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Law, Justice and Public Philosophy**

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Abstract

This paper offers an account of two political traditions. The first tradition is that of allegiance to abstract principles and procedures; the second is that of responsiveness to the needs of persons and communities. The first two parts of the paper describe some of the basic features of each tradition, while also paying attention to the problems and difficulties within them. The third part of the paper shows how we can see the same tension, i.e., between allegiance and responsiveness, at play in the practice of public philosophy. The paper argues for the importance of maintaining a tension between the two traditions. Ultimately, the paper calls for more attention to be paid to the relationship between, on the one hand, how we understand law and pursue justice, and, on the other, how we practice public philosophy.

Keywords

Law, Justice, Public Philosophy, Tradition, Needs, Responsiveness

Introduction

If we were to trace the history of international law from nineteenth century positivism to the burgeoning of human rights and jus cogens norms ever since the Second World War, we would be witness to one of the great tensions in the government of and by peoples, i.e., the tension between allegiance to abstract principles and procedures on the one hand, and responsiveness to the needs of persons and communities on the other.

Part of what we would notice, in this imaginary history, is that even where such principles and procedures may have arisen, initially, in response to disasters and catastrophes – their further urgency renewed with everyday stories of suffering and vulnerability – with time, the usual run of problems that accompanies the faith placed in these procedures and principles soon begins to dominate. The most vexing of these problems can most probably be traced back to their limitations in enabling us to foresee or control the possibilities of future

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circumstances, and to the short reach of their universalistic ambitions. Almost inexorably, then, reliance on and the popularity of abstract principles and procedures (such as is the case, increasingly, with human rights and jus cogens norms) leads to ever more abstract principles and procedures, e.g., for interpretation, for the construction of exceptions, or for the resolution of conflicts.

Sometimes, we attempt to address the limitations of principles and procedures with institutional innovations, e.g., we argue, as does Seyla Benhabib, for legal cosmopolitanism, which is designed, via the interpretative authority given to local courts, to introduce some institutional responsiveness into the universalist ambitions of human rights.¹ Indeed, it could be argued that some of the biggest challenges and issues currently confronting theorists and governments arise from the momentum behind the new natural law, expressed in the form of human rights and jus cogens norms. The more abstract content we give to these norms, and the greater universalism we attempt to ascribe to them, the less, it seems, they are able to help us to see and meet the needs of an intensely diverse world (potentially resulting in their being seen as illegitimate, and thereby risking becoming normatively powerless); and the less content we give, and the more cosmopolitan we strive to be, the more we worry that we shall fail in our attempt to rein in the excesses of power, and thus fail to protect those most vulnerable. There is, in all of this, a constant tension, as noted above, between allegiance and responsiveness.

This paper is not, however, the occasion for a respectfully subtle history of international law (as seen through the lens of this tension); nor is it the occasion for an analysis of the contemporary challenges thrown up by the growing reliance on human rights and reference to jus cogens norms (and the inroads they arguably continue to make into, for example, the principle, and associated procedures, of state consent).² Rather, the aim of this

¹ See, e.g., S. Benhabib, *Another Cosmopolitanism* (Oxford: Oxford University Press, 2006).

² The rise of the individual in international law is but one rubric under which such inroads can be described.

paper is much more modest: it is to stand back and offer a first account of some of the motivations that lie behind, and the values (including those relevant to professional and academic status and livelihood) at stake in, the advocacy of either allegiance or responsiveness.

If we see the advocacy of both allegiance and responsiveness as political traditions – as this paper urges us to do – then we will also see, fittingly, that even within each tradition, there is much disagreement. That disagreement, in turn, may be disagreement that we can understand, strikingly enough, on the basis of the same tension, i.e., the tension between allegiance and responsiveness. In other words, at each level of disagreement – whether within or between the two political traditions presented here – the tension between allegiance and responsiveness continues to flourish. This disagreement is not, however, a bad thing. On the contrary, we would be much worse without it. The danger, then, that this paper wishes to emphasise, is precisely in the other direction: that the debate will cease and that we shall settle on one or the other. In other words, it is vital that the two orientations (allegiance and responsiveness) keep each other in check. But for them to keep each other in check, each must recognise the existence of the other. And, in order for that to occur, we may need to revise our practice of public philosophy (a theme that is returned to in the third part of this paper). In other words, the fate of law and justice in the twenty-first century is at once the fate of public philosophy.

One final preliminary matter must be mentioned. The two political traditions mentioned here may be said to be underwritten by different explanatory tendencies, i.e., tendencies in the explanation of human behaviour. Although a full portrait is outside the scope of this paper, one could associate the tendencies accompanying the advocacy of allegiance with explanatory priority being given to the status and function of normative requirements, such as already posited rules or theoretically identified norms (i.e., differently

put, abstract principles and procedures), in the guidance of behaviour, itself conceptualised from the first-person ex-ante perspective, and predominantly self-conscious and deliberative. These kinds of explanatory tendencies can be contrasted with those which may be aligned to that of the political tradition of responsiveness, namely the giving of explanatory priority to common activities (e.g., common ways of doing and seeing), which may be said to be acquired, over long periods of time, in certain spatio-temporally specific contexts (such as institutions or families in certain polities at certain times), and exercised in common with others (the third-person perspective) and without much self-conscious awareness, though not in such a way as to exclude potential critical reflection (the post-factum perspective).

Future work would need to show whether the combination of these explanatory tendencies with value orientations could help us provide an alternative history of legal, political and social philosophy.³ It is, however, worthwhile noting these tendencies if only in order to point to the fact that both political traditions can be understood to be supported by a complex of methodological and explanatory tendencies (which require much further investigation). It is time now to turn to the task of revealing some of the guts and gusts of both political traditions.

Allegiance

Jeremy Bentham famously defined law ‘as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power.’⁴ Although Bentham’s location of the source of the ‘assemblage of signs’ in ‘the sovereign in a state’ has, in more recent times, been much

³ To say this is not to say there is a neat division of labour between them (on the contrary, this paper attempts to eschew such divides by using the term ‘public philosophy’).

⁴ J. Bentham, *Of Laws in General* (London: Athlone Press, ed. H.L.A. Hart, 1970) 1.

criticised (particular from the perspective of legal pluralism), the very idea of there being a source from which valid laws are yielded has remained largely intact; similarly so with the political ambitions expressed by Bentham.

Bentham, as is well known, was highly critical of what he saw as the unrestrained, unaccountable and ultimately corrupt power wielded by common law judges. He sought, by reform consisting in universal codification – based, furthermore, on utilitarian principles – to curb, and perhaps even eradicate, that power. A particularly strong statement of his position is available from his response to a charge delivered on the 19th of November 1792, to a Middlesex Grand Jury, by Sir William Ashhurst, then a Puisne Judge of the King’s Bench. The title of Bentham’s paper, already indicative of the tone, was ‘Truth versus Ashhurst, or, law as it is contrasted with what it is said to be.’⁵ The paper was a response to a series of quotations from Ashhurst’s speech. The first of these was that ‘No man is so low as not to be within the law’s protection’, a proposition that Bentham ridiculed by pointing out that ‘Ninety-nine men out of a hundred are thus low’, for want of the extortionate sums required to ‘take his chance for justice’, i.e., to access the court.⁶ ‘How many causes,’ said Bentham, ‘out of each of which Mr Justice Somebody has been getting in fees, while this speech of Mr Justice Ashhurst’s has been printing, more in amount than many a poor family has to live upon weeks!’⁷ And how could it be otherwise, he asked: ‘How should the law be otherwise than dear, when those who pocket the money have had the setting of the price?’⁸ Not only was there a problem – no less so pronounced in contemporary times – with access to justice, but there was also a justice-tax imposed on citizens, upon which Bentham comments: ‘He’,

⁵ J. Bentham, ‘Truth versus Ashhurst, or, law as it is contrasted with what it is said to be’ in *The Works of Jeremy Bentham*, Vol. V (Edinburgh: Tait, 1843) 231-237. The paper was written in 1792 but not published, for the first time, till 1823.

⁶ *Ibid.*, 233.

⁷ *Id.*

⁸ *Id.*

referring to King George, ‘denies it’, meaning justice, ‘to ninety-nine men out of a hundred, and sells it to the hundredth.’⁹

Bentham’s criticism of the treatment of the common people by law and its institutions was relentless. ‘The lies and nonsense’ that ‘the law is stuffed with’, he said, ‘form so thick a mist, that a plain man, nay, even a man of sense and learning, who is not in the trade, can see neither through nor into it.’¹⁰ It is no surprise, then, that when Ashhurst asserted that ‘Every man has the means of knowing all the laws he is bound by’, Bentham declared to the contrary, ‘Scarce any man has the means of knowing a twentieth part of the law he is bound by’¹¹ – not merely that of the common law ‘by its very essence’, but also that of statute law ‘by its very bulk.’¹² In a particularly strongly-worded passage Bentham says:

It is the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way to make laws for your dog: and this is the way the judges make law for you and me. They won’t tell a man beforehand what it is he should not do – they won’t so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then hang him for it.¹³

As is well known, Bentham was particularly critical of an absence of codification of criminal law. He complained, then, that, just as a hundred years previously (in the 17th century), when there was ‘no statute law to tell us what is, or what is not, theft; no more is there to this day: and so it is with murder and libel, and a thousand other things; particularly the things that are of most importance.’¹⁴ And in making this complaint, Bentham asserted he was but echoing ‘that great Lord Coke’, who had said that ‘miserable is the slavery of that people among whom the law is either unsettled or unknown.’¹⁵

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Ibid.*, 235.

¹² *Id.*

¹³ *Id.*

¹⁴ *Ibid.*, 236.

¹⁵ *Id.*

Bentham's complaint with his times, linked to his pursuit of a definition of law along the lines quoted above (i.e., as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state), contains at least two features that we can recognise in contemporary legal theory: first, that of the impact of a lack of codification on the life of the citizenry; and second, that of the impact of a lack of codification on the behaviour of officials.

Under the first heading, it has been argued that 'what the rule of law required was that all citizens be able to know in advance what the law demanded of them, so that they could plan their lives to avoid legal sanctions.'¹⁶ For the law to do this, it is thought, 'it must not be arbitrary or uncertain or variable. It must be a clear and consistent system of public rules with predictable outcomes. It must be a rational order.'¹⁷ The second feature has received even more – one might even say, a good deal more – attention in legal theory since Bentham. The orthodox view is that 'the rule of law meant that judges must not inject their own moral and political viewpoints into their decisions.'¹⁸ Rather, 'they must simply apply the already existing rules in a neutral fashion', which meant 'that the law had to be a system of comprehensive rules which could be applied to different fact situations in a logical fashion which would produce a uniform result regardless of the judge deciding the case.'¹⁹ Again, as with the life of the citizenry under a legal system, 'the law had to be a rational order.'²⁰

Both features have been taken up by Neil MacCormick, Tom Campbell, and others, arguing for the ethics of legalism, ethical positivism, or making a moralistic case for a-moralistic law.²¹ MacCormick, for example, has argued that a Rule of Law without rules of

¹⁶ M. Robertson, 'Telling the Law's Two Stories' (2007) 20(2) *Canadian Journal of Law and Jurisprudence* 429-45, 431.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ See, N. MacCormick, *Rhetoric and the Rule of Law* (Oxford: Oxford University Press 2005) and N. MacCormick, 'A Moralistic Case for A-Moralistic Law' (1985) 20 *Valparaiso Law Review* 1-45; and T. Campbell, *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth 1996).

law is impossible.²² These rules may take the ‘form of provisions in treaties or on constitutional texts or in acts of legislation or in judicial precedents.’²³ Where the state is not governed ‘according to pre-announced rules that are clear and intelligible in themselves’ then we risk, says MacCormick, placing in jeopardy ‘reasonable predictability in one’s life and reasonable protection from arbitrary interventions either by public officials or by private citizens.’²⁴

These views are no doubt anything but new. Michael Robertson writes that ‘in ancient Greece and Rome, and also in the medieval period in the West, there were persistent attempts to use the law to prevent tyranny by kings and emperors.’²⁵ Others have provided historical illustrations of the rule of law as a bulwark against totalitarianism, absolutism and other manifestations of unbridled power.²⁶ Given all this, then, it is somewhat ironic that some of those who have taken issue with such arguments, as shall be explored presently, have done so on the basis that the rule of law is an ideology designed to protect and further increase the power of the already powerful.

Peter Goodrich is a prominent example of this critical view. Goodrich takes issue, in the first instance, with the understanding of language he believes underlies views such as those of Bentham, MacCormick and Campbell. To understand law, he says, we cannot remain within the ‘positivistic view that law is an internally defined ‘system’ of notional meanings or legal values, that it is a technical language and is by and large, unproblematically, univocal in its application.’²⁷ Goodrich argues that in both traditional linguistics and conventional jurisprudence ‘it is the abstract imperatives of a notional system that forms of the object of synchronic (static) scientific study’, which ignores ‘actual meaning, actual usage and the

²² MacCormick 2005, n 21 above, 12.

²³ *Id.*

²⁴ *Id.*

²⁵ Robertson, n 16 above, 430.

²⁶ For a recent overview, see P. Costa, and D. Zolo, *The Rule of Law: History, Theory and Criticism* (Dordrecht: Springer, 2007).

²⁷ P. Goodrich, ‘Law and Language: An Historical and Critical Introduction’ (1984) 11(2) *Journal of Law & Society* 173-206, 173.

diachronic (historical) dimension.²⁸ Goodrich looks back with some nostalgia to the rhetorical tradition. He laments that, over time, the tradition of rhetoric declined as it was made subordinate to logic.²⁹ Meaning, under this logical conception of language, ‘came to be conceived...as given or monolithic.’³⁰ As Michel Foucault, one of Goodrich’s heroes, put it, in typically poetic fashion: ‘The day dawned when truth moved over from the ritualised act – potent and just – of enunciation, to settle on what was enunciated itself: its meaning, its form, its object and its relation to what it referred to.’³¹

Goodrich argues that this ‘analysis of law as a unitary, formal language’ is made in political bad faith. Not only, he says, did the view of law as a written code allow for the development of a ‘an elitist, revelatory or hierophantic, culture of interpretation’,³² to the effect, he argues, of ‘safeguarding and preserving the sanctity and general impenetrability of the written word as a system of social control’,³³ but it also implied that that written word of the law emanated from ‘a source, an authority or singular authorship that originally sets out the meaning and whose ‘will’ may be analytically or exegetically recovered.’³⁴

To be fair, Goodrich’s target in these criticisms is Hans Kelsen. For Kelsen, as Goodrich cites him, ‘the law is an order, and therefore all legal problems must be set and solved as order problems. In this way legal theory becomes an exact structural analysis of positive law, free of all ethical-political value judgements.’³⁵ Legal science is to study the law in its systematic context, as a grammar and hierarchy of norms, as a structure, as a logical, internally defined, normative unity.³⁶ Such a view is about as antithetical to Goodrich’s own as is possible. Goodrich argues that the ‘study of both linguistic and legal structure as systems

²⁸ *Ibid.*, 174.

²⁹ *Ibid.*, 177.

³⁰ *Id.*

³¹ M. Foucault, ‘Orders of Discourse’ (1971) 10 (2) *Social Science Information* 7-30.

³² Goodrich, n 27 above, 178.

³³ *Id.*

³⁴ *Ibid.*, 177.

³⁵ Kelsen, quoted *Ibid.*, 180.

³⁶ *Id.*

or codes,’ which ‘carries with it the attraction of clarity and abstract verifiability in terms of propositional logic and presupposition’, is a form of ‘crude, early semiotics’, that exists to provide ‘a descriptive overview of linguistic and legal rationality and certainty which is not only comforting to those within the legal institution who have a professional interest in the belief or mythology of legal determinacy, but also the intuitive appeal of describing “the common sense position prevalent amongst most lawyers, judges and legal scholars today.”’³⁷

Following on from the sociolinguistics of theorists such as V.N. Volosinov, who emphasised the ‘functional and material concepts of language use’, what we ought to do, argues Goodrich, is to move the object of the study of language ‘from system to practice, from potential meaning to the determination and realisation of meaning within the concrete and hierarchical organisational forms of social interaction.’³⁸ What we ought to study, says Goodrich, is the ‘appropriation and institutionalisation of meaning and discourse, the process of selection whereby a particular set of socially oriented interests and usages gain control of a discourse and define the social accenting and paradigm forms of meaning that are to prevail and to win credibility.’³⁹ We ought to ask: ‘Who is speaking? Who has the right to speak? Who is qualified to do so? Who derives from it their own special quality, their prestige, and from whom, in return, do they receive assurance, at least the presumption that what they say is true? What is the status of the individuals who – alone – have the right sanctioned by law or tradition, juridically defined or spontaneously accepted, to proffer such a discourse?’⁴⁰

There are a number of things at stake in Goodrich’s critique. One is the alleged conservatism of legal scholarship as modelled on Kelsenian legal science: this shall be returned to below. Another is disagreement over the best means of constraining the power of officials: one view takes it that pre-articulated rules of considerable clarity and precision

³⁷ *Ibid.*, 181; the quote is from Michael Moore.

³⁸ *Ibid.*, 184.

³⁹ *Ibid.*, 185.

⁴⁰ *Id.*

make it more difficult for officials to abuse the power granted to them by the task they are required to perform; the other takes that very same clarity and precision to be a mirage, which only creates an illusion of impartiality and neutrality, making it all the more difficult to criticise the exercise of power by officials, and serving thus only to maintain the status quo. This disagreement is indeed a neat illustration of the difficulties at play here. On the one hand, much faith is invested in the autonomy of an ordered set of articulated norms or rules to constrain the power wielded by officials. The alternative – as described by Bentham, i.e., of unaccountable and corrupt judges – is seen to be the enemy. For the Goodrich-like view, on the other hand, the enemy is the alleged dishonesty of the orthodox view, said to consist in the inability or unwillingness of the proponents of the orthodox view to recognise that misuses of power cannot be avoided by clear and precise language alone. The orthodox response most commonly asserted to this is that it is true that the existence of such clear and precise language does not guarantee misuse of power, but that it at least minimises it, and is also the best method for minimising it. The rebuke to that, in turn, is that it ignores the role of other kinds of influences on action, much more powerful than language, including, perhaps primarily, self-interest. The debate, in the perhaps inevitable absence of any conclusive empirical evidence, continues. What is common to it, however (for Goodrich and Kelsen alike), is that continues to coalesce around the benefits and drawbacks associated with allegiance to abstract principles and procedures.

The charge against legal science, mentioned above, ought to be understood against a broader historical background. As noted by Mark Van Hoecke and Francois Ost:

The emergence in the 19th century of the general theory of law can be explained by the deep-seated crisis in the science of law in Continental Europe at that time. Before the major codifications, legal scholars were faced with a considerable scientific and creative task. The sources of law were many and varied unsystematic and difficult to find, consisting as they did of customary law which differed considerably from region to region, of a limited body of legislation and learned Roman law that was taught in

the universities. The creative work consisted in development and systematisation, principally of customary law, with the aid of Roman law.⁴¹

At play may also have been the desire, brought on in the spirit of the Enlightenment, to prove and reveal ‘the power of human reason to discern the basic principles underlying both the natural world and human societies.’⁴² As Hoecke and Ost note in that respect:

As a theory, legal science constitutes a collection of systematically linked-up propositions. It involves the application of a consistent methodology and obtaining knowledge which is communicative and capable, if not of verification, at least of rational agreement. Whatever the scientific criteria used, scientific discourse sets out to rationalise the phenomena studied by reducing them, if not to uniformity, at least to order.⁴³

On a charitable view, such desire for the triumph of rationality may be said to be motivated by an attempt to liberate the governance of societies – particularly in Europe – from religion. After all, Europe had had plenty of experience of the intolerance of institutionalised religion. But the Goodrich arguments continue to haunt these kinds of explanations: was ‘Continental legal dogmatics’ influenced more by ‘the belief in the sovereignty and rationality of the legislator’,⁴⁴ and in that respect, was but a servant of absolute power? Or, was it more self-serving than that, for the belief – one could say, assumption, of the sovereignty and rationality of the legislator, ‘allows giving positive responses concerning the intelligibility and validity of norms claimed to be part of the law’⁴⁵ and thus gives legal scholars (and only them) something important to do, guaranteeing their livelihood?

There are contemporary voices in agreement with Goodrich. Reza Banakar, for example, claims that assertions concerning the securing by law of the neutrality of adjudication, the safeguarding of expectations by the law, the expression of ideals and values within the law, and other such tasks – which, says, Banakar, secure the law’s support of the

⁴¹ M. Hoecke and F. Ost, ‘Epistemological Perspectives in Legal Theory’ (1993) 6(1) *Ratio Juris* 30-47, 31.

⁴² Robertson, n 16 above, 430.

⁴³ Hoecke and Ost, note 41 above, 37.

⁴⁴ *Ibid.*, 40.

⁴⁵ *Id.*

state, which is in turn dependent on the law for its legitimacy⁴⁶ – are qualities of the law that ‘tell us more about how the law, as a professional body, legitimises itself and secures its domination, than the role it plays in society in actual fact.’⁴⁷ Here is a fuller and clearer account of Banakar’s picture:

The strength of the law is geared to its ability...to present itself as a professional body, which organises itself around a rigorous code of ethics regulating the activities of its members, who use their expert knowledge to provide vital public services. To secure and enhance its professional standing, the law often presents itself from the vantage point of its ‘high priests’, that is, primarily as a formal body of rules and principles, which prescribes rights and duties, and which is applied with impartiality to given facts in the courtroom. Such a description places the law beyond the direct reach of the laity and strengthens its position among other disciplines and forms of knowledge. According to this view, the centre of gravity of the legal system rests on an esoteric body of knowledge, primarily of substantive character, which requires considerable exegetical skills of interpretation. Law becomes essentially concerned with interpretation of acts and case readings, expounding legal doctrines, and constitutes itself through textual manifestations of legal decisions, judgements, and opinions.⁴⁸

It is a view in close sympathy with Goodrich’s. It could, for example, be Goodrich speaking when Banakar says that ‘the unified vision of the law emerges as sections of the legal profession speak on their own corporate behalf to ensure its monopoly of knowledge.’⁴⁹ It is also a highly sceptical view, according to which nothing is as it seems, and where all attempts at self-regulation are but further increases in power.

Those more positively disposed to the so-called ‘unified vision of the law’ have not remained silent. As MacCormick has noted, with respect to the specific debate over the intelligibility and appropriateness of the practice of rational reconstruction, the disagreement is largely about the political effects of ‘the act of propounding legal doctrine of the traditional or mainstream type.’⁵⁰ For MacCormick, however, the effects that ought to be paid attention to are the effects on the treatment of citizens by officials. ‘The rule of law’, he says, ‘can yet

⁴⁶ R. Banakar, ‘Reflections on the Methodological Issues of the Sociology of Law’ (2000) 27 (2) *Journal of Law and Society* 273-952, 281.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Ibid.*, 283.

⁵⁰ N. MacCormick, ‘The Ethics of Legalism’ (1989) 2(2) *Ratio Juris* 184-93, 191.

make a real difference for the better where it hedges official action against alleged wrongdoers and judicial moralising over unprohibited ill-doing.⁵¹ Legal certainty and clarity, being the features of the rule of law, ‘are systematic virtues which certain approaches’ to legal scholarship ‘can help generate.’⁵² ‘Reconstructions of law which are its rational reconstructions generate in a high degree’, says MacCormick, ‘law with these virtues.’⁵³

But MacCormick’s response, it must be said, is made in a different time, i.e., in the late twentieth century, when the viability of legal scholarship as rational reconstruction is reasonably secure. One example from another time – to which Goodrich and a good deal of Critical Legal Studies (‘CLS’) in the United States may be reacting to – is that of Christopher Columbus Langdell’s insistence on the case method. Langdell, says Robertson, ‘was attracted to the picture of law as a rational, consistent and ordered system, but he did not agree’ with Bentham ‘that this could only be achieved by new statutory codes.’⁵⁴ According to Robertson, ‘Langdell claimed that the common law already contained such a system, and it was the task of the legal scientist to distil from the empirical data of the reported cases the legal principles which revealed which decisions were correctly decided and which were not.’⁵⁵ Langdell’s argument for rational reconstruction is very much at odds with the one offered by MacCormick. MacCormick argues, against the CLS charge, that the unified vision of law, rational reconstructed, ‘should not be presented as a predetermined necessity which exists wholly independently of the descriptive science. Perhaps even more than usually, here is indeed a science which constitutes its own object.’⁵⁶ Langdell may well have overstated the mark. According to Wai Chee Dimock, in promoting the case method, Langdell wanted the law to be made ‘into a science – a logical enterprise, a combination of induction and

⁵¹ *Id.*

⁵² *Ibid.*, 192.

⁵³ *Id.*

⁵⁴ Robertson, n 16 above, 431.

⁵⁵ *Id.*

⁵⁶ MacCormick, n 50 above, 189.

deduction – laying claim to just that generalisability and predictability properly attributed to it. Like science, law was to proceed, inductively, from observable phenomena to fundamental principles to more observable phenomena.⁵⁷ And, crucially, what was at stake in claiming law as a science – in the context of an America smitten by technological advances – ‘was nothing less than the identity of the legal profession... Either law was to be a craft, reproduced through an apprentice system; or it was to be a branch of learning, in which case it could only be reproduced through books, reproduced at places where books were abundantly collected.’⁵⁸ Were the status of legal scholarship not accepted as science – were a conception of law be adopted that did not allow for that status – then law would not, as Langdell hoped, be the ‘province of the university.’⁵⁹ And, Goodrich might add, if that were to be the case, Langdell would, presumably, be out of a job.

Of course, we cannot know with what motivations – either to curb official power, or to selfishly maintain monopoly over legal knowledge, or indeed some combination of both, or perhaps something else altogether – may explain the emergence and continued dominance of rational reconstruction in legal scholarship and the associated vision of law as a rational and consistent order of articulated rules or norms that are said to allow for reasonable predictability in the life of the citizenry and that allegedly enable the control and scrutiny of officials. The point of the discussion was not to evaluate such explanations, but, rather, to point to some aspects of the political tradition of allegiance.

In summary, we can say that allegiance-oriented theorists will tend to:

- represent and value the ability of systems or orders of normative requirements to control or constrain the actions of officials; and

⁵⁷ WC Dimock, ‘Rules of Law, Laws of Science’ (2001) *Yale Journal of Law & the Humanities* 203-225, 205.

⁵⁸ *Ibid.*, 207.

⁵⁹ *Id.*

- emphasise the importance of governance from above, believing that social order is best maintained via the function that normative requirements, imposed by an authoritative source, play as reasons for action in the deliberation of the citizenry.

The above discussion has also pointed to the difficulties associated with maintaining these orientations, e.g., we saw that this orientation contains within it a certain understanding of language (as, according to some, more static and autonomous than is the case).⁶⁰ Further, we saw that the capacity of abstract principles and procedures to guide and constrain behaviour (whether official or otherwise) can be placed in doubt. The second difficulty can be further illuminated by reference to a distinction made by Michael Giudice between norm-subjects and norm-subjecteds. The latter are made subject to normative requirements, but without possessing the kind of knowledge that would be required in order for them to be norm-subjects, i.e., persons guided by those requirements such that those requirements can function as reasons for their action. Persons may not possess such knowledge when the normative requirements in question are too complex or too vague, or where there is simply too many of them to keep up with them (hence, one might think, the need for lawyers).⁶¹

However, to reiterate, this paper is not the occasion for an evaluation of the two political traditions – the aim, rather, is to offer a basic sense of the motivations behind and the values at stake in the two traditions (including, above, the motivations behind professional monopoly or academic prestige). Let us turn, now, to the political tradition of responsiveness.

⁶⁰ The debate is far too complex to summarise. A proper account would show that this value orientation tends to favour an understanding of language in which meaning is, at least in the easy cases, said to be guaranteed by the inherent properties of words and phrases (whereas the opposing view is that use, perhaps in accordance with certain forms of life, is too fundamental for any terms or phrases, even in easy cases, to have inherent properties). The debate, in any event, can be understood to consist in disagreement over how much explanatory priority to give to abstractions and representations (and our conscious awareness of them) in human cognition and action.

⁶¹ See M. Giudice, 'Normativity and Norm Subjects' (2005) 30 *Australian Journal of Legal Philosophy* 102-121. What this raises is the entire panoply of debates over the scope of practical reason. This is another illustration of how closely interlinked are the value orientations and explanatory tendencies (in this case, certain ways of conceiving of behaviour, such it can be so guided under certain circumstances) within any political tradition.

Responsiveness

A helpful source of the advocacy of responsiveness comes from the work of Philip Selznick and Philippe Nonet. Indeed, they use the term themselves, referring with approval, in their co-authored work, to what they call ‘responsive law.’⁶² In later work on his own, especially in *The Moral Commonwealth*,⁶³ Selznick further developed the concept of responsiveness, using it more widely than in his work with Nonet. As we shall see throughout, neither Selznick himself, nor Selznick and Nonet, are unaware of the limitations of responsiveness as a political aim, or even as a value of forms of institutional and other social organisation.

Selznick and Nonet argue that the study of ‘the foundations of law’ cannot be divorced from ‘the place we give law in society’ and in that spirit they call for an integration of legal, political and social theory.⁶⁴ In writing their book, they offer their own view for ‘assessing the worth of alternative modes of legal ordering’,⁶⁵ that is, ultimately, for assessing the place of law in society. In setting the scene for responsive law, which they offer as the mode of legal ordering against which the current states of affairs should be evaluated, they criticise two other identifiable modes, namely, repressive law and autonomous law. In the case of the former, they argue that ‘every legal order has a repressive potential because it is always at some point bound to the status quo and, in offering a mantle of authority, makes power more effective.’⁶⁶ Under a repressive form of legal ordering, ‘short shrift’ is given to ‘the interests of those governed’, resulting in their position becoming particularly ‘precarious and vulnerable.’⁶⁷ They acknowledge that to some extent all modes of legal governing are repressive, and that the emergence of that repression depends on many factors including ‘the

⁶² P. Selznick, and P. Nonet, *Law and Society in Transition: Toward Responsive Law* (New York: Transaction Publishers, 2001).

⁶³ P. Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992).

⁶⁴ Selznick and Nonet, n 62 above, 3.

⁶⁵ *Ibid.*, 4.

⁶⁶ *Ibid.*, 29.

⁶⁷ *Ibid.*

distribution of power, patterns of consciousness and much else that is historically contingent.⁶⁸ Nevertheless, there are identifiable forms of avoidable repression, particularly where the use of coercion is unrestrained and results in the suppression of deviance and the putting down of protests.⁶⁹

The emergence of autonomous law, the second alternative mode of legal ordering, assists in ‘taming repression.’⁷⁰ More commonly referred to as the Rule of Law, such taming is made possible when ‘legal institutions acquire enough *independent* authority to impose standards of restraint on the exercise of governmental power.’⁷¹ Such autonomous institutions must themselves have only ‘qualified supremacy’, and be subjected to ‘defined spheres of competence.’⁷² But there is a price, ultimately too high according to the authors, for the preservation of this kind of institutional integrity. Sharp lines are drawn between politics and law and, thus also, between the legislative and judicial function.⁷³ The legal order is understood as a model of legal rules, which does ‘enforce a measure of official accountability’, but also ‘limits...the creativity of legal institutions.’⁷⁴ Regularity and fairness, rather than substantive justice, become ‘the first ends and the main competence of the legal order.’⁷⁵ Finally, ‘fidelity to law’ is ‘understood as strict obedience to the rules of positive law.’⁷⁶

Thankfully, however, according to the authors, the autonomous mode of legal ordering contains within it the seed for the development of responsive law. Where law is responsive to social needs, it is ‘competent as well as fair’, it helps to ‘define the public interest’ and it is

⁶⁸ *Ibid.*, 30.

⁶⁹ *Ibid.*, 31.

⁷⁰ *Ibid.*, 53.

⁷¹ *Ibid.*; original emphasis.

⁷² *Ibid.*

⁷³ *Ibid.*, 54.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

‘committed to the achievement of substantive justice.’⁷⁷ The vision of a responsive legal order is one that takes ‘affirmative responsibility for the problems of society.’⁷⁸ The ideal of responsive law does not entirely replace the warnings of repressing legal ordering and the aims of autonomous law, for it recognises that these levels of development may at times be historically necessary. It does, however, move the ideal beyond them, calling, ultimately, for ‘larger institutional competencies to the quest for justice.’⁷⁹

The movement away or beyond the ideal of the rule of law is a significant one. It has emerged also in other literature, including most recently in a policy movement dubbed ‘the legal empowerment of the poor.’⁸⁰ Stephen Golub’s paper, entitled ‘Beyond the Rule of Law Orthodoxy’⁸¹ provides a neat summary of the basic principles of ‘the legal empowerment alternative.’ By ‘rule of law orthodoxy’ Golub refers to an approach in the international aid field of law and development that ‘focuses too much on law, lawyers and state institutions, and too little on development, the poor and civil society.’⁸² As a ‘top-down, state-centred approach’, it tends to concentrate ‘on law reform and government, particularly judiciaries, to build business friendly systems’, and it is a system ‘most prominently practiced by multilateral development banks.’⁸³ The problem with this approach, says Golub, is not with the ‘economic and political goals, *per se*’, but rather, ‘its questionable assumptions, unproven impact, and’, most relevantly for present purposes, ‘insufficient attention to the legal needs of the disadvantaged.’⁸⁴

⁷⁷ *Ibid.*, 74.

⁷⁸ *Ibid.*, 115.

⁷⁹ *Ibid.*, 116.

⁸⁰ See, the United Nations Commission on the Legal Empowerment of the Poor, www.undp.org/legalempowerment.

⁸¹ S. Golub, ‘Beyond Rule of Law Orthodoxy: the Legal Empowerment Alternative’ (2003) 41 *Rule of Law Series: Democracy and Rule of Law Project*, Carnegie Endowment for International Peace, accessed online at www.carnegieendowment.org/files/wp41.pdf on 11 October 2007.

⁸² *Ibid.*, 3.

⁸³ *Id.*

⁸⁴ *Id.*

The alternative approach, i.e., legal empowerment, which Golub describes as ‘more balanced’, focuses on the ‘use of legal services and related development activities to increase disadvantaged populations’ control over their lives.’⁸⁵ It is ‘community-driven’ development, and ‘is grounded in grassroots needs and activities.’⁸⁶ More concretely, there are four further differences. Under the legal empowerment approach: ‘1) attorneys support the poor as partners, instead of dominating them as proprietors of expertise; 2) the disadvantaged play a role in setting priorities, rather than government officials and donor personnel dictating the agenda; 3) addressing these priorities frequently involves nonjudicial strategies that transcend narrow notions of legal systems, justice sectors, and institution building; 4) even more broadly, the use of law is often just part of integrated strategies that include other development activities.’⁸⁷ What is key here is the lack of an anxiety concerning values of the legal order conceived as a discourse – i.e., coherence, consistency, and unity – and anxiety, instead, about the needs of the citizenry, particularly the poorest citizens. Golub does not, however, overstate his case. He argues that it is not his position that ‘rule of law orthodoxy is the wrong path to take under all circumstances; nor is legal empowerment a panacea.’⁸⁸ The two are not mutually exclusive.⁸⁹

Similar modesty is displayed by Selznick in his *The Moral Commonwealth*. As he explains it there, responsiveness invokes the challenge ‘to maintain institutional integrity while taking into account new problems, new forces in the environment, new demands and expectations.’⁹⁰ A responsive institution, in short, ‘avoids insularity without embracing opportunism.’⁹¹ This richer picture of responsiveness recognises that what is required is ‘controlled adaptation’: all institutions must be, to some extent, isolated and inflexible, but

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Ibid.*, 4.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Selznick, n 63 above, 336.

⁹¹ *Id.*

responsiveness demands that this be balanced with openness to the needs of the citizenry. Thus a well-working legislature, for example, is at once open – it registers majority will; it is composed of representatives elected democratically and responsible to the people – but it also has its own ‘moral principles’ which ‘safeguard the deliberative character of legislation.’⁹²

However, not only does Selznick offer a richer account of responsiveness than in previous work with Nonet, he also spends a considerable amount of time bringing out the limitations of the value. The ‘perils of responsiveness’, as he puts it, all centre around one big problem: selectivity. The strategy of responsiveness ‘entails a burden of choice...there is always a need to decide who shall be the privileged beneficiaries of help or forbearance.’⁹³ Selectivity, he reasserts, ‘is the Achilles’ heel of responsiveness’, and it is because of it that ‘what appears to be responsiveness may turn out to be a hidden form of domination or a screen for covert, opportunistic adaptation.’⁹⁴ Selznick provides an illustration, which shall not be dwelt on here, and which he himself has developed at much greater length, concerning the Tennessee Valley Authority (‘TVA’).⁹⁵ The point to make here is a general one: adaptation, spontaneity and openness are the values at the heart of responsiveness, but their limitation is the problem of selection, of not being able to help all simultaneously, and not all to the same degree.

There is another problem, too, not addressed by Selznick, but one alluded to, even if anecdotally, in Ryszard Kapuscinski’s reflections on communism in the USSR. Kapuscinski argues that ‘the system depended on...punctiliousness, on a psychotic control of very detail, an obsessive desire to rule over everything’,⁹⁶ illustrating this obsession with an example of the kind of detail engaged in by Stalin: ‘Transfer’, Stalin ordered, ‘the sewing machine belong

⁹² *Ibid.*, 336-7.

⁹³ *Ibid.*, 338.

⁹⁴ *Id.*

⁹⁵ See, P. Selznick, *TVA and the Grass Roots: A Study in the Sociology of Formal Organization* (Berkeley: University of California Press, 1984).

⁹⁶ R. Kapuscinski, *Imperium*, London: Granta, 1994) 310.

to tailor's shop number 1 to factory number 7.'⁹⁷ On this reading, then, a government can become too 'responsive', too involved in the affairs of everyday life, too intrusive into private affairs, and, even worse, act and justify its actions in the name of the people, believing it is concerned with and addressing their needs. Thus, not only in selectivity a problem for responsiveness, but so is over-responsiveness.

The second of these difficulties points to an important proviso on the advocacy of responsiveness. It is a proviso that can be brought out well by considering Larry May's distinction between the sensitive and the sympathetic person.⁹⁸ The former is characterised by four features: perceptiveness, caring, critical appreciation and strong motivation. The first feature, perceptiveness, is a matter of being vigilant about whether anyone will be hurt or offended by some proposed conduct; the second, caring, requires caring about the well-being of others and acting so as to advance that well-being; the third, critical appreciation, demands that the sensitive person consider 'what is morally relevant about the situation of those who are affected by his behaviour'; and the fourth, motivation, builds in the impetus to act so as to minimise the harms and offences that otherwise might result.⁹⁹ It is the third feature that distinguishes the sensitive person from the sympathetic one, for, according to May, the 'sympathetic person does not typically maintain a critical distance from the suffering of the other, whereas the sensitive person does maintain that critical distance. This is partially due to the fact that sensitivity involves a judgement about the moral legitimacy or worth of the wants or needs of others.'¹⁰⁰ May's example is that of a sensitive father who, although attentive to his son's wants and needs, considers those wants and needs in the context of the son's long-term well-being.

⁹⁷ *Ibid.*, 311.

⁹⁸ L. May, 'Insensitivity and Moral Responsibility' (1992) 26 *The Journal of Value Inquiry* 7-22.

⁹⁹ *Ibid.*, 10, *et passim*.

¹⁰⁰ *Id.*

Responsiveness, then, is not a reflex action, though sometimes it can be.¹⁰¹ It is better conceived of as an exercise of judgement, but with particular attention to the needs of persons and communities, particularly those that tend to be marginalised by current arrangements.¹⁰² Conceived of this way, the advocacy of responsiveness can be noticed in a wide array of works in legal and political philosophy. We may draw on, for example, Alex Honneth's struggle for recognition (where attention is paid, via different modes, i.e., affective, cognitive and intellectual, to a range of objects, including concrete needs, formal autonomy and individual particularity);¹⁰³ and Amartya Sen's and Martha Nussbaum's capabilities approach (where attention is paid to the idiosyncratic capacities of persons and communities to participate fully in, for example, political life).¹⁰⁴ Looking more widely, we can also bring to bear the importance of the ethics of care emphasised by Carol Gilligan,¹⁰⁵ and the role of love in the quest for living lawfully, as expressed by Zenon Bankowski.¹⁰⁶ No doubt, treatments and traces of responsiveness can be found in many other works, and across political orientations.¹⁰⁷

¹⁰¹ A powerful illustration of the moral quality of such reflexes is provided in Raimond Gaita's description of the nun who encountered patients in the mental hospital in such a naturally kind and non-paternalistic way that it put the members of the visiting group (including Gaita, and according to him) to shame; see R. Gaita, *A Common Humanity: Thinking About Love and Truth and Justice* (London: Routledge, 1998) 17-27.

¹⁰² Of course, 'judgement' is itself a problematic term, that can be conceived of in more or less self-conscious ways. The point here, however, is simply to suggest that there is more to responsiveness than only the immediate exercise of empathy (though this can be very important, and is no doubt a necessary, even if insufficient, condition for the exercise of responsiveness).

¹⁰³ See A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Polity Press, tr. J. Anderson, 1995); a diagram of modes and objects of recognition is provided on page 25.

¹⁰⁴ See, for example, Nussbaum's discussion of the capabilities of disabled persons in M. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass.: The Belknap Press, 2007) chapters 2 and 3.

¹⁰⁵ C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982); for a recent treatment in political philosophy, see D. Engster, *The Heart of Justice: A Political Theory of Caring* (Oxford: Oxford University Press, 2007).

¹⁰⁶ Z. Bankowski, *Living Lawfully: Love in Law and Law in Love* (Dordrecht: Kluwer Academic Publishers, 2001). Bankowski's work can be profitably considered alongside that of MacCormick, whose work was noted above with respect to the tradition of allegiance. Both have influenced each other in their thirty-year long camaraderie.

¹⁰⁷ For example, there is a long-standing debate over the appropriate role to be played by particularism in legal and political theory; see Z. Bankowski and J. MacLean (eds.), *The Universal and the Particular in Legal Reasoning* (Dartmouth: Ashgate, 2006).

Keeping in mind the above difficulties and provisos, the political tradition of responsiveness may be summarised in the following orientations:

- the focus on and the valuing of governance from below;
- the emphasis on the fundamental importance of the needs of diverse persons and communities, particularly those marginalised by current arrangements; and
- the belief that social order emerges from, and is also best maintained, when persons govern themselves as much as possible.

Unlike that of allegiance, responsiveness has not been a popular value in legal theory and scholarship. It features more often, as we saw above with the work of Selznick, in the works of social and political theorists. It may be that much of legal theory and scholarship is too smitten by its stock of knowledge of abstract principles and procedures, and too entranced by the associated problems (of interpretation, etc), to engage seriously with, let alone advocate, responsiveness. But there is nothing inherent about legal theory and scholarship that renders it either impossible or even unlikely for responsiveness to be within its radar. On the contrary, as we saw immediately above, one can very coherently hold a responsiveness-oriented view of the nature of law and the aims of justice.

Public Philosophy in a New Key

In his recent magisterial two-volume work, entitled *Public Philosophy in a New Key*, James Tully entreats public philosophers to not only see themselves as fellow citizens (rather than as demi-gods, sitting in judgement over our common life), but also to ‘establish pedagogical relationships of reciprocal elucidation between academic research and the civic activities of fellow citizens.’¹⁰⁸ This paper is not the occasion for a review of Tully’s specific approach, but his entreaty is both relevant and timely. It is so because it is sometimes tempting to forget

¹⁰⁸ J. Tully, *Public Philosophy in a New Key*, 2 Vol. (Cambridge: Cambridge University Press, 2008) 3.

that academic life is as much an example of, and forum for, the tensions that may be said to be at play in the society at large. In that sense, then, the above discussion can also be understood as directed towards the practice of public philosophy. It is to this aspect of the discussion that this part of the paper turns.

Engaged as theorists are in the exploration of possibilities, and the construction of explanations and justifications, it is all too easy to become so involved and caught in elaborating the specific point of view of one's theoretical picture, that one spends one's entire academic life revealing the subtleties and niceties of one's vision, all the while defending one's theoretical fortress from incoming objections. Further, it is also all too easy to fall into the formation of a group or clique, whose members share certain methods, explanatory tendencies and value orientations, and reinforce each other's ways of doing and seeing things – sometimes combining this solidarity with derisive attitudes towards those deemed to fall outside this vision.

It is not difficult to see how the tension between allegiance and responsiveness can be understood to be at play here. Once we undertake the effort to see things in particular ways, and build a theoretical picture, it becomes increasingly difficult – especially with the onset of age and professional responsibilities (the pressure to get grants, to publish, etc) – to look back and recognise the limitations of one's view, and begin anew. To return to the rough ground, and listen again to the distinct formation of ways of life and their challenges in changing times, is extremely difficult. It is much easier, though still very difficult, to return to one's theoretical picture, and keep tweaking the machinery to find solutions to increasingly abstract problems – in other words, to meeting the needs of theoretical pictures themselves. As theorists, then, we become ever more responsive to the values of theoretical consistency, coherence, elegance, simplicity, and so on. In doing so, we risk not having our ear to the ground.

At the same time, it is difficult to see how theorists, as well as theory and academic life in general, could survive without the formation and sedimentation of methods, visions and interests. Just as in social life generally, it is difficult to see how individual theorists could avoid developing common ways of seeing and doing, or resist the tendency for simplifying attention by stabilising expectations in ever more repetitive environments. Whether it be in large or small communities – including in intimate relationships – it is remarkable how quickly human beings come to co-ordinate their efforts by a common terminology (sometimes so technical that it takes years for others to enter the group) and how quickly we converge on common strategies for implementing similar solutions or other forms of the exclusion of complexity.

The point, with respect to this paper, is as follows. We can understand allegiance and responsiveness as another instantiation of tensions that can be brought out in many other ways, e.g., as the tension between repetition and change, consensus and concern, legality and love, justice and care, self-deception and self-examination, universals and particulars, the habitual and the spontaneous, the status quo and radicalism, the tangle of representations and the rough ground of meaningful social relationships, and many others besides. But we ought not to think, as theorists, that these tensions are beyond us; that they are only at play in societies seen from a comfortable distance. They are right here: in us as persons and in our communities of scholarship. Both as human beings, and as scholars, we are constantly faced with challenges thrown up by the imagination of life itself (as long as we can pay attention to it). That imagination asks to reconsider our current stock of schemes and ways of making sense of ourselves, the world and others. Of course, we must rely, to some extent, on all those forms and strategies of stabilisation, agreement and continuity – but the rub is: to what extent? How far can we defend our ways of seeing and doing, and at what point must we say: I need to change? At what point do I need to realise, and act on the realisation, that no matter how

much things seemed to make sense to me, I have been excluding too much, not listening hard enough? At what point must I stop persuading, and begin to learn again?¹⁰⁹

All this may seem far removed from the problems of ‘law and justice.’ It may also seem all too vague, and perhaps even be characterised as unhelpful lionised preaching. That would be an unfortunate way to read the above. The point is that no matter how technical we think our theoretical problems are, at play within those debates are problems, and ways of dealing with them, that are deeply personal. In practicing theory, theorists are not merely engaged in debating our common future: we are also displaying who we are as human beings. In the same way that we, as individuals, can practice allegiance to abstract principles and procedures, or be more or less responsive to the needs of those around us, so societies, great and small, and forms of government, can emphasise one or the other.

Or, as this paper urges, we can keep both in check, i.e., maintain the tension between the need for a home, for familiarity and sameness, and the casting adrift, the leap of faith, required by the bottomless diversity of life itself. There is no single answer as to how we can maintain this tension – neither for us, nor for communities and governments. Perhaps the best we can do is to practice vigilance, which, as Tully shows, is what characterises the most promising models of public philosophy, e.g., of the kind practiced by John Dewey and Hannah Arendt.¹¹⁰

Conclusion

This paper is a first attempt at showing the need for two strands in the practice of theory: first, the need for a socio-historically sensitive picture, informed by a wide range of resources

¹⁰⁹ For a pedagogically oriented account of these two modes of interaction, i.e., persuasion and learning, see RJ. Condlin, ‘Socrates’ New Clothes: Substituting Persuasion for Learning in Clinical Legal Instruction’ (1981) 40 *Maryland Law Review* 223-283.

¹¹⁰ I have discussed this tension, though in different terms, and by reference to different resources, in Z. Bankowski and M. Del Mar, ‘Na Progu (On the Doorstep): From Images of Borders to the Politics and Legality of Identity’ (2009) under review.

(containing methodological and explanatory tendencies and value orientations) in legal, moral, political and social philosophy (called here ‘public philosophy’), of certain tensions at play in both persons and communities, and practices of government (let us call this ‘first-order theory’); and second, the need for awareness and examination of the relationship between that first-order theory, and what we may call the ‘second-order theory’ of the understanding and practice of theory itself (including more generally, the academic life).

As sketchy as it undeniably is, the first two parts of the paper attempted to reveal at least some of the possibilities for an exercise in first-order theory. Already within that exercise, however, we saw signs of the importance of the second strand, namely the relationship between the practice of theory and its objects – we witnessed this, for example, in the relationship between the practice of rational reconstruction in legal scholarship and its alleged ties to the pressure imposed by professional protectionism and the need for establishing academic credentials. But although these socio-historical elements of second-order theory ought to be more properly investigated, it has also been the aim of this paper (particularly in the third part), to note that second-order theory also operates at a much more personal level, i.e., at the level of how we, as human beings, get involved in certain ways of seeing and doing; how we interact with others (including other theorists); and, what we see as a problem and how we deal with it.

Perhaps fittingly, I shall end on a more personal note. Over twenty years ago now, Richard Wasserstrom argued that the professional environment in which lawyers worked had, according to him, very problematic repercussions for the moral quality of lawyers.¹¹¹ He argued that the lawyer’s world is, at best, ‘a simplified moral world; often it is an amoral one; and more than occasionally, perhaps, an overtly immoral one.’¹¹² He argued this on the basis of the kind of encounter with others that the professional environment of the lawyer

¹¹¹ R. Wasserstrom, ‘Lawyers as Professionals: Some Moral Issues’ (1975-6) 5 *Human Rights* 1-24.

¹¹² *Ibid.*, 2.

demanded, principally in the case of the relationship between the lawyer and the client. Lawyers were taught to play a specific role, i.e., one in which the interests of the client were to take precedence over all other interests, such that, according to Wasserstrom, the lawyer was always at risk of becoming ‘an amoral technician whose peculiar skills and knowledge in respect to the law are available to those with whom the relationship of client is established.’¹¹³ Further, and perhaps more originally, Wasserstrom argued that the more lawyers encountered other human beings as clients, the more they became acculturated into relationships of dominance-dependence, where they always took on the position of the former. While the relationship existed, said Wasserstrom, it was not one between two equals, but rather between a professional who was always in control, and a client who was dependent on the professional’s skill or knowledge. The pressing question that Wasserstrom asked, following on from this characterisation, was what effect this form of encounter with others had on the moral quality of the lawyer. If lawyers constantly encountered others in circumstances of inequality, where they always dominated, and if they were taught to play, and went on to master, the role of a technician with no concern for the ends pursued, then what did this form of life do to their moral sensitivity, to their moral quality as persons?

Whether or not we agree with Wasserstrom’s characterisation is, for present purposes, beside the point. More important are the kinds of questions he raises. I am longer a practicing lawyer, but I am now a practicing academic. Wasserstrom’s diagnosis raises the following anxieties for me: what is the moral quality of the academic life? What role am I playing, or have I been playing without realising it? How do I encounter others in that life, and what interests have I been paying attention to and prioritising as a result of my living that life? Finally, and very importantly, what impact does my involvement in that life have on how I understand the challenges facing other individuals and communities worldwide? Whatever

¹¹³ *Ibid.*, 6.

may be the merits of considering these questions from the perspective of a tension between allegiance and responsiveness, it has been the ultimate purpose of this paper to share the pressing (for me) nature of these questions with the readers of this journal.