Putting Legal Philosophy in its Place

JOHN GARDNER*

The editors of *Rivista di Filosfia del Diritto* have set me (and several other candidates) nine questions. I have tried to answer them one at a time below in the order in which they were set. They were not all of them questions that I would naturally have asked myself, and I could not always work out how they were meant to interconnect, or even what they were getting at. That may be their genius. To me they seemed rather like a selection of questions in an end-of-year examination. Attempting to answer them accordingly reminded me of sitting my first jurisprudence exam back in 1986. Alas, some of my answers below probably reveal how little I have progressed since that time.

1. What is philosophy of law first and foremost about?

Legal philosophy, also known as philosophy of law, is part (a small but important part) of political philosophy. This claim is often misunderstood. Many suppose, with Pavlos Eleftheriadis, that 'political philosophy is part of practical reason and seeks to evaluate actions and tell us how to act.'[1] They therefore expect the philosophy of law, in turn, to tell us how to act through and in relation to law. But political philosophy is not exclusively evaluative, let alone action-requiring. As well as discussing (in an abstract way) what should be achieved on the stage of public life and why, political philosophers also discuss who the actors are on that stage and how they relate to and differ from each other. And

* Professor of Jurisprudence, University of Oxford.
[1] Eleftheriadis, *Legal Rights* (Oxford 2008), 15.

they must often discuss these matters first. What makes for good government? First we need to know what government is, including how it relates to and differs from leadership, management, sovereignty, power, public service, and so forth. Which tasks can safely be left to markets? First we need to know what markets are, including their relations with exchange, contract, property, preference, freedom, money, commodities, etc. Should the acts of the legislature be reviewable in the courts? First we need to ask: What is a legislature? What are its acts? What is a court? What does it mean to review things? And how do these things relate to each other? In the same vein, before asking how anyone should act through and in relation to law, we need to have a proper sense of what law is and how it relates to government, sovereignty, courts, legislatures, and so on.

Some people think they already know what counts as law, (government, legislation, money, freedom, etc), or at least close enough for jazz,[2] and rush to get on with the evaluating. Fair enough. There is no shortage of work to go around. But political (including legal) philosophers are useful, *inter alia*, in giving us pause for thought before we rush to evaluate, thereby helping to correct the errors of overexuberant would-be world-changers. They are there to identify more carefully the things being evaluated, the possible approaches to evaluating them, the differences between them, the relations among them, their implications and presuppositions, the range of possible attitudes one might have to them, how they might figure in thinking about what to do, and so on. Their work is accordingly not 'part of practical reason'. It is the *philosophical study* of part of practical reason. If one wants to do the practical reasoning oneself – and in particular to 'tell us how to act' – one should choose politics or law or the police or some other public service profession.

[2] Or 'preinterpretatively', as Ronald Dworkin fancily puts it: *Law's Empire* (Cambridge, Mass. 1986), 94–6.

Philosophy suits only those who have a philosophical temperament, interested in solving puzzles about practical reasoning that are usually, and usually rightly, left unexplored by practical reasoners themselves. Indeed one topic commonly explored by political philosophers is this. How can it be practically rational not to weigh up all the reasons for action that apply to the situation before one, but instead to weigh up just some of them and to leave the rest for other agents to deal with? Such rational selectivity is characteristic of practical life both in market settings and in bureaucratic settings, including the law. Possibly it is characteristic of all of practical life. Practical reasoners muddle through, often unaware of their selectivity. Philosophers stop to consider how it can be so. How, without contradiction, can one reasonably sideline some reasons?

The problem is compounded in the domain of the law. The law not only restricts the range of reasons to which its practitioners and officials are to have regard; it also purports to add extra reasons of its own. Legal reasoning seems *doubly* remote from ordinary practical reasoning: as well as refusing to count some perfectly ordinary reasons as reasons, lawyers insist on counting extra things called 'legal reasons' as reasons. These often strike non-lawyers as not being reasons at all. At any rate non-lawyers often ask themselves how these strange things could possibly have come to be reasons. The lawyer's answer is invariably that they are found in statutes, cases, customs, constitutions, treaties, etc. They are among the products of human decisions and practices. But that answer only heightens the puzzle. It is easy to see how reasons can yield decisions and practices. It is a lot harder to see how decisions and practices can yield reasons. How can a reason be man-made? Or as H.L.A. Hart once put the question: '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?'[3]

This is a puzzle not only about the law but also about promising, requesting, consenting, and so forth. Nevertheless it is writ large in the law. Legal systems systematize the creation of reasons as well as the use of the reasons thereby created. At least they are presented by lawyers and judges as doing so. This means that even when we have shown how it is *possible* for reasons to be man-made, our problems as legal philosophers have only just begun. Now we want to know whether the law succeeds in creating such reasons in the systematic way in which it is presented as doing so. Some like to think that all so-called 'legal reasons' are straightforwardly reasons, and deserve to be counted in human deliberations just like any other. Such law-favourers need an explanation of how the law not only can *but consistently does* give us the reasons that it purports to give. I belong to a less law-favouring constituency myself. I believe that the law can alter our reasons in the way that it purports to do, but very often fails to do so, mainly because (like all other human affairs) it is plagued by human stupidity. The law is often an ass. I conclude that so called 'legal reasons' are often not reasons, or not the reasons they are held up by the law to be. One should not read the qualifier 'legal' in the expression 'legal reasons' in the same way that one might read the qualifier 'moral' in the expression 'moral reasons'. Moral reasons are a class of reasons in the same way that mallard ducks are a class of ducks. But legal reasons, as the expression is typically used, are a class of reasons only in the way in which decoy ducks are a class of ducks; they are merely modelled on and presented as if they were reasons. The word 'legal' is a cautionary qualifier. It means that the so-called legal reason may turn out, on closer inspection, to be no reason at all.

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

Things are made more complicated here by the fact that some people – notably but not only certain legal officials and practitioners – may have special reasons to treat legal reasons as reasons even when they would not be reasons for anyone else, special reasons (as it is sometimes put) to 'take the legal point of view' in some or all of what they do. Some have taken oaths of loyalty to the law, which can bind them morally to uphold even the most idiotic laws (although probably not positively immoral ones). This means that it can be reasonable for judges and juries, for example, to hold people to standards to which it is not reasonable for those same people to hold themselves. This is a pervasive curiosity of life under the rule of law. In my own work I have reflected on how it plays out in the criminal law, and in particular whether criminal defendants have any reasons to co-operate with a process that holds them to standards by which, often enough, they are not bound.[4] This, however, is only one direction in which reflection on the nature of legal reasons might take us. The subject-matter of the philosophy of law radiates out from the puzzle formulated by Hart. It is the systematic playing out of this puzzle in the law that makes it a rich subject for philosophical study, and that makes the philosophy of law an important, if small, department of political philosophy.

2. When does a theory deserve to be seen as 'philosophy of law'?

There are at least three ways to interpret this question. One interpretation: which philosophy is philosophy *of law*? I have already outlined my view in answering question 1. Philosophy of law is the part of political philosophy that deals with problems thrown up by, or at any rate impacting heavily upon, law. To decide which part of political philosophy this is, one needs already to know what law is, which is itself a key question in the

[4] See my *Offences and Defences* (Oxford 2007), ch 9.

philosophy of law. Beyond this, however, the subject is not very sharply demarcated. Its boundaries are extremely vague. The well-known volume in the series *Oxford Readings in Philosophy* called *The Philosophy of Law*[5] includes two essays on the rights and wrongs of abortion and one on the theory of free speech. These are certainly topics that trouble contemporary lawyers in some countries but they are not specific to the law. They might be no less pressing, as political problems, in a country without a legal system. Whereas the two essays in the same volume that debate whether law is a system of rules, and the essay on the justification of civil disobedience, focus on questions that do not arise except in connection with law. These law-specific questions could perhaps be thought of as the core questions of philosophy of law. But it hardly matters which areas are core areas except in discussing what to include in a course syllabus or student textbook. As a scholar one should not worry much about which area of philosophy one is working in, so long as one does it well. One should surely never say (as a philosopher pursuing one's own scholarship): 'I won't discuss this point here as it belongs to epistemology.' One might reasonably say this in the classroom, however, so as to avoid breaking down the convenient system by which philosophy students organize their study.

A second, quite different, interpretation of the question: Which theoretical endeavours are philosophical ones? The borders of philosophy itself are also vague and philosophical theorizing about law tends to blend naturally into other types of theorizing about law, such as sociological, anthropological, economic, psychological, and 'black letter' (or doctrinal) theorizing. One becomes more philosophical the more one focuses one's theoretical attention on the presuppositions of these (and other) alternative modes of theorizing, subjecting them to a measure of critical scrutiny to which they would not normally be

[5] Ronald Dworkin (ed), *The Philosophy of Law* (Oxford 1977).

able to subject themselves consistently with fulfilling their own theoretical missions. So philosophers of law, on this view, are those who interrogate the presuppositions of other perspectives on law, including the perspective of law itself. One could also express the point, I think, by saying that philosophy has a second-order subject-matter. Physicists and historians (even the most theoretical ones) ask first-order questions about particular subject-matters, respectively physical and historical events and processes. Philosophers of physics and history, meanwhile, 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?' This keeps the boundaries of philosophy suitably vague because there are many questions that cannot be classified as either first-order or second-order. It is possible to frame them either way. Perhaps they become more philosophical, the more they are framed as questions that leave others free to exercise their subject-specific expertise in history, physics, law, etc.

A third interpretation: What does it take to turn some theory or some philosophy into *a* theory or *a* philosophy? I am extremely suspicious about such uses of the indefinite article, and similar individuating usages such as 'my philosophy', 'that philosophy', 'well-known philosophies', etc. Such usages seem to me to perpetuate some common but false assumptions about what philosophers do for a living. First, they give the impression that philosophy is product, when in truth it is an activity. Second, they give the impression that a philosopher should be aiming for a harmonious and unity, ideally a big claim that explains many things at once, a 'comprehensive theoretical position ... [with] broad philosophical vistas.'[6] Douglas Adams very nicely poked fun at this idea when he premissed the story of

[6] Ernest Weinrib, 'Why Legal Formalism?' in Robert P. George (ed), *Natural Law Theory* (Oxford 1992), at 352.

The Hitchhikers Guide to the Galaxy on the search for the 'Answer to the Ultimate Question of Life, the Universe, and Everything.' It turns out that the answer is 42. I tend to think that good philosophizing actually provides an *antidote* to the passion for big questions that Adams is parodying. Philosophers ask awkward little questions that tend to complicate things. They often expose big questions as bad questions. Someone who says 'this is my philosophy' (or 'this is my theory') is usually heading down the Adams-parodied path of trying to answer too many different questions at once, inviting only a baffling result. I very much hope that I don't have *a* philosophy of anything, and in particular that I have never (professionally) answered a big question without breaking it down into a lot of smaller ones first. I have certainly never offered a 'broad philosophical vista'.

3. Which are the subjects that should be the primary focus of a legal-philosophical inquiry?

I am not sure how this question differs from question 1. There are many eligible topics of philosophical study within the philosophy of law. In my answer to question 1, I suggested that they tend to radiate out from the puzzle of how laws (being norms made by people) are possible. But there are many interesting puzzles in legal philosophy that can be tackled with that puzzle quite far in the background. Personally I have devoted a lot of my working life to what is sometimes known as 'special jurisprudence', which reflects on philosophical questions lurking in particular legal systems and traditions, and particular areas of law such as criminal law and contract law. These differ from 'general jursiprudence' in which one studies philosophical puzzles thrown up by law wherever it may be found.

Work in special jurisprudence may sometimes seem closer to the work 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 specialization. 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 philosophical 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 may make the subject seem unfamiliar and remote, possibly even threatening, to lawyers, law teachers, and law students. This suggests that, in a way, the questions of general jurisprudence have priority. But that is not the kind of priority which suggests we should all be working on them, and neglecting the rest. Why should one not simply work on the philosophical puzzles about law that interest one most? (One reason is that one is sometimes asked by academic friends to contribute to conferences and volumes on the philosophical puzzles about law that interest *them* most!)

4. Does the distinction between jurisprudence and philosophy of law still make any sense?

Jurisprudence is wisdom about law. Philosophy is the love or pursuit of wisdom. So the most obvious difference between the two is that jurisprudence is a product, a body of knowledge or understanding, and philosophy (as I already said) is an activity, maybe even a vocation or calling. This clearly allows for very close connections between the two. Should we conclude that philosophy of law is the activity of pursuing the very wisdom that constitutes jurisprudence? Not quite. Philosophical wisdom about law is only one part of jurisprudence. Many courses called

'jurisprudence' have come to focus on this kind of wisdom, at least in recent decades. But the name of the course certainly doesn't require this focus. Even acknowledging what I said in answer to question 2 (that the distinction between philosophical wisdom and other kinds of wisdom is not very sharp), jurisprudence teachers could reasonably entertain a much wider variety of wisdoms. There is also sociological, anthropological, and historical wisdom about law, to name but three possible alternative angles for a 'jurisprudence' course. Most importantly, there is the specialized doctrinal wisdom about law that is the preserve of the most able lawyers, and is often associated with the work of the higher courts. Thus we can speak of 'the jurisprudence of the European Court of Human Rights' or 'First Amendment jurisprudence' to refer to a body of doctrine accepted and used by the higher courts that reflects their sophisticated grasp of what is put before them in legal argument.

In my University the whole first law degree, aimed at undergraduates, is called 'The Honour School of Jurisprudence'. It includes a required examination in jurisprudence, which is conceived philosophically. But one should not conclude from its name that the rest of the degree programme is particularly philosophical. There are certainly some philosophical aspects in every examination but, apart from the 'jurisprudence' exam, the 'Jurisprudence' of the degree title is principally doctrinal wisdom of the kind associated with the work of the higher courts. Tort, contract, land, trusts, constitutional law and so on are studied at a very high intellectual level but always through exacting study of the reasoning and conclusions of appellate judges.

Some black-letter lawyers fear that their work is looked down upon by philosophers, or is regarded by philosophers as ripe for annexation. Some philosophers of law may take such attitudes to black-letter law, but I am not one of them. I am constantly in awe of the great mastery that the best legal scholars show of their subject. I regard theirs as an intellectual discipline in its own right that should not be colonized by any other. I

greatly regret that my work as a philosopher of law has over the years made me a less adept black-letter lawyer than I was as a law student. I also greatly regret the wider tendency, in the UK academy, to pressurize academic lawyers to be more interdisciplinary, or at any rate to move away from purely black-letter work, a tendency which so far as I can see mainly reduces the quality of scholarship emanating from law schools and takes them one step closer to becoming trade schools. Why should a great lawyer have to double up as a mediocre philosopher or sociologist to be eligible for research funding? Why should the great works of the best legal commentators, such as Smith and Hogan or Treitel, now be sidelined as 'student textbooks'? This is not law schools becoming more intellectual. It is law schools becoming less intellectual, as often first-rate academic law is marginalized in favour of often second-rate interdisciplinarity. I wish that jurisprudence in some narrower sense would not be substituted everywhere for jurisprudence in the widest sense.

5. What about the traditional opposition between legal positivism and natural law theories?

My colleague John Finnis rightly suggests, in the first issue of this *Rivista*, that I am among those recent writers who self-identify as legal positivists but who have abandoned '[t]he (legal) positivism that is self-conceived as somehow in opposition to natural law theory.'[7] In my recent book *Law as Leap of Faith* I devote a lot of my argument to breaking down this traditional opposition.[8] I argue against the thesis, traditionally associated with the legal positivist school of thought, that 'there is no necessary connection between law and morality.' I argue, indeed, that the

[7] Finnis, 'What is the Philosophy of Law?' *Rivista di Filosofia del Diritto* 1 (2012), 67 at note 11.
[8] Gardner, *Law as a Leap of Faith* (Oxford 2012), especially chs 1, 2 and 6.

traditional association of this thesis with legal positivism is mistaken: none of the leading figures traditionally regarded as belonging to the legal positivist school of thought actually defend this sweeping thesis, and most of them openly reject it. I argue that these leading figures are actually *ad idem* only on a more modest thesis, which is a thesis about the validity-conditions for legal norms. They say that there cannot be moral (or otherwise evaluative) validity-conditions for legal norms. This thesis, although certainly opposed by some (e.g. by Ronald Dworkin, at least in early work), does not stand in opposition to any thesis espoused by the leading figures of the natural law tradition. Indeed the thesis is central to the work of Aquinas and of Finnis. I argue that the thesis is perfectly compatible with there being many necessary connections between law and morality. These include (to name a few): that law necessarily claims to be morally binding; that legal reasoning is a kind of moral reasoning; that there is a special moral ideal for law, the ideal of legality; and that law that fails in respect of its conformity with this ideal is in a sense deviant or degenerate law. I have some quarrels with other claims that are often made by those who self-identify as 'natural lawyers', notably with their tendency to regard the law as prima facie morally binding on non-official users. But this is a detachable debate. The important thing is that there is no reason for anyone who thinks that all law is positive law (i.e. a legal positivist) to deny that there are necessary connections – both humanly and conceptually necessary connections – between law and morality. They need not conclude that these necessary connections render law necessarily morally *attractive*. Indeed some – in my anarchistic youth I was among them – think that one necessary connection between law and morality is that law is necessarily, in one respect, morally obnoxious.

Here I do not want to rehearse all the misguided and misleading moves that have led generation after generation to perpetuate the pseudo-struggle between the legal positivists and the natural lawyers. I do, however, want to highlight one of

them, because it is closely related to what I said at the end of my answer to question 2. As I said there, some people have an appetite and an eye for *theories*, for relatively unified and relatively comprehensive modes of explanation. They present and regard all ideas as belonging to some package deal. One may quibble over details but fundamentally one either takes the package or one doesn't. I, on the other hand, have an appetite for unbundling, for separating out disparate thoughts that have often been regarded, in my view mistakenly, as part of some package deal. I like to deal in theses rather than theories, and (except in order to problematize them) I therefore prefer to avoid the many '–isms' that blight our subject. Am I a 'legal positivist'? In the end, who cares? Not me. In invoking the famous brand-name, I only care to expose the confusions that lead people to imagine that since I endorse one thesis that is commonly associated with the brand, I must endorse lots of other theses that are commonly associated with it as well. In general, I think, we should work one thesis at a time, and recognize the many possibilities for consistently combining them, sometimes in odd and surprising new ways. I say 'consistently' because I certainly do care about avoiding contradiction. That is because I believe that if I embrace two contradictory theses then at least one of them must be false, and I care about avoiding falsehood. What I do not care about is the unity of my theses. I do not care how fragmented the truth turns out to be; I do not believe that a unified view is more likely to be true, or that one has any other good reason, aside from presentational or pedagogical convenience, to prefer tidiness over untidiness in philosophical (or any other) thought.

6. What kind of relationship is there between legal normativity and other kinds of normativity?

This question takes us back to what I said in answer to question 1. I said there that it is a mistake to think of the word 'legal' in the expression 'legal reasons' as playing the same role as the word

'moral' in the expression 'moral reasons'. Moral reasons are (a class of) reasons. Legal reasons are only purported or would-be reasons, and it is an open question, regarding each legal reason, whether it is indeed the reason that it purports to be. One could reasonably say the same about 'legal norms' and 'moral norms'. Moral norms are (a class of) norms, whereas legal norms are merely purported norms, which may or may not have the force that they purport to have, depending on the situation. In my youth, as I said above, I was a bit of an anarchist, and tended to think that legal norms never had the force that they purported to have, except perhaps over officials of the law. Nowadays I am more mellow and think that they sometimes, albeit rarely, have the force that they purport to have over non-officials. On this basis I am tempted to give the following answer to a question about legal normativity: Legal normativity is only purported normativity. That does not mean it is normativity in a different *sense* from, say, moral normativity. It is normativity in the same sense.[9] It is just that law only purports to have normativity in this sense, whereas morality actually has it. One should conform to moral norms just because one is a moral agent, a person, whereas with legal norms it is an open question whether one should conform to them, the answer to which varies from norm to norm, and person to person, and situation to situation.

In saying this I am reading the word 'normativity' in the question to refer to whatever property it is that norms have in virtue of which they are norms. This is a rather literal-minded reading. I am not sure whether this is how other people read the word. It is a technical philosophical term, and a rather ugly one at that. So far as I can see it is used to do a number of different jobs, not least to do a lot of vague hand-waving.

[9] For an influential explanation and defence of this thesis, see Joseph Raz, *The Authority of Law* (Oxford 1979), 134–145.

7. What are the main stumbling blocks or limits that legal-philosophical inquiry must overcome in order to face the new challenges?

I am not totally sure which new challenges we are talking about. Life is full of new challenges and some of them, if one is a philosopher, are philosophical challenges. I have sometimes lain awake at night worrying about, for example, which idea of responsibility, if any, has logical priority over the others. That is not a challenge faced by non-philosophers but at some point it became, for me, a new challenge.

I am tolerably certain, however, that this is not the kind of new challenge to which the question is averting. Much more likely the question is supposed to be about new challenges facing the world or the human race, perhaps the grave challenges of environmental change, the failure of global capitalism, population explosion, the rekindling of aggressive nationalism and sectarianism, the collapse of the rule of law in America, the tinderbox of the Middle East, the invention of drone warfare, the renewed social acceptability of misogyny, etc. Obviously I do not doubt the gravity of these challenges. I also lie awake, on occasions, thinking about some of them. Not, however, in a professional capacity. They are not philosophical challenges, and I very much doubt whether philosophers will contribute much (in their professional capacities) to their solution. If they do, it will be by accident. If you are a philosopher who wants to improve the world on purpose (other than by adding to its stock of philosophical wisdom) then you are in the wrong profession. You need to retrain as an engineer, a politician, a campaigner, a doctor, or a farmer. How about a lawyer? Possibly. There is certainly some legal work to be done, although beware of the timeless truth that it is the bad guys who have the cash to pay the lawyers to help them stop the progress. Even that, however, is not a timeless philosophical truth. It is a timeless empirical truth that calls for socio-economic research to confirm it.

Some philosophers of law, perhaps because they work a lot with legally trained colleagues or perhaps because they have legal training themselves, confuse their work with that of a swashbuckling lawyer, freed from the need to find a paying client but otherwise orientated towards getting results in the courts, legislatures, and regulatory agencies of the world. It is tempting to claim that what we do is 'part of practical reason' (to use Eleftheriadis's expression) in the following way: it is the back-room activity of helping legal practitioners and officials to do their front line work well, with their heads held high. As I have already said, the philosophy of law is in fact the philosophical *study* of part of practical reason, the same part of which legal practitioners and officials partake. That is nothing to be ashamed of. No other area of philosophy, so far as I can see, has the same shame at being straightforwardly philosophical. One does not meet epistemologists who believe that their work ought to help people prosper in the 'knowledge economy', or who think that their professional success should be measured by the degree to which they help to combat general human ignorance. One does not meet philosophers of physics who judge their work by whether it helps out in the labs, or can enable the emergence of new technologies. Even moral philosophers rarely regard it as a professional objective to get people to embrace and live up to higher moral standards. Nor should they. If you want moral advice, ask a friend or a priest. Ask a moral philosopher only if you want to know what qualifies as moral advice, how it differs from an exercise of moral authority, how it differs from prudential advice, and so forth. Similarly, if you want legal advice, ask a lawyer. If you want advice on law reform, ask a senior civil servant or a law commissioner or someone else with serious policy expertise. If you want to know what a lawyer is, or which advice counts as legal, or what the difference is between law reform and ordinary legal change, ask a philosopher of law.

8. The role played by constitutional law and by international law has become increasingly meaningful in international discussion – does this imply any change in the traditional goals and methods of legal philosophy?

No. While it is always important to find a readership for one's work, which may mean saying something about topical issues, one should not allow oneself to be lured into regarding topics as more philosophically important, or as yielding new philosophical insight, just because they are topical. I am not aware of any 'international discussion' outside philosophy of law that is currently impacting on what philosophers of law should do. Contrary to what some people think, there have been no recent paradigm-shifts in legal life that require us to revisit any theses about the nature of law or the role of legal reasoning or the existence of a moral obligation to obey the law or such like. Much as they may be novelties in other ways, the rise of globalization, transnational law, legal pluralism, international criminal law, the use of states of emergency, etc., are all reruns of old problems, so far as their philosophical study is concerned.

9. What contribution can law offer, when the new ethical and political dilemmas of the contemporary world are at stake?

Now this question is in a way the strangest one of the nine I have been set because it is neither a question *about* philosophy of law (like questions 1-4 and 7-8), nor is it a question *in* philosophy of law (like questions 5-6). It is not a question in philosophy of law because it is not a philosophical question. It is a question for policymakers, social commentators, maybe some kinds of social scientists. I have views about it, which I will give you in a moment. But I want to be clear that when I comment on the potential usefulness of law in any particular time or place, or to tackle any particular set of problems, I do so as an informed amateur, a kind of fancy-titled pundit. I enjoy punditry and have

often indulged in it with late-night slots on radio to discuss legal affairs. Since I was trained originally as a lawyer I have some qualifications to do so. But this is a sideline. I do not regard it as my day job to have a lot of views about the legal affairs of the day, or even of the age. Professionally, my focus is philosophical.

Having said that, let me tell you straight that I think there is far too much law, and far too much peddling of supposed legal solutions to human life's ever-changing (and yet somehow also ever-constant) problems. Modern governments, their hands tied by the robber-barons of global finance, often try to assert their power with their feet: by kicking out wildly at another supposed social problem with a fresh policy initiative, usually accompanied by a raft of new laws. Legislative incontinence prevails, in international and transnational as well as in national affairs. Leaving aside the grave challenges that this incontinence already presents to the rule of law, I am inclined to think that it is by and large not only futile but *tail-chasingly* futile. Every raft of new laws creates the perceived need for another raft, that exist only to mop up the unintended effects of the last lot. In my view the whole business is wildly out of control, and serves mainly to distract both governors and governed from the fact that they – we – are increasingly slaves to a rapacious hyper-capitalism that will eventually eat itself, and perhaps human civilization too. You may say: In the face of that, why be content to sit around philosophizing? I reply: In the face of that, why not?