The Past of Jurisprudence

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1. Now and Then

Shortly after John Gardner retired from Oxford's chair in Jurisprudence, some colleagues proposed a conference on the future of that subject. I asked Gardner whether he would go. 'Not on your life!' he laughed, 'I'm the *past* of jurisprudence. Let someone else worry about its future.' Of course, Gardner was not the past of jurisprudence, not then and not now. But I began to wonder: when *was* the past of jurisprudence? And how should we think about its role in contemporary jurisprudence? In exploring these questions, I want to enter a plea for more attention to the subject's history—although not in the way, and not for the reasons, that legal historians or historians of ideas attend to it. We should look to it for solutions to problems in contemporary jurisprudence, but also for the lessons to be learned from problems that have no solutions at all.[2]

In the world of Anglophone legal philosophy, the past is the period before the work of H.L.A. Hart, his colleagues, and his early critics—let us say before the 1950s.[3] Everything after that is contemporary jurisprudence. (If this seems odd, remember that modern history has also been around for a long time.) Any such dividing line is arbitrary in the sense of being chosen rather than found, but it need not be arbitrary in the sense of being unreasonable. There are reasons for choosing this one. English books with 'jurisprudence' in the title used to be scholarly *bric à brac*: a jumble of judicial lore and folklore, a few ideas plucked from Roman law, some speculative history or anthropology. H.L.A. Hart's influence changed that. Jurisprudence books became works in the philosophy of law.[4] In one way, that marked a narrowing of focus—the history, sociology, anthropology, and economics of law stopped couch-surfing with jurisprudence and moved into their own disciplinary homes. Yet in another way jurisprudence broadened. Hart and his colleagues put a vast range of problems on the agenda: legal rights and obligations, social rules, causation in law, responsibility and

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[2] Some terminology: I use 'jurisprudence,' 'philosophy of law,' and 'legal theory' interchangeably. I take the subject to address both descriptive ('conceptual') and normative questions. When I discuss 'contemporary' or 'current' jurisprudence, I refer only to the state of the subject in the Anglophone world. The 'past' of the subject has no linguistic restriction.

[3] In addition to Hart, the leading players were J.L. Austin, A.D. Woozley, A.M. Honoré, and L.L. Fuller

[4] As Gerry Postema aptly puts it, Hart 'taught Anglo-American jurisprudence again to speak the language of philosophy". G. J. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World,* (Springer 2011) 262.

punishment, the limits of liberty, the virtue of justice, the nature of law, and the philosophy of Jeremy Bentham. The new work also consolidated a methodological shift. Jurisprudence would henceforth be held to the standards of analytic philosophy of the day. And, minus some parochial concerns of 1950s Oxford, those remain the standards of our day: the Anglo-American style of philosophy with its relentless (and sometimes remorseless) demands for clarity in analysis and precision in argument.

There might be a case for pushing the line between past and present back as far as Hans Kelsen. Kelsen's career overlapped Hart's, and Kelsen's legal and philosophical interests were also prodigious. Moreover, he too was concerned to impose quality control on jurisprudence. He wanted to expunge what he called its uncritical 'syncretism': a mixture subjects with unrelated standards of inquiry.[5] But Kelsen's own methods belong to an earlier philosophical generation that took its lead from German philosophies of the previous century—the elder cousins of analytic philosophy. That is why the twenty-seven years between Kelsen's *Pure Theory of Law* (1934) and Hart's *The Concept of Law* (1961) bridge two jurisprudential eras. We see this reflected in the fact that most legal philosophers who came after Hart are much more like Hart, and like each other, than like any earlier writer. This includes Hart's most stringent critics. For example, Ronald Dworkin's *Taking Rights Seriously* (1977) and *Law's Empire* (1986) contain extended discussions of writings by Hart and Hart's followers yet not a single comment on, or citation to, any work by Kelsen. Whenever Dworkin attacked legal positivism, his target was always Hart (or a Hartian); whenever he criticized 'conceptual analysis,' he returned to Hart. I have no idea whether Dworkin ever studied Kelsen's works, but if he did, he must have considered them old hat.

Most Anglophone jurisprudents now work in this post-Hartian present. Some do glance backward in search of clues about how to solve problems in legal theory—more about that shortly—but only a handful have made significant contributions to contemporary jurisprudence as well as to the literature on past writers.[6] Most legal philosophers have some acquaintance, at least second-hand, with the most famous among our ancestors and can name-check the likes of Aristotle and Aquinas, Hobbes and Hume, or Beccaria and Bentham when that seems useful. But compared with neighbouring fields, jurisprudence has fallen out of touch with its past.

In moral philosophy or political theory, for instance, study of both 'historical figures' and 'theoretical problems' is usually part of the basic training. In jurisprudence, it is common to find even postgraduates who are conversant with the ideas of only contemporary writers, and sometimes only a half-dozen of those. Likewise, there cannot be many professors of political theory who are unaware of the contrasting uses to which Hobbes, Locke, and Rousseau put the idea of a 'social contract,' or many epistemologists in the dark about how Locke, Berkeley and Hume understood 'ideas.' On the other hand,

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[5] Hans Kelsen, *Pure Theory of Law* (2nd ed, trs. M. Knight, University of California Press, 1967) 1.

[6] Especially Tony Honoré (Justinian), John Finnis (Aquinas), Jeremy Waldron (Locke), H.L.A. Hart (Bentham), David Lyons (also Bentham), G.J. Postema (Bentham again), and Brian Leiter (Nietzsche).

plenty of professors of jurisprudence would struggle to explain offhand the concept of sovereignty as understood by Bodin, Hobbes and Bentham.

Of course there are exceptions. Nearly everyone knows John Austin's theory of law—primarily through Hart's criticisms.[7] A second exception lies with theorists of international law. They can generally be counted on to know the leading ideas of Grotius, Pufendorf, and Kelsen—perhaps because those philosophers contributed to theoretical reflection on the subject and to the development of its doctrines and institutions. Finally, some of those marching under the banner of a revered forebear (e.g. Thomists or Kantians) do pay close attention to the works of their champion. But apart from these, most contemporary legal philosophers treat the past of jurisprudence as, well, *past*.

That is the context for two questions that I address here:

- (1) Why has contemporary jurisprudence lost touch with its past?
- (2) What, if anything, might jurisprudence lose by such 'presentism'?

The first is a problem for the sociologist or historian of ideas. I am neither, but as a long-time participant-observer, I can perhaps offer a few conjectures about (1). I will be more concerned with (2), treating it as an evaluative problem internal to jurisprudence. By this, I mean to inquire whether neglect of its past makes for a poorer theory of law, that is, work that is *poorer as* a theory of law. If one understands 'evaluative' to mean 'prescriptive,' then what I have to say about (2) will inevitably sound like advice. There will be some of that, but I hope it will not sound hectoring. For one thing, I have no wish to join those whose main ambition is to direct others how (not) to do jurisprudence. For another, I am well aware how far the following criticisms apply also to me. I am not trying to reorient a subject, only to redirect some attention. Finally, I will not be reviewing any historical authors or defending any interpretations of the few examples I do mention. The theoretical claims to follow are claims *about* the uses of history in jurisprudence; they are not historical claims.

2. Presentism

Everything new first appears in the transient present. I will call the scholarly attitude that values novelty 'presentism.' This admiration for the new extends beyond mere originality. A work may be a writer's own, not a crib of someone else's work, yet defending arguments or conclusions familiar to anyone knowledgeable in the field. In malignant forms, presentism values the new over the true. In all forms, it overestimates

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[7] H.L.A. Hart, *The Concept of Law* (3rd ed; J. Raz and P.A. Bulloch, eds; L. Green, intro, Oxford University Press, 2012), chaps II-IV. Hart chose Austin as representative of imperatival theories of law mainly because earlier English writers had done so and because Jeremy Bentham's works were not then readily available. Later, Hart described Bentham as the most important of English legal philosophers, and he edited Bentham's *Of Laws in General* (London: Athlone Press, 1970) and produced critical studies of Bentham, collected in his *Essays on Bentham*: *Jurisprudence and Political Theory* (Oxford University Press, 1982).

the significance of currently popular ideas. Yet every jurisprudent now writing will soon become yesterday's news. What accounts for this self-defeating ethos?

In our domineering digital cultures, the noisy present constantly clamours for attention, but that affects many other disciplines, too. Some things are particular to jurisprudence. I mentioned one above. The subject has broadened to cover many new issues, some of which have few antecedents in earlier writings, including methodology in jurisprudence, causation in the law, and theorizing about new areas such as welfare rights, restitution, or anti-discrimination law. Those working on fledgling topics like these perforce deal with a recent literature. Then there is seepage from attitudes that are common amongst academic lawyers but quite out of place in legal philosophy, including a preference for fresh authorities over old and a craving for the attention of judges (attitudes given cover by political demands for 'relevance' or 'impact' in scholarship).

There are also two more philosophical pressures in the direction of presentism. One is the idea that the past of jurisprudence has become irrelevant owing to theoretical progress. The other has it that jurisprudence is a body of imaginative literature whose past need interest only those with antiquarian tastes. Let us take them in turn.

2.1 The Price of Progress

Presentism may be thought concomitant to theoretical progress: contemporary jurisprudence is more nearly true (or correct, or acceptable) than are any historical works.[8] On this view, the past of jurisprudence has been superseded and any ideas of value in it have been absorbed into current legal theory, probably in a more precise and rigorous form.

This idea is influenced by one image of progress in the empirical or formal sciences.[9] Progressive supersession explains why it would be a poor biologist who learned ethology solely from Aristotle's *On the Generation of Animals*, a work largely obsolete after Darwin. It would also be a poor logician who knew no results or techniques not found in Aristotle's *Organon*: Frege and Russell explained why. But would it be a poor legal philosopher who decided to approach the concept of justice via *Nichomachean Ethics*? Not at all. Aristotle's analysis can be improved, but it remains an excellent starting place.[10]

Some may say that Aristotle's ethics survives while his biology and logic do not because theoretical progress is limited to 'scientific' subjects. Since a theory of justice is not

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[8] I add 'correct' and 'acceptable' to allow for the possibility that some evaluative or normative theses in jurisprudence may not be truth-apt. (For example, some may need a non-cognitivist approach.)

[9] It is inadequate even there: Larry Laudan, *Progress and Its Problems: Towards a Theory of Scientific Growth*. (Berkeley CA: University of California Press, 1977). The formal sciences are logic, mathematics, and their subfields and applications (including deontic logic and the theory of games and decisions).

[10] John Finnis once pointed out to me that Hart's discussion of justice in *The Concept of Law*, chapter VII, looks as if it had been written with *Nichomachean Ethics,* Book V open on the desk.

subject to empirical refutation or formal disproof, it remains with us as a relic of a pre-scientific age. That is Kelsen's view. He thinks a condition of jurisprudential progress is its 'purification' by expunging moral judgments and leaving all empirical questions about law and society to other fields. This is jurisprudence as janitor: sorting material into rubbish to be disposed of, recyclables it hands over to some other discipline, and the ore it will refine into 'legal science.'

Clean-up is always on the jurisprudential to-do list, but Kelsen goes too far. Perhaps some people still believe in a unity of all sciences, but no one expects a unity of science and *not-science*. And the 'not-science' fields cover most of the humanities, including legal philosophy, where we aim not to discover new facts about the legal world but to explain what matters about familiar facts. Here, explanation comes in the form of understanding rather than the discovery of formal relationships or causal connections. Can understanding make progress? It can when it becomes more illuminating and more compelling. Ideally, a deeper understanding of legal phenomena should be both clarifying and convincing to any informed inquirer. We should see that in growing areas of convergence, if not around wholesale theories ('natural law,' 'legal realism,' 'legal positivism,' etc.), then around retail theses in the field. Jurisprudence has made that sort of progress.[11]

2.2 The Eye of the Beholder

Supersessionist doubts assume that legal theories present their core propositions as true. Maybe they are all false. Or maybe their truth-claims merely conceal some other ambitions. Be that as it may, a work that fails by its professed standards may succeed by other standards. No philosopher is obliged to take any other philosopher's work as it was intended or received: that distinguishes philosophy from the history of ideas. David Hume says his writings show how political morality can be reduced to a science. He failed in that, and Hume could not have succeeded using the ideas and methods of the *Treatise* or *Enquiries*. Yet there is much of value in Hume's writings. His theoretical works brim with insight; his essays and histories illuminate and entertain; he is a charming and witty companion. These are reasons to seek out his company that do not depend on buying into his fantasy of a scientific politics.

However, as with any literary encounter, readers are entitled to pursue what they enjoy. And the prospects for enjoying the past of jurisprudence do vary. Some write elegantly like Cicero or Hume, serviceably like Locke or Mill, or as wearyingly as Hegel or Kelsen. Allowing that some of these works do have greater aesthetic value than others, reading-for-pleasure need not track it. Readers may seek literary enjoyment to suit their own tastes. There is no duty to read great Elizabethan literature. Those who prefer Nicholas Shakespeare to William Shakespeare need not be at fault.[12] There is plenty of good

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[11] Leslie Green, *The Germ of Justice*: *Essays in General Jurisprudence* (Oxford University Press, 2023), 18-19. Convergence is not a criterion of progress, but it is a mark of it.

[12] There is, however, a fault in confusing the two, as did François Hollande: '*Je me permets de citer Shakespeare : ils ont échoué parce qu'ils n'ont pas commencé par le rêve.'* One Shakespeare did say

contemporary literature to enjoy, even including some jurisprudence, if that is where your tastes lead you. And that is not all: contemporary authors are often more accessible and can answer back, whether *viva voce* or in the journals. Many jurisprudents enjoy the rough-and-tumble of polemics. No past writer can join in that fun.

3. The Past of What?

Anglophone jurisprudence has long been accused of being unhistorical.[13] But this covers two different charges. There is (A) the claim that jurisprudence should attend more carefully to the past *of law* and (B) the claim that jurisprudence should attend more carefully to the past *of legal philosophy*. It is one thing to urge (A-style) that contemporary jurisprudence should attend more closely to Roman law at 50 BCE or English law at 1650. It is a different thing to suggest (B-style) that it would profit from Cicero or Hobbes's reflections on law.

3.1 The history of law

One objection of type (A) can be found in Savigny's 'historical jurisprudence.'[14] In opposition to then-popular enthusiasms for codification, Savigny holds that German law should reflect the spirit of the people whose law it is, a spirit we can recover only with historical inquiry.[15] As a theory of the nature of law, that is a non-starter. Because law is an institutionalized rule system administered by officials, it can drift far from the spirit of any people, present or past. But Savigny knows that legal systems need not be the repositories of popular history and traditions. His ambitions are normative: he wants the law to *become* like that. Taken as a programme for legislation or interpretation, however, this proposal to entrench an imagined *Vōlksgeist* is quite dreadful. Even if we

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something like that, but not the one Hollande imagined he was quoting: https://www.theguardian.com/commentisfree/2012/jan/29/francois-hollande-shakespeare-gaffe

[13] The first notable complainant is Sir Henry Maine, in his *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London: Dent, 1936 [1861]), discussed below, Section 3.1. A contemporary example is Morton J. Horowitz, 'Why is Anglo-American Jurisprudence Unhistorical? (1997) 17 *Oxford Journal of Legal Studies* 4, 551.

[14] Friedrich Karl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg: J.C.B. Mohr, 1814); trs as: *Of the Vocation of our Age for Legislation and Jurisprudence* (A, Hayward, trs, London: Littlewood, 1831). Savigny's theory is often considered an outgrowth of nineteenth-century German romanticism. It is that, but it follows a tradition of earlier writers with related concerns, including Montesquieu, Adam Ferguson, and Adam Smith. On the later career of 'historical jurisprudence,' see David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press, 2013).

[15] Savigny especially wanted to keep German law pure of French influences. We find contemporary parallels in the British Conservatives' desire to purify English law of 'European' ideas and American Republicans' desire to shackle constitutional interpretation to American 'history and traditions.' On American lawyers' attempts at history, see Jack M. Balkin, 'Lawyers and Historians Argue about the Constitution,' (2020) 35 *Constitutional Commentary* 245.

could distil some determinate principles from the mayhem of legal history, ancestor worship would be a hellish faith to inflict on modern, pluralistic societies.

A more interesting objection of type (A) is that history reveals past societies on whose social arrangements contemporary jurisprudence casts a false light. If jurisprudence were more historical, it might become more modest, giving up some of its universal claims about the nature of law. Possibly, little would remain of general jurisprudence, for legal history shows more diversity than uniformity.

We find this sort of complaint in the work of Sir Henry Maine—Oxford's first Professor of Jurisprudence.[16] Maine proposes ancient societies as test cases for legal theory. He strenuously objects to Bentham and Austin's definitions of law because they are, he says, unfaithful to the beliefs and arrangements of past times:

> [T]he farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined. Law has scarcely reached the footing of custom; it is rather a habit. (…) The only authoritative statement of right and wrong is a judicial sentence after the facts, not one presupposing a law which has been violated, but one which is breathed for the first time by a higher power into the judge's mind at the moment of adjudication.[17]

Maine claims 'ancient law' had that character because it was an aspect of a more tribal, despotic society than nineteenth-century jurisprudents imagined. It was a society especially concerned with regulating status; even the private relations we now think of as contracts emerged late and fitfully. If only Bentham had studied ancient Irish or Indian law, he could have discovered this.[18]

That Bentham's theory of law is inadequate is beyond doubt. But we hardly need a dose of ancient law to see why. The picture of law as a set of sovereign imperatives was a

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[16] This storied chair began as a professorship of comparative jurisprudence, created to attract the eminent historian away from Cambridge to Oxford. (Its success was limited: Maine took the job in 1869 but continued to spend much of his time in Cambridge.) However, starting with the appointment of H.L.A. Hart in 1952, every Professor of Jurisprudence at Oxford has been a philosopher—another marker of the line between past and present in jurisprudence.

[17] Maine, *Ancient Law*, 4-5.

[18] The early Irish sources are challenging, and Maine never learned to read the originals. In a contemporary comment on Maine's *History of Early Institutions*, Grant Duff writes: 'A large portion of [these lectures] is occupied with the new materials for legal and social history which had been then recently published in translations of ancient Irish or Brehon law treatises, while some unpublished translations of Brehon manuscripts, to which the lecturer had access, were also freely used.' M.E. Grant Duff, Sir *Henry Maine: A Brief Memoir of His Life* (NY: Henry Holt and Company 1892), 42. Cf Fergus Kelly, *A Guide to Early Irish Law*, (Dublin: Dublin Institute for Advanced Studies, 1988). Likewise, Maine's lack of Sanskrit was no barrier to his sweeping claims about early Indian sources. With examples like this before us, what are the odds of persuading contemporary legal scholars who write about Foucault that they really do need French? Or Kantians that they need German?

poor account of English law in the nineteenth century. Moreover, given the theoretical weight Maine gives to his historical inquiries, it is odd that he does not even consider the threshold question of whether the purely discretionary, *ex post facto* arrangements he describes actually *were* law. Pertinent here is a methodological point. The history of law is less like the history of economic exchange and more like the history of money. We can speak without metaphor of the 'economics of the Stone Age' but not of 'the money of the Stone Age'—unless neolithic societies did indeed have things generally accepted as means of exchange, units of account, and stores of value. Some social concepts *apply to* societies without anyone in them possessing those concepts; others *apply in* a society only when members of that society take them on board and use them. Law is the latter sort. Like money, law is a social construction that exists only by virtue of shared beliefs and expectations, including beliefs and expectations about which standards are to be socially binding. If Maine is correct that 'primitive' thought about delicts did not presuppose 'a law which has been violated' then that thought lacked the beliefs and expectations characteristic of law. The discretionary arrangements Maine describes may eventually grow into legal systems, but an acorn is not yet an oak.

Of course, it is undeniable that there were societies without legislatures and without judges—maybe even societies without any standing set-up for resolving disputes. These societies lacked the kinds of institutions and procedures many legal theories hold essential to law. It would certainly be a mark against jurisprudence if it was unable to detect legal systems wherever they do exist, not only in the familiar contexts of empires, states, and religions but also in ancient heroic societies, pre-colonial Indigenous civilizations, or tiny hunter-gatherer bands. Yet all of these had some sort of law.

Wait—*did they*? There is no general answer to that question. It is clear that the Aztec empire had law and that the tiny 'triblets' of pre-colonial California did not.[19] Some may bristle at that comparison because they think the triblets' norms had enough in common with law to repay the sort of reflection that theorists have lavished on the legal systems of the Roman Empire, Stuart England, or the Weimar Republic. That may be so. But many organizations have things *in common with* law and repay the attention of legal philosophers that are, for all that, not legal systems: for example, the rules of clubs, games, or sports.[20]

Others may bristle because they think my contrast between the Aztecs and the Californian bands is demeaning towards the latter. Why think that? Perhaps they assume that if a people did not have law, they would be a 'lawless' people in the derogatory sense of that term—savage or chaotic. Since many past societies were neither savage nor chaotic, such historians infer that those societies *must have had* law: their very own kind of law, maybe one that contemporary jurisprudence cannot even

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[19] Compare Jerome A. Offner, *Law and Politics in Aztec Texcoco* (Cambridge University Press, 1984) and Robert L. Bettinger, *Orderly Anarchy: Sociopolitical Evolution in Aboriginal California* (Oakland: University of California Press, 2015).

[20] But cf Mitchell Berman and Richard Friedman, *The Jurisprudence of Sport: Sports and Games as Legal Systems* (St Paul, MI: West Publishing, 2021).

recognize (Indigenous law, aboriginal law, etc.) We should resist that inference from 'ought' to 'did.' It would be safer to drop the assumption that it is always a good thing to live under law and instead allow for the possibility that many ancient and pre-colonial societies lived not as 'lawless' peoples but as *law-free* peoples. There is nothing demeaning about that. It sounds like a terrific achievement.[21]

Legal history is what it is, and it has value as a reflection on and part of our cultures. That is enough without also trying to turn it into a laboratory of legal philosophy. Nor does jurisprudence need legal history to demonstrate the complex, multi-criterial nature of law, or the fact that there are many borderline and marginal instances of legal systems. After all, some contemporary legal orders lack features of paradigmatic legal systems: international humanitarian law or the law of the European Union, among others. Legal history is unlikely to disclose test cases for jurisprudence of a sort that are not all around us. The jurisprudential issue is how such cases are to be integrated into a theory of law, and legal history cannot help us with that.

3.2 The history of jurisprudence

Let me now turn from the past of law to the past of jurisprudence, that is, to the (B)-type case for history. Again, let me take an example from the descriptive, conceptual side of the subject. Compare these two definitions of law, the first from Cicero (around 51 BCE) and the second from Hobbes (1654):

(I)

> [T]rue law is right reason in agreement with nature; it is of universal application, unchanging and everlasting .... We cannot be free from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times.[22]

(II)

> Law in general, is not Counsel, but Command; nor a Command of any man to any man; but only of him, whose Command is addressed to one formerly obliged to

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[21] For some reasons why, see William Godwin, *An Enquiry Concerning Political* Justice (M. Philp, ed, Oxford University Press, 2013 [1793]); Michael Taylor, *Anarchy and* Cooperation (London: Wiley 1976); and David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (NY: Farrar, Strauss, Giroux, 2022).

[22] Cicero, *De Re Republica* (T.E. Page et al. (eds), C.W. Keyes (trs), London: Heinemann,1928 [54-51 BCE]), III: xxii, 33.

> obey him. And as for Civil Law, it addeth only the name of the person Commanding, which is *Persona Civitatis*, the Person of the Common-wealth.[23]

Never mind whether either of these accounts is adequate. It is obvious that they are not aggregates of fine-grained data from the history of law. Both Cicero and Hobbes deliberately abstract from local features of the legal orders with which they are familiar in search of something like the 'nature' or ‘definition’ of law ('true' law; law 'in general'). The same method characterizes the approaches of Plato, Aristotle, Aquinas, Vittoria, Grotius, Pufendorf, Locke, Rousseau, Kant, Bentham, Hegel, Weber, Pashukanis, and Kelsen. The abstract character and universalizing ambitions of contemporary jurisprudence are not due to the fact that it is *contemporary* but to the fact that it is *jurisprudence*. If such methods are unhelpful in understanding law, we will not find a corrective among past philosophers, for they were doing what we are doing.

The fact that so many past writers worked in familiar ways is no accident. The jurisprudence we have now is a development of those traditions of understanding law, and we continue to be influenced by them, methodologically and substantively. That continuity encourages us to enlist their help. But the continuity also includes raw contingencies. Rarely is some doctrine or thesis a rationally inevitable result of its ancestors. General theories like Cicero's natural law or Hobbes's positivism are susceptible to various lines of development, and such developments take place as loosely related families of argument, not tight chains of inference. Even where one thesis does entail another, the second arrives on the scene only when someone actually draws the relevant inference. There may be true propositions about law that were known to the ancients, and that provide grounds for other true propositions about law, though we have yet to discern them.

Contingencies in the development of jurisprudential ideas influence whether and how we encounter them. Some theses such that if they had not emerged as they did, they would never have emerged at all.[24] Others seem to be just waiting, so to speak, to be discovered by anyone who can appreciate the problems to which they are solutions. It is hard to imagine arriving at the doctrines in *The Laws of Ecclesiastical Polity* without Hooker, but if Condorcet had not proved his 'jury theorem,' someone else might well have done so. And many other now-familiar ideas—including the notions of universal 'human rights' or an ultimate 'rule of recognition'—are mixed cases: rational theoretical developments within contingent parameters. In assessing these, we may need more

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[23] Thomas Hobbes, *Leviathan* (R.Tuck, ed., Cambridge University Press, 1996 [1651]), Chapter XXVI, 183. I have modernized the spelling.

[24] Hannah Arendt writes: 'Had history taken a different turn, the whole modern scientific development from Galileo to Einstein might not have come to pass. And certainly the most vulnerable truth of this kind would be those highly differentiated and always vulnerable thought trains—of which Plato's doctrine of ideas is an eminent example—whereby men, since time immemorial, have tried to think rationally beyond the limits of human knowledge.' Hannah Arendt, 'Truth in Politics,' in her *Between Past and Future* (Penguin,1993) 230-231.

than a bare grasp of the theoretical problems they attempt to solve. We may also need to appreciate why anyone thought there was a problem to solve in the first place (and what it was). Here, jurisprudence and its history mix and, ideally, cooperate.

4. Solution-oriented Jurisprudence

4.1 Resources in the past

One natural way to approach the past of jurisprudence, then, is as a resource for its present. We are trying to solve theoretical problems about law and legal systems; the past may contain clues about how we might advance. Just because an historical text has already been read and considered (by someone, sometime), it does not follow that its wisdom has been exhausted or fully understood.

Sometimes, the help we get from the past arrives by semi-rational or sub-rational routes. An argument, comment, or even a turn of phrase may inspire a productive new idea. However, there is no reason to think that the past of jurisprudence is the most fertile source of inspiration. Walking in a garden or listening to music might do as well. When approaching the past as a theoretical resource, we usually look for rational (if non-demonstrative) prompts. Some of these will be positive—analyses to adopt, inferences to draw—while others will be negative: distracting confusions and fallacies to avoid. It would take unbelievable self-confidence to think we have already absorbed all lessons available in the last two millennia of jurisprudential thought.

In addition to fresh insights, there will be teachings that we need to recover and retain if we are to make further progress. This may recall the following admonition from George Santayana:

> Progress, far from consisting in change, depends on retentiveness. When change is absolute there remains no being to improve and no direction is set for possible improvement: and when experience is not retained … infancy is perpetual. Those who cannot remember the past are condemned to repeat it.[25]

Memorable words. But what exactly is wrong with repeating the past? In the above passage, Santayana writes about conditions for overall human progress. I doubt we can make much sense of that: getting better along some dimension is compatible with, and sometimes the cause of, humanity getting worse along other dimensions. We can hope for unalloyed progress only in restricted domains: in jurisprudence, perhaps. In this case, however, the wrong in repeating the past is even less clear—so long as we are not just plagiarizing or restating known errors. Perhaps we want to avoid the embarrassment of 'discovering' something that was already known to the ancients, for

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[25] George Santayana, *The Life of Reason, Or The Phases of Human Progress* (New York: Charles Scribner's Sons, 1905) 284-285. I have elided Santayana's false and offensive parenthetical comment 'as among savages.'

instance, that ‘law is a certain kind of order, and good law is a good order,’[26] or that, without reliable obedience on the part of some, no legal system can exist.[27] To theorize unoriginally is not much of a vice, however. Most good philosophy is to some degree unoriginal. The vice is not so much a matter of repeating the past but repeating it then doing nothing with it. And if we approach the history of the subject only as a source of quotations to give our work a patina of scholarship, we might as well not bother.

A different reason for attending to the past of jurisprudence is suggested by this remark by Alfred North Whitehead:

> The safest general characterization of the European philosophical tradition is that it consists of a series of footnotes to Plato. I do not mean the systematic scheme of thought which scholars have doubtfully extracted from his writings. I allude to the wealth of general ideas scattered through them.[28]

Whitehead does not intend this famous 'footnotes to Plato' remark as a slight.[29] Nor is his point that we are all Platonists now. It is that the 'wealth of general ideas' scattered through the works of Plato was sufficiently interesting and illuminating that it provided nourishment for centuries of further inquiry. But the Platonic corpus is not some unique treasure-trove. There are many illuminating ideas available in the works of other ancient philosophers, early modern philosophers, Enlightenment philosophers, and many non-Western philosophical traditions. All of these are rich enough to sustain centuries of Whiteheadian' footnotes', and they have already done so.

Admittedly, the richness of a past philosophical tradition does not prove that we need it now. Maybe post-1950s jurisprudence contains its own stock of 'general ideas,' or at least enough to help us with the problems that interest us. Even if a more extensive pool improves our odds of hitting on something useful, there is now more jurisprudence than at any other time in history, so the marginal benefit of revisiting past theorists just for a solution may not be worth all the effort.

Quantity is not the only pertinent consideration, however. As J.S. Mill taught us, diverse perspectives can increase our chances of hitting on the truth, especially in areas where each view is likely to be a partial one. There is much more diversity in the past and

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[26] Aristotle, *Politics* VII.4.1326a29–31 (trs mine).

[27] Aristotle, *Politics*. II.8.1269a20–1; compare *Nichomachean Ethics*, X.9.1180a21.

[28] Alfred North Whitehead, *Process and Reality* (D.R. Griffin and D.W. Sherburn, eds, New York: Free Press, 1978 [1929]), 39.

[29] It is therefore curious how often 'footnotes-to-Plato'-type comments are meant as dismissive. I once read a reviewer's comment (provided to me but not directed at me) that jurisprudence needs to move beyond 'footnotes to Hart.' That echo of Whitehead was intended as an insult—though it was aimed at a theorist whose work could not fairly be described that way. What's more, as someone who *actually* wrote 'footnotes to Hart,' I can affirm that scholarly work of that sort can be both challenging and productive. (Leslie Green, 'Notes to the Third Edition,' in Hart, *The Concept of Law*, 3rd ed, 309-325).

present of jurisprudence taken together than in its present alone. We often imagine that yawning chasms stretch between contemporary legal theories.[30] However, once we sort out talking at cross-purposes and reign in the exaggeration of modest differences, they can also seem rather similar. Some think moral principles are part of the law; some do not. But who argues that the only valid law is divine law? Some trust legislators over courts; some the reverse. But who holds that all officials are more corrupt than the deliverances of custom? Some favour more equality, some less. But who defends slavery or argues that the destitute deserve their misery? Of course, the views I just mentioned are false or repugnant. But how quickly and convincingly could we marshal the arguments that warrant our smug '*of course'* without help from the past of jurisprudence?

The fact that many past writers lived in different thought-worlds and different social circumstances to our own is usually seen as problematic. We seem to want our philosophers, like our politicians, to be 'relatable' and 'inclusive.' But working with texts that are strange and exclusionary can also benefit us. As Acton says, 'history must be our deliverer not only from the undue influence of other times, but from the undue influence of our own, from the tyranny of the environment and the pressure of the air we breathe.'[31] When past writers share few of our ideas about what is obvious or common sense, their arguments can lead down strange or frightening paths. It is for us to decide whether to follow them and, if so, how far. But even if we see only dead ends, stopping for a time along old roads can clarify our destination as well as the depth of our own commitments, conceptual and moral.

One final virtue of the history of legal philosophy: Because the past of jurisprudence is causally isolated from its present, all historical authors have a sort of neutrality, or indifference, concerning our own interests and ambitions. No one fears a lousy review from Cicero or Hobbes; no one pines for their citations or invitations. We can approach them without fear or hope of favour. The past is not only, as Acton says, a deliverer from the undue influence of our own times; it can also be a deliverer from the undue influence of our own pride and ambitions. That is another reason we may sometimes see more clearly in the rear-view mirror.

4.2 Barriers to the past

The past of jurisprudence can be a resource for us only if we can access it. We need to learn its language, both literally and figuratively. We also need to consider how to address supposed general barriers between us and them, especially the idea that some kind of relativism deprives earlier ideas of intelligibility or utility ('true for them; false for

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[30] Could this be because so much of it is now written in near-hysterical tones? It is no longer enough for a theory of law to be mistaken or misguided; it has to be 'scandalous,' 'outrageous,' or—that favourite among lawyers—'dangerous.'

[31] Herbert Acton, *Lectures on Modern History* (J.N. Figgis and R.V. Laurence, eds, London: Macmillan,1906) 33.

us'), as well the fear that if we do try to make use of those ideas we will commit objectionable anachronisms.

The issue of relativism, whether conceptual or moral, is too complex to confront properly here. I will assume we can build enough of a bridgehead across differences for the past of jurisprudence to be reasonably intelligible to us. Concerning moral relativism, we need only three points. First, a simple one: if some claim or principle is false (or unacceptable) we should not rely on it. If it is false (or false 'for us') that all authority comes from God, then Romans 13.1 cannot help us understand the authority of the state. It does not matter whether there is any sense in which that proposition 'was true' at Rome or Corinth in 56 CE, or whether Paul thought it timelessly true. If relativism undermines its validity here and now, we can no more make use of it than we could if it were simply false. Second, there is nonetheless no reason to think that all prior principles should be confined to their own time and place. Insofar as our social, material, and epistemic circumstances differ from those of earlier writers, sound general principles should apply differently now than they did then. Exclusionary 'family values' may have been valid in societies where people could depend on no one else for mutual aid; in our societies, they may be less important, or even destructive. What remains valid are the norms that direct everyone to support effective institutions of mutual aid. Third, jurisprudence can handle (apparent) relativism across time in the same ways it handles it across space. We have learned to work with, or around, relativistic claims about many modern doctrines, for example, when we debate universal human rights or the rule of law. We look for stable features of the human condition, for commonalities beneath differences or, failing that, for principles that can sustain a *modus vivendi*. These techniques are no less available when we look back than when we look abroad. The past may be a foreign country, but so are foreign countries. We already know how to learn from the latter.

Now for anachronism. Herbert Butterfield warns that 'the study of the past with one eye, so to speak, upon the present is the source of all sins and sophistries in history… It is the essence of what we mean by the word unhistorical.'[32] While anachronism may be a sin or sophistry in historical writing, why should it trouble jurisprudence? Let us set aside absurd projections of the 'Was-Plato-a-Fascist?' variety. It is bad enough to inflict that sort of thing on students as an essay prompt; there is no excuse for it in serious scholarship.[33] But is there also something wrong in trying to understand civil disobedience with the help of Plato's *Crito* or the authority of the state in light of Locke's *Second Treatise of Government*?

Anachronism might be objectionable if it were a precondition of drawing on the past that there be timeless problems picked out by terms like 'civil disobedience' or 'state authority.' That is not plausible. Neither Plato nor his academicians thought of the Laws' speech in *Crito* as a discussion of civil disobedience, a problem they would not have

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[32] Herbert Butterfield, *The Whig Interpretation of History* (London: Bell and Sons,1968 [1931]), 11, 31-33.

[33] And so no excuse for it in Karl Popper, *The Open Society and Its Enemies*, Vol. 1 (5thed, Princeton: Princeton University Press, 1966 [1945]).

recognized. But it does not follow that Plato's arguments can never do double duty—in his problem and in ours.[34] We will need to be careful. Whatever Plato has in mind in saying that the laws are like our parents, it will not carry over smoothly from the context of a tiny polis to that of the sprawling, bureaucratic state. On the other hand, Plato articulates as well as anyone the idea that continued residence in a law-governed regime gives tacit consent to its authority, at least when one refused a fair opportunity to leave. Even Hume, who thinks that idea ludicrous, knows that Plato's argument is worth refuting. It was, and still is, invoked all the time.

Locke is closer to our period and our prejudices, but his claim that legitimate authority requires the consent of the governed presents a different challenge. The pagan writers live in a world of capricious gods, but those gods do not intrude in the *Crito*. Locke lives in a world governed by a loving God, and conjectures about God's will are foundational in Locke's arguments for authority and toleration.[35] A secularized Locke would indeed be an anachronism, and we cannot just subtract his theism as if it were a redundant premise in arguments that can stand on their own. But, inspired by Locke, we can do with our resources what Locke does in a different way using his: we can explain why and how a principle of consent must be limited if it is to be valid. We could not justify the authority of Hitler or Stalin's tyrannies by showing (if we could) that everyone had agreed to obey them. Our principle of consent, like Locke's, must be a limited normative power. Those who explain consent's limits on non-theistic grounds cannot say they are defending 'Locke's theory of authority.' But it would be fair to say they are defending a 'Lockean theory' and even to say it draws on some of the power of Locke's (actual) argument. These things are not all or nothing. It is true that if we were trying to recover Locke's ideas as they were intended or first received, we would need to locate them in the tradition of Calvinist political thought. Nonetheless, while Locke intends his argument to rely on theological premises, he also intends it to transcend his own thought-world. He often affirms that his claims are supported both by revelation and by reason. We cannot know which way Locke would have jumped had he thought it necessary (or possible--*etiamsi daremus*) to choose between them.

It is important to remember that a solution-oriented jurisprudence does not appeal to past writers as *authorities* for any proposition. We are therefore not primarily concerned with the details of what those writers thought or intended, as if legal philosophy were a

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[34] A.D. Woozley, *Law and Obedience: The Arguments of Plato's Crito* (Chapel Hill: University of North Carolina Press, 1979).

[35] Locke assumes we are God's property and, therefore, cannot validly consent to suicide or deliberately put our own lives in jeopardy. Agreeing to the rule of a tyrannical government would do just that, so we know *a priori* that every tyrannical government is illegitimate ('consent' or no). One of his leading arguments for religious toleration assumes that a Protestant God wants only free, individual conviction, so religious compulsion cannot attain its supposed end. John Locke, *Two Treatises of Government* (P. Laslett, ed., Cambridge University Press, 1988 [1690]) Second Treatise ss. 6, 23; pp 270-271, 184. John Locke, *A Letter concerning Toleration and Other Writings* (ed. M. Goldie, Indianapolis: Liberty Fund, 2010 [1689]) 13, 14.

kind of high-brow statutory interpretation. Unlike the lawyer or the historian, the jurisprudent is free to respond to arguments in ways that would have surprised their authors or original audiences. We look for illumination in historical texts; we do not 'apply' them to contemporary facts.

5. Problem-oriented Jurisprudence

In Section 4, I explored some possible uses of the past, presupposing that our aim is to track down solutions to current problems in legal theory. It is time to examine that presupposition. Is problem-solving the only proper ambition of jurisprudence?[36]

Necessarily, every solution responds to a (putative) problem, but not every stateable problem has a solution. This is obvious in the case of nonsensical questions ('Are there more calories in constitutions than in contracts?') and in unclarifiably obscure ones ('Does the form of tort law instantiate legality at its most legal?'). Before giving up on a question, however, we should try to repair it. Daniel Dennett writes,

> [W]e philosophers are better at questions than answers. (…) Finding better questions to ask, and breaking old habits and traditions of asking, is a very difficult part of the grand human project of understanding ourselves and our world. Philosophers can make a fine contribution to this investigation, exploiting their professionally honed talents as question critics….[37]

Dennett is a ‘naturalist’ who aspires to a philosophy that contributes to and answers to the empirical sciences.[38] Jurisprudence has other ambitions. Law is not a catalogue of the causes of judicial decisions, and jurisprudence is not an attempt to predict what judges will say. Any judge or court may predictably misapply or break the law. Every lawyer knows this is so, yet we may wonder *how* it can be so given officials' power to render authoritative dispositions. (How could the Supreme Court be mistaken about the law?) Or, again, we may wonder whether there is always something wrong with a judge refusing to apply valid law. (Isn't that what a judge, *qua* judge, must do?) Neither is a 'scientific' question, nor can such questions replace them. But the question critic has a role here, too. These questions can be sharpened to make them tractable without abandoning them. We can distinguish a final judgment from an infallible judgment. We can distinguish internal obligations of the judicial role—things on the job

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[36] What follows marks a change in my view. I used to think that jurisprudence should be solution-oriented and that unless a jurisprudential problem holds out some prospect for solution, it should be discarded. Julie Dickson persuaded me that I was wrong about this. For reasons given in Sections 5 and 6, identifying and elucidating jurisprudential problems may be valuable even if those problems prove intractable. Cf Julie Dickson, *Elucidating Law* (Oxford University Press 2022).

[37] Daniel Dennett, *Kinds of Minds*: *Toward an Understanding of Consciousness* (NY: Basic Books, 1996), vii-viii.

[38] The most influential contemporary work of legal philosophy from a naturalistic perspective is Brian Leiter's *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007). The more remote, and more tentative, ancestors of that approach include Montesquieu, David Hume, Adam Smith, and Adam Ferguson.

advertisement—and external obligations that flow from judges' power over people's lives. So revised, we may find that our initial puzzlement can be resolved.

The work of criticizing and improving jurisprudential questions never ends. Freshly minted questions that are bad or poorly formed can quickly get entrenched in the literature then attract increasingly florid 'solutions' before anyone sees that it is the question, not any answer, that is defective.[39] Sometimes, however, the history of jurisprudence reveals questions that resist all efforts at solving or improving them. These are problems that are intelligible, that suffer no reparable error or ambiguity that a question critic might correct but have no solution capable of commanding assent. Every proposed clarification and solution proves unsatisfying, yet we are unable or unwilling to turn the page and proceed as if the problem never crossed anyone's mind. We are left with a nagging doubt that something is awry, without knowing precisely what. When such doubts recur throughout the history of reflection on a problem, it becomes plausible to suppose that problem is intractable.

It is bound to be more controversial whether a theoretical problem is intractable than whether it is nonsensical, obscure, or ill-formed. Jurisprudential intractability is a bit like legal indeterminacy. It is not necessary for a legal question to lack a determinate answer that all informed lawyers agree *that it is indeterminate*. The typical sign of indeterminacy is that some lawyers affirm *p*, some deny *p*, and some say that *p* is arguable but uncertain. Likewise, it is not necessary for a jurisprudential problem to be intractable that a philosophically informed audience agrees that it is so. More usually, there is a cacophony of intelligible, incompatible solutions, none of which secure broad conviction and most of which cannot even garner the wholehearted, unreserved support of their proponents.

Let me hazard one example. Nearly everyone believes that some criminal punishments are morally required: violations of law demand accountability, and state officials' deliberate, calibrated infliction of suffering on offenders is just the right kind. Lawyers, judges, and criminologists can quickly rattle off many 'purposes' of punishment: deterrence, retribution, denunciation, rehabilitation, incapacitation, etc. But people in such roles are often happy to invoke these ideas without commitment to their soundness: they are the justifications for punishment as some legal system or law commission sees them, which may be enough for lawyers and judges. Legal philosophers, in contrast, want to know whether the justifications are sound. And the

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[39] Consider the question: 'How do we explain the normativity of law?' Does that question presuppose that (some) laws are norms, or doesn't it? If no laws are norms—e.g. if they are predictions about what courts will do—there is nothing normative that calls for explanation. On the other hand, if it is presupposed that laws *are* norms, what is the puzzlement? Since 'normativity' is nothing other than the property of being a norm, puzzlement at the fact that *norms are normative* is as odd as puzzlement at the fact that circles are circular. The question needs repair. Possibly it means: (a) Are any laws norms? or (b) How do things become legal norms? or (c) Do moral norms require that we guide our conduct by legal norms? Historically, there have been many treatments of (a), (b), and (c) but, as far as I know, no one before the present era ever asked, 'How do we explain the normativity of law?' (Not even Kelsen. His questions are (a) and (b): *Pure Theory of Law*, s.4).

defects of all supposed justifications for criminal punishment are now legendary.[40] Some therefore conclude that punishment cannot be justified at all. But if state punishment is unjustified, then its imposition on offenders is itself as serious a wrong as theft, kidnapping or, in the case of execution, murder. In fact, it is worse, for the legal officials who deliberately inflict such evils do so systematically, on an immense scale, and from positions of personal and political privilege. Yet on the sceptics' case, the prosecutors, judges, jailers, and executioners who coolly and bureaucratically afflict so many should not be punished either. Could it be true that, while *offenders* should never be punished, *offender-punishers* must be? At this point, backsliding becomes all but inevitable: maybe criminal punishment is, after all, justifiable? And round we go.

The problem of punishment feels (to me) intractable. If I am right, why spend time on it except to check our work? Perhaps this is a case where we should follow Dennett's advice to 'break[ ] old habits and traditions of asking.'[41] But having broken them, what should we do next? We could, I suppose, break our tradition of asking whether punishment can be justified by replacing it with a genealogical question: 'What are the origins of our punitive impulses?' Maybe that question can be answered. It may bear on our original question if their etiology undermines any claim of such impulses to respect or satisfaction (for example, if they involve false, ideological, or self-undermining beliefs). If the etiology has no further upshot or relevance, however, changing the topic in that way cannot quell our original anxiety. And that anxiety is not going away any more than are our punitive practices themselves. We are left with the problem of punishment, and nary a solution in sight.

When there is no convincing solution to a jurisprudential question, we may be tempted to ask a different question instead, one that we *can* answer. There are certainly cases in which that is the proper response.[42] But sometimes that is more like continually losing at chess and therefore deciding to play noughts-and-crosses instead. There is a better approach to this predicament. Instead of supposing we succeed only when we find a solution, we should look to the problems themselves. A *problem-oriented* jurisprudence allows for the significance of theoretical problems independent of our ability to solve them. On this view, we address such problems to find value in engaging with them, and in reflecting on the fact that the ordinary life of the law throws up problems like these. The problem of punishment teaches us that the conflict between morality and our punitive impulses is intransigent. No justificatory argument has the power to control

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[40] On the defects of the familiar justifications and hybrids thereof, see Ted Honderich, *Punishment: The Supposed Justifications* (Harmondsworth: Penguin, 1979) and David Boonin, *The Problem of Punishment* (Cambridge University Press, 2008).

[41] See note 37, above.

[42] See note 39 above. Another example: 'What explains the fact that everyone has a prima facie moral obligation to obey the laws of their own jurisdiction?' There is no good answer to that question because there is no such obligation—nor do people generally believe that there is. We should instead ask: 'Under what conditions and how far does law create any moral obligations to obey it?' See Leslie Green, 'Who Believes in Political Obligation?' in *The Duty to Obey the Law* (W. Edmundson, ed., Totowa, NJ: Rowman and Littlefield, 1999) 301-17.

those impulses; no natural history of them undermines the claims of morality. Moreover, criminal punishment is unlike philosophers' made-up 'trolley problems' or 'exploding goldfinches.' The law deliberately and continually destroys people's life prospects (and often those of their innocent families as well). Can we do such things in a spirit of winking irony—knowing we lack any justification yet going ahead anyway—and then restrict our theory of law to the problems that we *can* solve?

More compelling here is Thomas Nagel's suggestion that we should continue to labour on intractable problems in philosophy where,

> such insight as we can achieve depends on maintaining a strong grasp of the problem instead of abandoning it, and coming to understand the failure of each new attempt at a solution, and of earlier attempts. (That is why we study the works of Plato and Berkeley, whose views are accepted by no one).[43]

Perhaps we could have reached that conclusion by working through a broad enough sample of contemporary works. However, the fact that *so many* philosophers have struggled with these questions over *so much* time, and in *such a variety* of social and intellectual contexts, supports an inference to the explanation that these problems are intractable. An optimist who read nothing published before 1961 might suppose it is still 'early days' for jurisprudence and predict that a satisfying theory (of everything?) is just around the corner. No one seriously engaged with the past of jurisprudence could think that.

We do not study Plato or Berkeley—or Aquinas or Kelsen—only to learn from their insights or avoid their errors. We also study them to understand how their ideas respond to persistent human concerns, among them concerns about law that irresistibly attract our attention and leave a mark on our cultures, even when we find no compelling solution to the problems they disclose. The value of jurisprudence is to be found not just in the destination but also in the voyage. And sometimes there is only the voyage.

7. Engagement and judgment

In sum, neither the past of law nor the past of jurisprudence is likely to present test cases for legal theory that cannot be found in the present. Despite worries about relativism or anachronism, the past of jurisprudence may be a resource for current philosophical questions about law. It may prompt solutions that we have missed or misunderstood. It may prompt us to clarify or repair questions handed down in bad or misleading form. When we do engage the past of jurisprudence, however, we encounter some problems that do not respond to reasoning or repair: they are intractable. Here, we should trust the teachings of the problems over anyone's purported solution to them,

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[43] Thomas Nagel, *Mortal Questions* (Cambridge University Press 1979), xii.

and in doing so recognize the value to be found in struggling with them, and in struggling with the similar struggles of past legal theorists.

This is not defeatist. The fact that there are intractable problems in the philosophy of law is a substantive conclusion supported by the subject's history. It is progress to acknowledge it and valuable to work in light of it. And I do mean work. While we might be able to get all we need from an empirical finding or a formal result by reading someone else's report of it—checking the results if necessary—the value in problem-oriented jurisprudence requires actual engagement with its problems. The sort of engagement that is called for is judgmental, and that is a fundamental difference between jurisprudence and histories of jurisprudential ideas. Yes, there is no purely 'objective' history; every narrative is selective and evaluative; every one expresses some point of view. But jurisprudence goes miles beyond that. It also asks whether conceptual claims are correct and whether moral claims are valid. One could write a brilliant history of criminal punishment in England without ever asking, never mind trying to answer, the question, 'Was any of that justified?' Nor is an historian likely to spend more than a prefatory page on questions like, 'What is punishment?' Jurisprudents write books about things like that.

Philosophical engagement with its past is value-laden but it is also judgmental. Judgment is engaged right from the outset, when we decide which problems merit consideration. It becomes more exigent when we decide which treatments of a problem merit study and again if we need to decide which ones to teach or publish.[44] All of this now takes place against a constant current of presentism. To row upstream, we must train hard with the past of jurisprudence (and teach students to do the same). There are ideas, arguments, and conclusions that are lost without engagement: this is an upshot of contingencies in the development of jurisprudential thought, together with the fact that some problems are intractable. The work of jurisprudence is never complete. New circumstances and new bodies of law give rise to new questions, but some of the most important questions are ones that have been with us for a very long time, and are likely to remain.[45]

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[44] Even an edited collection expresses judgment—through its selections, obviously, but also through their arrangement. Introductory anthologies often present materials chronologically, thereby intimating that (say) Aquinas is at the beginning of an ordered sequence of inquiry that ends with some recent paper on 'transnational' or 'post-colonial' jurisprudence. It would be a courageous student who began by supposing that the works near the beginning of such a collection might be just as important as any at the end.

[45] I thank Tom Adams, Julie Dickson, Allan Hutchinson, and Craig Scott for criticisms of earlier drafts of this paper.