Why study jurisprudence?

JOHN GARDNER*

Jurisprudence is wisdom about law. That is what we hope is imparted by legal education as a whole. But in many university law schools, students are also required or invited to study for a specific examination called 'jurisprudence'. Here the word is used in a narrower sense. It means the theory of law: the articulation, defence and criticism of propositions about law and legal life that are supposed to hold generally, across many times and places. To study this subject usually requires forays into other academic disciplines, such as sociology, philosophy, politics, and economics. In the version that I teach, the main questions are philosophical. Jurisprudence equals the philosophy of law.

In philosophy, propositions are supposed to hold very generally indeed. Indeed they are vulnerable to falsification by just one counterexample. And so it is in jurisprudence, understood as philosophy of law. We are investigating which propositions about law and legal life hold true universally, not just usually. For instance, we are asking 'what is a legal right?' meaning not 'what rights do people have according to the Human Rights Act?' or 'what rights do people have under typical modern constitutions?', but 'what is it to have a legal right under any law?', such that if the Carthaginians or the Martians have ever had any legal rights, this is what they have had.

Why invite, let alone require, law students to study such abstract problems, exemplified by the imaginary legal practices of science-fiction Martians? The simple answer – easily forgotten in this anti-intellectual age - is that these students are at university,

* Professor of Jurisprudence, University of Oxford, and Master of the Bench of the Inner Temple.

and so should be studying at least some universals. But even if they don't study any universals, they should certainly study something other than parochial legal doctrine. In many countries, the academic study of law is possible only after an undergraduate degree in some other discipline. Students will typically have pursued a broader humanities curriculum to first degree level. The vast majority of those taking law degrees at UK universities, by contrast, have no such exposure. Most of their time as undergraduates is spent meeting the requirements for a 'qualifying law degree', dominated by the mastery of British and European legal materials and techniques. By any standards these are startlingly narrow horizons for a twenty-year-old, especially one who aspires to join what aspires to be a humane profession. The least we in the universities can do, by way of compensation, is to remind our students that there is more to life than legal practice. One way to do that is to study some philosophy. It could in principle be the philosophy of anything, but the easiest way to make a smooth transition into philosophy from law is to study the philosophy of law. Then the students already have a treasure trove of legal examples against which they can test philosophical hypotheses. Science-fiction counterexamples are unnecessary if one already has some homely counterexamples from English law up one's sleeve.

While making the transition into philosophy, law students are often uneasy or even rebellious. They are often frustrated by what they see as the impractical and inconclusive aspects of philosophical speculation. So they tend to carry over from their legal studies some reassuring practicality and conclusiveness. For example, they tend to treat the writings of philosophers as if they were legal authorities, to be judged by their institutional standing and reputation rather than by the insights that they contain. Many of my students are content to tell me what is true according to H.L.A Hart without telling me whether it is actually true (i.e. whether Hart is right). They also tend to treat every philosophical dispute as if it were an occasion of adversarial

litigation. Jurisprudential inquiry is thus presented as if it were not really an investigation of the truth of any propositions, but rather a struggle between opposing teams or camps, each offering a package deal of views that must either win as a package or lose as a package. And my students also tend to adjudicate these strange package-deal disputes by asking which of the package deals on offer is more 'realistic'. This always makes philosophers of law laugh, because the very question which philosophers of law are aiming to solve is the question of what *counts* as legal reality. A proposition about law is realistic because it is true. So, contrary to the fond imaginings of my students, one cannot decide whether it is true by asking whether it is realistic!

Perhaps most importantly, law students tend to read into every philosophical proposition about law some vaguely reforming ambition. Law, they think, is a practical business, and they expect the philosophy of law to be the backroom activity of telling frontline practitioners how to do it better. Judges and legal practitioners often inherit this attitude. They look to works in the philosophy of law in the hope that they will there find advice on how to improve the law, or how to improve their interpretation of the law. If there is no such advice, the work strikes them as irrelevant. To save it from irrelevance, they tend to read all sorts of useful advice into it, even if the authors disclaim any intention to give any. Most philosophers who ask 'what is law?', for example, intend to investigate law's *necessary* properties. Where necessity reigns, there can be no question of desirability: a necessary property of law is one that we are stuck with whatever we do. But this does not stop many lawyers and law students from reading answers to the question 'what is law?' as recommendations for doing law in a more desirable way.

In recent years this search for practical advice in the philosophy of law has gained some respectability thanks to the highly original works of Ronald Dworkin. Dworkin is disdainful of any attempt to segregate the philosophical study of law ('what is law?') from the practical problems faced by judges and trial

lawyers ('what is the default legal remedy for breach of contract in France?'). The only philosophy of law worth doing, Dworkin argues, has the same objectives as legal practice itself. The legal philosopher, like the lawyer, is there to interpret legal materials, and indeed can help lawyers to see (by example) how best to do it. The difference is that philosophers tackle the same problems in a more abstract and general way, attempting to bring coherence not only to particular corners of the law but to whole systems of law, or perhaps even (Dworkin does not tell us where to stop) to all the law that there is. This, however, is a difference of degree not of kind. It turns philosophers of law into ambitious lawyers and lawyers into workaday philosophers of law.

One can immediately see here why Dworkin's work strikes a chord among lawyers. It appeals to their vanity. The greatest judge is also the greatest philosopher of law. But one can also see what is puzzling about this. Epistemologists – another subgroup of philosophers – are experts on knowledge. More precisely, they are experts on the nature of knowledge and how (if at all) it could be justified. But they are not experts on knowledge in the sense of knowing more things than the rest of us, or even knowing better how to find more things out. I would not call an epistemologist to find out when my bus is coming, what are the telltale signs of a throat infection, or how to win at poker.

Why would I call a philosopher of law, then, to get legal advice? Philosophers of law are experts on law in the sense that they are experts on the nature of law and how (if at all) law could be justified. But it does not follow that they know more law than the rest of us, or know better how to find out what the law is, or know better how to interpret whatever law we have. Dworkin profits, I think, from comparing legal philosophers with moral philosophers rather than with epistemologists. He trades on the thought that moral philosophers know more about morality than the rest of us, and can therefore give better moral advice. That idea may be easy for non-philosophers to swallow, but it is a lot harder to swallow for those of us who are in the business. I know

many fine moral philosophers, but there are few of them that I would ask for advice on anything other than philosophy. I certainly wouldn't ask most of them for moral advice. If I wanted moral advice I would ask a friend. Likewise, if I wanted legal advice, even very general legal advice (e.g. about the meaning of the constitution), I would ask a lawyer. I would never dream of asking a philosopher of law.

The same holds in reverse. There are few legal practitioners, however scholarly their interests, whom I would invite to a philosophy conference. Judicial attempts to philosophize, in particular, tend to be deeply embarrassing. We are seeing more of this kind of judicial overambition now in the United Kingdom, thanks to the grandiose claims of human rights law. But the most extreme examples still come from the United States. The judicial work of both Oliver Wendell Holmes and Richard Posner, for instance, is harmed much more than it is advanced by its philosophical pretensions. The pretensions also spill over into their respective extrajudicial ruminations on philosophical issues about law, which are for the most part amateurish and confused. This is not because of any intellectual incapacity on the part of either man. It is because the demands of being a judge are incompatible with those of being a philosopher; the two jobs require contrasting attitudes and temperaments. When a philosopher encounters a borderline between two categories or a conflict between two values, her job is to understand it – to explain why it is there and what form it takes. When a judge encounters a borderline or a conflict, by contrast, his job is to *resolve* it. As a judge he doesn't have the option of leaving the indeterminacy where it is so that nobody wins the case. He has to somehow replace it with determinacy.

One could sum this up by saying that philosophers can go only as far as reason will take them, whereas judges can and must make progress beyond the limits of reason by acts of will or decision. One could also sum it up by echoing Karl Marx: For philosophers, the point is to understand the world; for judges, the

point is (at least partly) to change it. Judges (and more generally lawyers) are therefore predictably impatient with those of genuinely philosophical temperament, who have no professional agenda beyond seeing things for what they are.

Dworkin, similarly impatient, tries to bring the imperatives of legal and philosophical life into closer alignment with each other. He does this by making two simultaneous but opposite moves. On the one hand, he tries to persuade us that a philosopher of law with no agenda for legal interpretation – and more generally with no practical proposals addressed to lawyers – should be dismissed as a philosophical sideshow. On the other hand, he tries to persuade us that, contrary to the received wisdom, judges rarely need to go further than reason alone can take them: the law already furnishes them with 'right answers in hard cases' if only they go deep enough. Here Dworkin seems to be advocating a swap, rather than a meeting, of the two mindsets as I explained them above. His philosophers are expected to think like trial lawyers and judges (aiming to get the law working right), while his trial lawyers and judges are expected to think like philosophers (aiming to see only what is already there).

Unlike Dworkin, I don't think that it is healthy for lawyers (even highfalutin appellate judges) to have highfalutin philosophical ambitions. Nor, conversely, do I think it is the principal job of philosophers of law to act as backroom boffins for the law industry. They are not there to lay on new ideas or arguments for lawyers any more than philosophers of art are there to provide new ideas or materials for artists. They are not there to campaign for better law any more than philosophers of history are there to campaign for better history. So you may wonder whether the jurisprudential education of law students has any contribution to make to the training of legal practitioners (beyond the mere widening of their horizons and hence their development as human beings). My own view is that it does. In fact there are two significant contributions.

The first is a contribution to excellence in argument. When I studied for the Bar, I found that the area of my vocational training to which my philosophical education was most directly relevant was the legal drafting component. Those of my peers who had no philosophical education found it harder than those of us who did to write statements of claim, defences, etc. in complex cases. That was because their philosophy-free law degrees had given them very little training in the formal structure of arguments, very little training in the rules of logic, and very little opportunity to build complete arguments from scratch. Contrary to the self-image of the profession, lawyers and judges tend to make do with a great deal of sloppy argumentation. The adversarial environment encourages excessive resort to rhetorical flourishes. The tradition of oral delivery makes room for extra unnoticed nonsequiturs and fallacies. The central role of authority dulls the lawyer's critical faculties, and allows argumentative error to become embedded in the law. Only in the drafting of formal documents such as statements of claim are these problems brought to the surface. Education in philosophy enables one to anticipate the problems and deal with them.

This proposal may come as a surprise to those who imagine that philosophers of law are mainly people – like Dworkin - who swashbuckle with big ideas, and who will therefore be particularly at home in public law, human rights law, and similar broad-brush areas. In fact philosophers are mainly people who break arguments down into very small moves and test those moves very thoroughly. So they are more likely to be in their element in the law of trusts, the law of subrogation, or other areas dominated by complex logic problems and complex drafting problems. It is no accident that, before he transformed the philosophy of law, H.L.A. Hart was a trusts lawyer.

Secondly, an education in philosophy allows one to see legal problems, on occasions, as different problems from those that appear on the face of the law. If one is defending (say) protestors arrested for assembling in Parliament Square, one may speak

proudly of the British tradition of freedom of assembly and access to Parliament, and the law's historic respect for such access. One may ask the court to continue the line of respect by protecting one's clients under the Human Rights Act in the face of hostile Parliamentary legislation. One may regard oneself as striking a blow for human rights in the process. But in the long view one's argument does not bear mainly on who can lawfully assemble in Parliament Square, or indeed on who can lawfully assemble anywhere. It bears mainly on who is to *determine* such questions. By arguing for judicial protection of the right to assemble one is asking the court to shift the determination, or part of it, out of Parliament's hands and into the hands of the court itself. One is arguing for an adjustment to the separation of public powers.

Most human rights cases, in the long view, are cases about the separation of public powers. They are not cases about whether human rights will be protected but about who – executive, legislature, judiciary - gets to decide the scope of protection. This fact is rarely at the forefront of our legal minds as we work on such cases. We tend to assume (because we are taking the case to court) that the judge *must* be the one to give us our ruling on the scope of protection. And we are too busy thinking about the human rights of our client – the immediate issue that has been brought to us – to think about the implications of what we are doing for the separation of public powers. A philosophical education encourages us to look beyond this immediate issue. It encourages us to look for timeless problems underlying topical problems. You may say that for a lawyer with clients this could be a distraction. No doubt it could. But a lawyer who is astute to both perspectives has two levels of argument to think about. Whereas her opponent – lacking any philosophical education – can maybe muster only one.