluctant about pulling the trigger is that it's worse to be a principal than to be an accomplice. In fact, it has to be more than ten times worse, doesn't it? – because he's an accomplice to ten killings if he refuses to pull the trigger. Of course you can reply that Jim shouldn't feel *that* reluctant, but if we want to defend Jim's reluctance at all, then in my view that's how we have to think about it. That's one interesting case.

Another case, with a different lesson to teach us, is a real case. This is the case of the bombing of Dresden in the Second World War. Now, this case is interesting because there is no individual principal. If you think about it, there's no one person who set

fire to Dresden. There's a collective principal, which is the RAF or Britain or the Allies – I don't want to make a final determination on which of these collective bodies it is, but it's one of them. And all of the individual pilots, if they have any case to answer individually, it must be as accomplices, accomplices to the act of the collective agent of which they were part, because if you said to any one of them 'Did you burn Dresden?', they'll say, 'No, if I had been sick that day, it wouldn't have made any difference. Suppose I hadn't been able to go? Dresden would still have been burnt. It would probably have been burnt in exactly the same way, at exactly the same time, to exactly the same extent.' In other words, 'it wasn't me, govn'r' would be the obvious answer. So, that's a way for an individual pilot to defend himself against the charge that it was he, as the principal, that burnt Dresden. The question which is interesting is, is that also a way of defending himself against the charge that he was an accomplice? Suppose you now say, 'But weren't your complicit in the bombing of Dresden because you played your part in it? You were like the person who provided the crowbar to the burglar'. To which the individual pilot can again reply something like this: 'No, I wasn't like the person who provided the crowbar. My assistance could have been dispensed with. The bombing could have gone on without me. I wasn't even an accomplice.' This makes me think – I don't

know what it makes you think – but it makes me think that the test 'would I have made any difference' isn't the correct test for complicity, that it must be possible to be an accomplice even though you wouldn't have made any difference. Because otherwise it's too easy to be exonerated, isn't it, from collective war crimes? It's too easy for the individual players who were entirely dispensable to say 'It was nothing to do with me', even at the level of complicity, and that result seems to me to be morally unacceptable. We must think about the doctrine of complicity in a way that allows people in that position still to be accomplices, assuming of course that they have the right intentions and that they know what they're doing and so on.

Does this not lead into another area in which you're interested - the question of causation? Because it seems to me that while some could argue even if I didn't pull the trigger, even if I didn't release the bomb, the result would have been the same, the fact is, that they did and they were part of the causal chain. Now this is one of your specialities, so perhaps you could explain a little about causation. Causation in five minutes please!

Well, I'm not sure I can give you the answer, but I can give you a sense of the puzzle about causation. Here's an example that was set to me when I was applying to university to study law, but

it's actually a philosopher's example. It's got something in common with the Dresden fire-bombing. I'm setting out across the desert and I have one water bottle. I'm at camp the night before I go, and I fill my water bottle because I'm always prepared. In the middle of the night when I'm asleep, my first enemy comes and adds a drop of poison to my water, thinking that when I'm out in the desert, I'll poison myself. A few hours later, still during the night, unbeknown to me and unbeknown to the first enemy, a second enemy comes and punctures a tiny hole in the water bottle. I'm dead in the desert twenty-four hours later. The question is who killed me? Now, you can see straightaway what the puzzle is, can't you? Because if someone says to enemy number two, who punctured the hole, that he deprived me of my water and that's why I died, he'll say 'No I didn't, I just deprived you of some poison that would otherwise have killed you sooner'. And if smeone says to the first enemy that he did it, he'll say, 'No, no, no, I didn't pour away any water, I just put a drop of poison in. If it had been me, he would have died of poisoning not of thirst'. Philosophers call this a case of over-determination: too many causes, and therefore you might think none. The result of having too many seems to be none, and that's because we apply this test 'if it hadn't been for that, would the person still have died?' Normally, the answer to that question gives you the answer to the question 'Who caused

the death?' but in this story, it gives you the answer 'Nobody caused the death. The death was just a miracle.' And so that shows, most people think, that there's something wrong with the test. So some of us mess around with that test and try to find other ways of understanding causation that don't link it in that way to the question, 'but for' or 'if it hadn't been for that'. You can see how that would feed back into the problems about complicity, about the Dresden bombing. Remember that our hypothetical Dresden bomber pilots were saying 'If it hadn't been for me, the fire bombing would still have happened', to which I might answer 'That's a bit like the case of the water bottle in the desert, isn't it? Too many poisoners, too many killers, means there's none. That doesn't seem to be a credible answer. There must be a different test.' But don't ask me to tell you what exactly the test is, because it's extremely convoluted and not suitable for presenting without a text!

In terms of your working method, how do you work? Do you simply sit down at your desk pondering?

Yes, that's right. I always feel a little embarrassed, because in today's universities, you get a form every year or so that says what research have you done? I always want to say: "Sorry, I haven't done any research. I do a lot of thinking, and quite a lot

of writing, but none of it was research." How would you research these problems? You have to know a few things, you have to know a bit about the law, you have to know a bit about what other philosophers have said, but once you know that stuff, well you know it, and now the question is what are you going to do with it? And I spend my life doing things with it. That mainly involves, yes, sitting and thinking, sitting and writing, sitting and deleting – I do more deleting some days than I do writing, because I find that I've taken a wrong turning. It's all very individualistic, and the rules are very unclear, even to me. Sometimes I start with a bit of law and I see what philosophical problems it throws up. Sometimes I start with a bit of philosophy and see if there are any legal cases that are connected. And sometimes I wonder whether I'm perpetrating some stupendous fraud!

Well let's talk about – well, not about the fraud, but…

I'm sure all academics think that they're charlatans some days. I'm not unique!

I don't think that's just intellectuals – most of honest humanity fall into that category! But there will be some people in the audience thinking: does any of this change the price of fish? Does it really matter? And I'm

not talking specifically about your work, but about legal theory generally. What impact does it have? What difference does it make? Is it worth pursuing?

There are several different chains of influence. Personally, I always think about this in terms of my students. Most of my students don't become philosophers of law. They do all sorts of other things – they go and work for the Cabinet Office, or they become lawyers. Some of them sail round the world. They do all sorts of things. But generally, I feel my influence when I see what my former students do rather than what I do. I think to myself: 'The approach to such-and-such that I'm now seeing emerging from the Law Commission reminds me of an approach we developed in class.' And that's a nice feeling. That's a lot more influence than I would have if I went and wrote a letter to the Law Commission myself!

So, to jump in, you're equipping them with the ability to analyse and clarify concepts?

I hope. That's the kindly way of putting it. The ruder way of putting it would be that I'm making new versions of myself and dropping them like cluster bombs!

Okay, you're shaping young minds!

That's very much my vocation. I am from a family of teachers and it's far and away my favourite part of what is by any standards a very varied job. There are other ways in which one can leave one's mark through this job, and some people have a much more direct aim with their work. I work very closely with a very influential legal scholar, Tony Honore, who's now in his eighties, and he has always addressed at least some of his work directly to lawyers and had a great deal of direct influence on the development of doctrine. He has a different writing style, it's less self-consciously philosophical. It raises all the same issues, but it presents them as issues that would be immediately applicable. As a legal academic, one could also leave a mark that way. Personally, it interests me less than leaving my mark as a teacher.

Just to interrupt again, isn't it interesting that Professor Honore, who really is a giant in academic legal circles, and both in this jurisdiction and in South Africa as I recall, that someone of his age is still so productive. I think the same also of some judges who are in their early seventies. They are actually at the peak of their powers.

Yes, it's quite true. I always want to know what the secret is of Tony's intellectual longevity. I think he has some elixir, because

he still teaches, and he still writes, and he's still just as innovative as he ever was. It's a remarkable career.

But philosophers don't tend to retire, do you? You don't suddenly switch off and say: well, I'm not going to be thinking deeply any longer?

It's hard to retire when you don't really work! Sorry, I'm putting a bit of a self-deprecating spin on this, because in fact I spend a ridiculous amount of my time working (mostly filling in forms and managing small corners of the university, which I hope I won't have to do when I'm Tony's age). But as for the scholarly work, should we really count that as work? I sometimes think it's an amazing privilege that I get to think about things that I find interesting, I get to write about them, I don't really have to answer to any particular political pressures in how I write about them, and yet somebody pays me to do it. I won't retire from that in a hurry!

I should now ask you a closing question really. In fact, I ask everyone who sits in that seat a similar question. If a student said to you that they were considering a career as an academic lawyer, how would you respond? Encouragingly or discouraging?

I'd be giving a mixed message. If I were talking to someone

exceptionally brilliant, I would suppress the downside a little, because I hate to lose exceptionally brilliant people to some other line of work where their brilliance probably won't be valued so much. But the downside of becoming any kind of academic in Britain now is that the amount of bureaucratic hogwash that you have to deal with has grown ridiculously – the regulation is completely out of proportion to the risk. And the teaching is much more routine or standardised. It's more and more like being a schoolteacher for those in relatively junior jobs. I'm not saying anything against schoolteachers, of course. I have schoolteachers in my family. But most people who wanted to be academics wanted to do something different, and nowadays it's harder and harder to do it in this country. On the other hand, insofar as you do get time to work on your ideas, what I said before applies. Nobody's asking you to tailor your ideas to a particular audience or a particular political purpose or even to make them socially acceptable. Journalists do have to tailor their ideas, and policy makers have to tailor their ideas, and even lawyers have to tailor their ideas to the politics of their audience – I don't mean the party politics, but the interests of their constituency or their clients. Academics in the humanities, by and large, don't have to do this at all. That's an amazing form of liberation. It's close to being a novelist or a poet. When my graduate students abandon it, which sometimes they do for better

money or for less bureaucracy, that's the thing they most often miss. They think to themselves: "Now I have to write things which people are going to agree with or find a use for, whereas before I could write things that were just exciting and interesting." I tell my most academically-oriented students that this would be the most important thing they would lose, and probably miss, if they left the profession.

John Gardner, thank you very much!