

On the Centrality of Jurisprudence

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Abstract: Political communities typically organise themselves by an appeal to values. Sometimes the values invoked are abstract ideas such as justice or equality. One such idea is that of law. In many important instances, practices cannot be understood except by reference to the values to which they make an implicit appeal but from which they fall short; and, equally, values cannot be understood except by reference to the practices within which they are imperfectly articulated. This general structure is captured by one strand of Platonic and Aristotelian thought, and is exhibited by the character of philosophy itself. Governance by law establishes a form of human association that is characterised by an orientation towards an idealisation of its own nature. Consequently, jurisprudential reflection upon the nature of law is a necessary and fundamental feature of communities that aspire to governance by law.

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Values and Law

Perhaps human groups may sometimes be governed by the simplest facts of force and violence: crude threats are made and people respond accordingly. In such circumstances, the practical conduct of life does not invite or require philosophical inquiry: one simply needs to understand the risks to which one is exposed and to take appropriate action as best one can. When force rules, philosophy retreats into the private sphere and sustains itself upon the hope of better times. But governance by unadorned force, if it is possible at all, is certainly unusual and probably pathological, a sign of social breakdown rather than the normal state of affairs. More typically, human communities try to organise themselves by invoking values that command our allegiance. Even communities that rely heavily upon the use of force nevertheless seek to legitimate that force by an appeal to values. Sometimes these appeals may be no more than a misleading patina that conceals the real mechanisms of power. But, more often, the appeals are in good faith and have a real significance in shaping the character of the community. They possess a power to summon the allegiance and compliance of citizens, even if the nature of that power is muddled and obscured by its entanglement with coercion.

Values may be conveyed and renewed by ancestral legends, by myths and stories, including stories of the community's own history. But they can also become the focus of more explicit appeals to abstract ideas such as justice, freedom, civility and equality. Once the governance of a community relies upon an appeal to ideas such as these it is on a path that makes philosophical thought an integral part of its collective life. The discourse of philosophy then shapes, sustains and renews the ideas by which we govern our lives together.

Many communities in the world today organise themselves around an idea which can appear to be straightforward, but is in fact profoundly elusive and problematic: the idea of 'law'. At first we may think of 'law' as simply a body of decrees issued by the powerful. Considered in that way, law does not look like a value so much as an established social fact. While an understanding of values such as justice or liberty requires philosophical reflection, a grasp of the nature of law might seem to call for careful description: knowledge of law's nature can superficially appear to be a matter for historians or social scientists rather than philosophers. Laws may be just or unjust, and their content therefore cannot be discovered by thinking about justice or other values. One discovers the law's content by

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investigating the ways in which power has been exercised: What statutes have been enacted? What judicial decisions have been handed down?

But this picture of law as the raw exercise of power is too simple. Consider, for example, the way in which legislators would characterise their own enactments. They would not speak of those enactments as 'decrees' or 'orders' or 'dictats'. They see themselves, not as issuing orders, but as creating *laws*. And the observation that such statutes are 'laws' is not a matter of neutral classification serving only values of intellectual tidiness. The status of legislative enactments as law is seen as very central to the claim that the statutes have upon the conduct of the citizen. If asked 'why should I comply with your statute?' the legislators would probably say 'Because it is the law!' But what is this status which is being ascribed to the statute? Since we know that laws may be unjust, and may fail to serve the common good, why should the status of a rule as law ground some claim to our compliance?

Judges strive to decide cases by reference to the law. They invoke the law's requirements as the justification for their decisions. This is what the litigants expect and insist upon. Our understanding of justice may perhaps inform and shape our view of what precisely the law requires, and some will take the view that the principal requirement of justice is the enforcement of the citizen's legal rights and duties. In these ways and many others, justice is pervasively relevant to the judge's task. But no one imagines that it would be right and legitimate for the judge simply to set on one side all the statutes and precedents and invoke his or her own convictions regarding justice in the abstract and apart from the legal rules. In all but the most extreme situations, the critical question for the judge is always 'what does the law require?'

Legislators, judges and citizens, therefore, regard the legal status of a rule as bearing directly upon its capacity to bind us and to justify the actions of public authority. If law is an exercise of power (which, in some sense, it clearly is) it is a particular form in which power is exercised, and a form to which we attach huge significance. But what precisely is that form? And what is the basis of its significance?

We are unclear about how our various values fit together. Indeed, we are unclear about *whether* they fit together, or whether they clash and compete and force upon us hard choices. Are liberty and equality compatible or competing? How does 'justice' relate to 'civility'? How do 'rights' relate to 'the common good'? These are obviously central and difficult questions for philosophical inquiry. Similar questions arise in relation to 'law'. Most obviously we may ask how law relates to justice. But here there is also an additional difficulty, since it is not entirely clear how far the idea of 'law' represents an orienting value of some sort, and how far it simply labels an interestingly distinctive way in which power may be exercised, sometimes for good purposes and sometimes for bad. Values seem to be very different from practices: they provide critical standards by reference to which practices must be judged; and, for that very reason, their content cannot be determined by examining the facts of actual practice. Law, on the other hand seems to be primarily a matter of practice and decision. As a fallible product of accepted authority, law may be just or unjust, good or bad. Yet law is also a guiding idea by which we live, being regularly invoked as the *basis* of authority and the *justification* for the state's deployment of force. A product of authority, yet the basis of authority. A practice to be judged by independent critical standards of justice, yet itself a guiding idea. This is the ambiguous ground explored by jurisprudence.

Life

If guiding values play a central role within our political communities, thereby giving a philosophical cast to public debate, something similar is true within our individual lives, at least when those lives

are led responsibly. For the concerns which shape our lives most fundamentally are not simple biological givens but are the fruit of life in community, possessing a depth that provokes philosophical thought. Our comprehension of them is enriched by reflection, just as with our political values. One should not imagine that a flourishing life consists of a steady flow of discrete pleasurable sensations. Even the most transient pleasures are informed by their deep cultural resonance: we taste not simply the wine but also the culture from which it springs. And no succession of such pleasures, however prolonged, will itself amount to a flourishing life. Beneath the transient pleasures, we want our lives to form some coherent and meaningful narrative, and a narrative within which our agency and our relations to others form a central part. Even shallow acquisitiveness may be less concerned with the assets acquired and more concerned with the manner of their acquisition: for many it may be true that 'Possessing some particular bundle of material goods is not nearly so important as possessing those goods because of one's own actions and choices.'² We want to be valued colleagues, trusted friends, good parents, responsible citizens, stalwart companions, and perhaps sophisticated participants in the fruits of civilization. Each of these aspects of our well-being is an ideal of conduct and personal virtue rather than a pleasurable experience.³ It is something to which we may approximate but from which we will always fall short; something which may be understood in different ways, and the character of which invites reflective inquiry.

A life that is in this way structured by ideas is, in that respect, an essentially human life. It is a life where individual agents endeavour to shape their conduct by reference to common standards and ideals, and where the relevant ideals are explored and endowed with their richness of meaning through a mixture of concrete example, experience and dialogue. It is a life where I am governed, not simply by a succession of intellectually opaque urges, but by enduring and evolving judgements concerning the authority and soundness (or otherwise) of my feelings and attitudes, and the way in which my action may or may not contribute to a worthwhile life. While those judgements, if they are to guide my decisions, must be my own, they will draw upon standards or ideals that are endorsed by others, informing their lives as they inform mine. Such a life is one wherein my capacity so to govern my conduct is publicly acknowledged by others and by the practices in which I and they jointly participate. It is a life wherein my understanding is enriched by dialogic encounter with both comrades and strangers, whose perceptions and experiences of this world can help to ensure that the values whereby I live my life reflect profound features of the human condition. I become an agent only within this context of the mutual recognition of persons and the shared acknowledgment of values.

Political philosophy sometimes proceeds as if it is entirely concerned with a problem of cooperation between agents each of whom possesses a set of clearly conceived fundamental interests that exist and are identifiable prior to such cooperation. Politics is then taken to address issues concerning the just distribution of the 'benefits and burdens' of social life, where 'benefits and burdens' are understood by reference to some pre-political notion of self-interest. Or it is taken to concern the ways in which convergence may be achieved between the common good (perhaps erroneously

² John Tomasi, *Free Market Fairness*, (Princeton University Press 2012) p.xi.

³ Can one lead a flourishing life while believing one's life to be an utter failure and consequently taking no pleasure in it? The answer, I would suggest, is that one can. The erroneous judgement about the value of one's life, and the consequent despair, would detract from, but not negate, the value of that life. Something similar is true of pleasurable experience. A life with few pleasurable experiences certainly gives us, in that respect, some cause for regret. A lot, however, turns upon the explanation for the shortfall. If I have foolishly neglected opportunities for pleasurable experience, or needlessly indulged my tendency towards gloom and despondency, the quality of my life may have been seriously marred by these missteps. But, where my life has lacked pleasure because of unavoidable circumstances, it may nevertheless constitute a triumph to be celebrated.

understood as some sort of aggregate) and the individual goods pursued by each agent. But these pictures neglect the way in which our collective practices give identity to the goods pursued within individual lives. Human communities are the matrix within which meaning is conferred upon our lives.

To be fully human involves the finitude of one's life, and the nature of one's relationships with others, being issues which compel attention and confer upon all that we do such meaning as it can possess. Similarly, a human form of association is one that is shaped by reflection upon its own character and value. A wolf pack doubtless has its own mode of association, with hierarchies of dominance and submission, group loyalties and group bonding. But the behaviour of wolves is not guided by the *idea* of the wolf pack, as a group of humans might be guided by ideas. Such ideas can, with variable success, be consciously adopted and instilled as part of a programme to change behaviour: consider the governing images and rhetoric (including the idea of wolf-pack solidarity) which might be instilled into the ethos of some military units. More commonly, however, our guiding ideas emerge from reflection upon existing ways of life, even though those ideas will often set critical standards from which existing practice falls short.

Practice and value

The intimate relationship which obtains between our values and our practices is often overlooked or implicitly denied. It can come to seem obvious that practices are simply facts about how we behave, open to neutral description, while values are something quite different. Values appear to endure apart, standing in judgement upon practice and setting standards from which our practices may diverge. Reflecting upon this, we may be tempted to think of values as inhabitants of another realm: visitants that touch us, but that remain for the most part remote (alluring at best, judgmental at worst). Or we may be tempted to think of them as simply expressions of individual subjective attitude (our hopes and yearnings) rather than intersubjective realities about which we may hold fallible beliefs. From either of these points of view (values as remote metaphysical objects, and values as subjective attitudes) the suggestion that practice and value are mutually dependent seems only to result in muddle. It appears to be in danger *either* of obliterating the critical capacity of values, thereby sanctifying the facts of power and conformity, *or* of allowing our subjectivity to colour and obstruct attempts at an objective understanding of the social world.

However, while the potential (and, all too frequently, actual) gap between what is done and what ought to be done is undeniable, that gap is not at all incompatible with the close dependencies that may obtain between practice and value. Sometimes a practice may appear to be the central instantiation of a value, without which we could have no firm grasp of the value's contours: consider, for example, the way in which the practice of trial and judgment informs our sense of justice as a distinct moral virtue.⁴ In general, the judge has a duty to consider only the legal rights and wrongs obtaining between the litigants. Once those rights and wrongs are established, the judge must not override them in the interest of third parties, or even in the interests of the community as a whole: the plaintiff cannot be deprived of his damages simply because the money would be better spent by the defendant. It is worth asking whether we would have a firm grasp of the concept of justice as something distinct from collective well-being if we were not familiar with such a practice of adjudication. Would the notion of justice not be in danger of simply dissolving into the general impartiality that is required by any assessment of collective welfare?

⁴ It is worth noting that the iconography of justice seems to refer both to the practice (of trial and judgment) and to the ideal (by reference to which the practice may itself be judged).

A practice may derive its character (as a practice of doing this or that) from its appearance of pervasive concern with a certain value. The departure of a practice from the values with which it is normally associated can be so great that it forfeits its claim to be a practice of this or that type. Thus it has sometimes been suggested that, although the law may frequently be unjust, the enactments and decisions of those who exercise power may sometimes be so *grossly* unjust that they forfeit their character as law. Values may inform the identity of practices, and practices may give substance to the content of values, without values losing their critical edge. A little reflection is sufficient to reveal that this seemingly puzzling relationship between practice and value is really quite familiar, and by no means limited to the jurisprudential questions that form our subject matter.

Universities, for example, are best understood as institutions oriented towards the discovery of truth. This is, of course, not to deny that many universities may become perverted into something else: into money-making businesses; or institutions that simply provide vocational training; or institutions that unconsciously and uncritically (or even knowingly and cynically) foster a particular ideology and suppress rival viewpoints. But we think of such institutions as falling short of an ideal that is internal to their claim to be universities. If someone suggested that such institutions are 'not really universities' we would understand what they meant. And it would be an error to suggest that such claims simply assert that the institutions in question are *bad*. The institutions in question do not simply fall short of values that we hold dear: they fall short of values that they themselves implicitly invoke by their very claim to be universities. Too great a proliferation of such institutions might lead to the suggestion that the very *concept* of a university had changed (indeed, a world where universities are understood to be about training for work, rather than about the disciplined inquiry into truth, may not be at all far away). But, short of such a fundamental shift, we are more likely to conclude that commitment to the value of inquiry into truth is part of what it means to be a university. Yet, in spite of being part of the university's identity as a university, that very value nevertheless provides a centrally relevant basis for the critical scrutiny of the university's practices.

Conversely, would we really have an understanding of the notion of truth as a value, if we did not have some knowledge of institutions such as our great universities, shaped as they are by practices of teaching and learning that have been pursued and reinforced by many generations of devoted scholars? Would we understand the value of truth if we lacked any knowledge of the practices of scientific inquiry and scholarship? In a world without those practices, would the value of truth not come to be thought of as simply the prohibition on lying, or perhaps as the pragmatic value of serviceably accurate cognition to aid our plans and projects?

The same is true of at least some, and perhaps all, other values. Would the value of friendship be grasped by one who had never encountered friends? Could we understand the value of enduring love if we were not familiar with the institution of the family? Could we attain any grasp of the notion of civility (with all of its rich political evocations) if we had not first encountered the formalised practices of courtesy?⁵

We come to understand values by a combination of habituation and reflection. That is to say, we learn to engage in certain practices, such learning frequently involving the acquisition of habits of perception and response that could not be articulated in the form of a set of rules. Beyond the most elementary stage, we learn by observing the experts and trying to copy. Only then do we reflect upon the significance of the practices in question, perhaps framing some general idea of the values served

⁵ Simmonds, 'The Bondwoman's Son and the Beautiful Soul' (2013) 58 *American Journal of Jurisprudence* 111 at pp.117-119.

by the practice. And one who is not a practitioner may be singularly ill-equipped to enter into or assess such reflections.

Pursuing the example of the university once again, we may notice that many students may enter the university hoping to increase their employability by gaining qualifications. But, if they are assiduous in their work, and their university is a serious institution, they will learn, from their experience, something concerning the intrinsic value of truth and understanding, together with associated values such as reasoned argument and civility towards those with whom we disagree. This can change the orientation of their lives, and not simply facilitate the attainment of objectives that they held prior to their studies.

Philosophy

The intimate relationship that obtains between some practices and the ideals that orient those practices is revealed by the practice of philosophy itself. For philosophy is a practice that necessitates reflection upon its own character; and it is a practice which, since Socrates, has been viewed by many as an important constituent of a fully flourishing life.

In considering the general nature of philosophical inquiry, we are reflecting upon an actual human activity that encompasses considerable diversity yet also exhibits a surprising degree of unity and of historical continuity. Not infrequently, across the long history of the subject, philosophers have claimed to discover the correct path that the inquiry should henceforth follow, and they have sometimes urged a radical break with the approaches of the past. Yet philosophy, unlike the natural sciences, never truly leaves its past behind: we constantly revisit the works of Plato and Aristotle and a host of others, and seem to find in them new insights and a new understanding of the road ahead. Consider, then, the following observation from Collingwood:

‘(W)hen we distinguish philosophy from the other activities of our minds, we do not think of it as something that merely happens in us like the circulation of the blood; we think of it as something we try to do, an activity which we are trying to bring into conformity with an idea of what it ought to be.’⁶

In being ‘an activity’ that we try to bring ‘into conformity with an idea of what it ought to be’, philosophy resembles many other important human practices. We try to understand such practices as oriented towards an idea. And our grasp of the orienting idea is not prior to our engagement with, and reflection upon, the practice. Thus, although Kant tells us that philosophy is merely the idea of a *possible* science which does not exist *in concreto*, but ‘to which, by many different paths, we endeavour to approximate’, he also points out that an understanding of the relevant ‘archetype’ can only be attained by our critical and reflective engagements with actually existing ‘attempts’ at philosophy.⁷

What then can we learn, concerning the inquiry which is jurisprudence, from reflection upon the origins of philosophical thought concerning law and justice?

⁶ R.G. Collingwood, *An Essay on Philosophical Method*, (1933) p.4. Collingwood emphasises that ‘The question what philosophy is, cannot be separated from the question what philosophy ought to be.’ But he also emphasises the dangers of what he calls a ‘philosophical utopianism’ which loses sight of the actual practice of philosophers of the past.

⁷ Kant, *Critique of Pure Reason*, B866.

The Greek Sophists revealed that values such as justice are not a fundamental part of the ordering of the cosmos, akin to the laws of planetary motion. Some believed that this revelation exposed justice as a fraud or a delusion. Since their day, many have agreed: Thrasymachus always seems to be with us, in one form or another. But many more have disagreed and have looked to Plato and his heirs as offering a basis for a thoroughgoing rejection of the Sophist view. Consequently, Plato is often read as seeking a straightforward reversal of the Sophist revolution, grounding value in a metaphysical status that is entirely prior to human thought and practice.⁸ Plato's texts can appear to lend plausibility to this reading by linking the inquiry into value with a search for enduring objects of knowledge beneath the Heraclitean flux of observable nature. Some of the most famous features of the *Republic* suggest a similar impetus away from the world of human practice and towards an obscure metaphysics. For the philosopher is portrayed in that work as required to embark upon a wholly individual quest, seeking to discover a reality that lies beyond the cave-like arena of human dialogue and human concerns.

To see the potential error in such an understanding of Plato,⁹ we need to remember that the work of the Sophists was but one manifestation of a gradually dawning awareness of the special character of human action as something distinct from unreflective nature. Other manifestations of that same awareness were the emergence of history (as something independent of cosmological and theocratic myth)¹⁰ and the Socratic turn towards the consideration of human affairs. Socrates shifts philosophical inquiry away from an investigation of the cosmos and towards the question of how we should live. If we are careful to read Plato within the context of that Socratic turn, we may come to conclude that his philosophy is not aimed at a simple reversal of the Sophist's view. And, if we judge by Socrates's own example, the question of how we ought to live is to be explored in dialogue with others, within the public space of conversation between equal citizens. The good is to be discovered, not by a transfiguring moment of solitary escape from the cave, or an excursion into metaphysics as something distinct from ethical discourse, but by the consideration of first-order ethical questions. We come to understand the sovereignty of good by careful attention to the human condition, to particular human lives and human practices, guided always by our concern to understand the nature of a life well-lived and of a flourishing community.¹¹ Even our understanding of the way in which practices fall short of the values that they serve is itself the result of quotidian experience.¹² Perhaps admirers of Plato who take an exotic metaphysics to be central to his thought make precisely the same error that was made by the Sophists, while rejecting the Sophists' genuinely transformative insight: they assume that the truth and objectivity of justice and the good can be preserved only by a denial of the dependence of such values upon practice. This, it seems to me, is a mistake.

Whereas the Sophists had asserted a clear distinction between nature and convention, Plato and Aristotle offered a more nuanced account, wherein the uniqueness of human action and speech was fully acknowledged but the civil and political structures thereby constructed were viewed as

⁸ G.A. Cohen, *Lectures on the History of Moral and Political Philosophy*, (Princeton University Press 2014) Chap. 1.

⁹ We should at least be aware of the possibility of reading Plato differently. While criticising Plato's 'hypostasis' of ideas, Kant observes that 'the exalted language, which he employed in this sphere, is quite capable of a milder interpretation.' Kant, *Critique of Pure Reason*, A 314n./B 371 n.

¹⁰ R.G. Collingwood, *The Idea of History*, Part 1 (Oxford 1946)

¹¹ See e.g. Iris Murdoch, *The Sovereignty of Good* (London 1970).

¹² Plato imagines the prisoner from the cave being 'forcibly dragged' up the steep ascent to the light. But what could motivate a voluntary ascent? Only indications to be found *within* the phenomena of the cave could lead us to suspect the existence of a more unified source of light, and so lead us to embark upon the journey.

containing *in potentia* a full realisation of human nature rather than a distortive imposition upon it. Consequently, for this tradition, an understanding of the nature and possibility of a fully human life requires careful thought regarding the significance of actual institutions and modes of association.

There are those who think of morality as something entirely inward and personal, to be identified through personal conscience, or perhaps through intellectual reflection on such abstract principles as the categorical imperative or the principle of utility. The domain of actual practice is thought of as the object to which such elevated ideas are to be applied in criticism: it is not thought of as something which might inform and enrich our understanding even of our most fundamental values. By contrast with this, the tradition of moral thought that runs through Aristotle turns its gaze outward, towards established practice, institutions and ways of life. As Aristotle explains, virtues of character are akin to skills in so far as we acquire them by engaging in the relevant practice. Thus 'virtues arise in us neither by nature nor contrary to nature, but nature gives us the capacity to acquire them, and completion comes by habituation.'¹³ So immersion in the practice must precede full understanding; and ethical inquiry is not exclusively a matter of turning the gaze inwards to our own moral intuitions, but outwards also to the practices of which those intuitions are an aspect.

This should not be taken as suggesting a static picture of morality as simply a body of inherited precepts. Fully to possess a virtue it is not enough to internalise and conform to certain precepts and prohibitions: one must also possess an understanding of the value served by those precepts and prohibitions. The honest person is not simply the one who avoids telling lies, but the person who prizes truth and pursues the value of truth. To understand a value is to see how it forms a constituent of a fully flourishing life, and this requires us to reconstruct in thought and imagination an entire world of practice. As Gadamer points out, moral knowledge always pertains to right living in general and tacitly contemplates an entire way of life. Moral requirements are never fully knowable in advance of the particular problems that they must confront, and moral precepts can never be more than schemata which take on a precise content only in particular contexts.¹⁴ To respect and sustain the practice we must seek to understand the values served by the practice. But to understand those values we must grasp the way in which the practice fits within a broader way of life. This creates the dialogue between practice and value, engagement and reflection, of which jurisprudence is one manifestation. Jurisprudence seeks to understand the law in the light of the value that the idea of law represents.

Suppose that we incline towards the view that morality is a body of standards arrived at by individual inquiry quite independently of practice, and with which outward practice should strive to comply. We will then regard any consideration of that practice as either purely descriptive or fundamentally judgemental. That is to say, we will assume that it must be concerned either with accurate description of what occurs in fact, or with the question of how far the practice complies with our favoured values and moral prescriptions. Down this route lies the picture of positive law as related to a 'higher law', with which it may or may not comply; similarly, we find here the picture of jurisprudence as a purely 'analytical' or 'clarificatory' inquiry that is quite distinct from any concern with substantive values. The general framework of thought does not invite the possibility that the practice might be, in itself, an articulation of values which cannot properly be understood apart from the practice. But this is the very possibility that underlies philosophical inquiry into the nature of law, when that inquiry is properly understood.

¹³ Aristotle, *Nicomachean Ethics*, Book II, Chap. 1, 1103a.

¹⁴ Hans-Georg Gadamer, *Truth and Method*, second revised edition, translation revised by Joel Weinsheimer and Donald G. Marshall, (New York: Continuum Books 2004) p.318.

History and political philosophy were born together, in the context of that perhaps hitherto unknown form of association that we call the polity. Historical understanding emerges only when human action begins to be grasped as something distinct from the regular course of nature. A narrative of past events befalling human beings (conquests, enslavements, defeats, migrations) is not a history if the events are viewed as part of a deterministic natural order indistinguishable from the weather or the movements of the heavens. Nor is it a history if the agency behind the events is ascribed to a divinity or an inscrutable fate.¹⁵ Similarly, political community cannot be understood if relations between human beings are equated with collisions or causal influences between physical bodies, or if human agents are regarded as simply responding unreflectively to biological drives, or as the puppets of divine providence. To understand history is to understand agency. Agency is not best understood in terms of mechanical responses to blind passions or urges, but in terms of reasons. Agents act upon reasons, and the capacity to act upon reason involves judgements of value. Actions are bearers of meaning, and are guided by our beliefs concerning value. The forms of human association are the arena within which meanings are conferred, and values collectively articulated and realised. The political community is the association within which this enterprise aspires to full self-awareness.

Like the study of history, political philosophy too engages with a world where the guidance of action by reason is understood to be different from the causal processes that govern the natural world. The perspective of reason, rather than causality, is one that we adopt when we consider our own actions. For, even though we may be well aware of the large role played by accident and contingency in our lives, we do not regard those lives as a succession of things that simply happen to us: in the midst of all the happenstance there is a core narrative of choices and actions for which we are responsible. To understand the actions and practices of others we must view those others as similarly responsible, and similarly guided by what the actors take to be reasons. Such reasons are always framed in terms of our ideas about what matters: our ideas about value. And such values are never wholly individual, but always and necessarily involve our relationship with others.

From time to time philosophers have attempted a rational reconstruction of the nature of the political community, by imagining the contractual emergence of political communities from a pre-political 'state of nature'. If one were to pursue this path, and one tried to be true to the moral phenomena, the simple contractual view (portraying the polity as a cooperative arrangement to satisfy pre-political desires¹⁶) would need to be significantly modified even if it was not abandoned altogether. At a minimum it would be necessary to echo Aristotle's observation that, while the polity originates in 'the bare needs of life', it continues in existence 'for the sake of a good life'.¹⁷ Today, the notion of 'the good life' has been debased in popular speech until it is synonymous with 'the highly pleasurable life', so that a modern reader might take Aristotle to be contrasting the satisfaction of 'bare needs' with the provision of luxury. But we would do better to read Aristotle's reference to 'the good life' as suggesting a meaningful life: a life that we regard as expressing some fundamentally significant aspect of what it is to be fully human. Nor does the good polity facilitate such a life so much as call it into being, by providing the framework within which its constitutive ideas possess a sense. We transform our nature and importance by the political and juridical practices that we construct.

In an intriguing remark, to be found in his *Doctrine of Virtue*, Kant writes of the tension that exists between the two 'great moral forces' of mutual love (which admonishes us to come closer together) and mutual respect (which requires us to keep at a distance one from another). He tells us that 'should one of these great moral forces fail' the whole 'kingdom of moral beings' would be swallowed, like a

¹⁵ See R.G. Collingwood, *The Idea of History*, (Oxford 1946) Part 1 .

¹⁶ See the contribution of Glaucon in Plato's *Republic*, 358c-359b.

¹⁷ Aristotle, *Politics*, Book 1, 1252a30. Cf. Plato, *Republic*, 369b.

drop of water, by the gaping throat of 'nothingness'.¹⁸ Both values are embodied within the practices of civility and legality that structure our form of association. But this is not simply a matter of human practice successfully enabling us to cope with competing values. For the values here are not simply competing: they also require each other. What is love without respect? And is not respect (with its recognition of the independent reality of the other) itself at least a step towards love? If either one of these 'two great moral forces' were to expand its domain at the expense of the other, it would negate its own character. It is their concrete instantiation, within a shared form of life, which constitutes us as moral beings. Without both the contending forces and the resolution that gives them their identity, the 'kingdom of moral beings' would cease to exist.

After the intellectual revolution that was brought into being by the Sophists, humanity would no longer be thought of as fully immersed in nature: no longer would the prescriptions of political and ethical life be equated with the laws that dictate the movements of the stars or the cycles of biological growth and decay. But nor would those prescriptions be reduced to the pure subjectivity of individual attitude. Plato and his heirs (including Aristotle, and the central figures of the natural law tradition) saw that, in rejecting a picture of humanity as an undifferentiated part of nature, we by no means abandon as empty the norms and standards that guide our thought and action: the fact that those norms are not akin to the laws of planetary motion does not entail the conclusion that they are mere fictions, or that they lack any genuine authority. Instead, a more subtle account than that offered by the Sophists must be explored. The political community, with its standards of reason and justice, is not a contractual arrangement which aims to overcome conflict between independent self-seeking agents who pursue individually coherent but mutually conflicting goals. For full human flourishing cannot even be conceived of independently of that community.

The forms in which we associate together (such as the family, the market, the state) are significant in ways that go beyond the impact that they inevitably have upon our opportunity to secure desired ends. For those forms of association are also forms of mutual recognition: and, as social beings, there is a sense in which we can fully exist only in the recognition of others.¹⁹ Each form of association depends upon the willingness of every individual to act in accordance with the requirements of the association, and every individual relates to every other individual as the occupant of a socially-defined status with duties, rights and responsibilities of its own. No one is regarded as simply a physical object or a locus of desires that compete with, or happily coincide with, my own wishes. The state, or *civitas*, is composed of citizens, as the market is composed of those who own property (perhaps only their own labour). And the facets of recognition are multiple and often interdependent: e.g. property depends upon the state, but the detached public power of the state depends upon its distinctness from the private power of ownership. Individuals move between these distinct statuses, thereby enjoying the possibility in mutuality of a richly flourishing existence that would otherwise be unattainable.

Core political ideas must be understood in this light if they are to be understood at all. Thus freedom is not simply the ability to move through or occupy space in the advancement of one's goals,²⁰ but consists also in the collective and individual acknowledgment of one's independent, and valued, status. For this reason, to live under domination is to lack freedom even if the dominant party seldom or never intervenes in one's choices: the importance of freedom cannot be reduced to the improbability of an interference with one's currently available options. Being modes of mutual

¹⁸ Kant, *Metaphysics of Morals*, 6:449.

¹⁹ In many respects, this is the core insight of the tradition that runs through Rousseau, Kant and Hegel.

²⁰ For a modern version of this view, see Ian Carter, *A Measure of Freedom*, (Oxford 1999); Matthew Kramer, *The Quality of Freedom*, (Oxford 2003).

recognition, the forms in which we associate together are frequently oriented towards ideas expressive of that very form of association. This orientation of communal life towards ideas is frequently denied or overlooked; and, in recent times, this has nowhere been more common than within the philosophy of law.

The State

The ideas of 'law', and of 'the state', seem to be poised uncertainly between the prescriptive and the descriptive. On the face of it, they seem to be very real and very evident features of the social worlds that we inhabit. On the other hand, they are remarkably difficult ideas to cash out in terms of observable patterns of conduct or established attitudes. Until very recent times, theories of law and state had a marked tendency to become reflections upon a range of ideal values, so that one modern commentator has even gone so far as to suggest that those theories were concerned with the 'advocacy of political and moral ideals within the framework of a convention' that required them to be framed as theories concerning the nature of existing institutions (such as law).²¹

Here we find some of the perennial battles of jurisprudence and political philosophy. These are battles which revolve around the relationship between our values and our descriptive understanding of the social world that we inhabit.

On the one hand are those who wish to treat both 'law' and 'state' as value-free descriptive categories. The desire is readily understandable, for we tend to think of values as independent standards that are to be employed in the critical assessment of actual practice, and this seems to suggest that the values must be independent of the practices so assessed. Furthermore, we are all familiar with states and systems of law that fall substantially short of what morality requires. If states can be seriously morally deficient, we need a concept of 'state' that acknowledges that possibility, and this may seem to necessitate an entirely value-free approach. Such an approach proves hard to carry through, however.

At first it may seem possible to analyse the notion of 'the state' in terms of a claimed monopoly of physical force.²² But the devil is in the detail and things get problematic when we try to spell that possibility out. Must the state claim a monopoly of force, or a monopoly of *legitimate* force? Does a claim to 'legitimacy' not involve an appeal to moral values? Of course, the fact that such an appeal is made is not itself a value. But can a regime plausibly be said to make a moral claim to legitimacy while acting with an undisguised disregard for all moral considerations? When we ascribe a claim to a complex system of institutions, the ascription is unlikely adequately to be justified by reference to some discrete fact, as I might justify my assertion that you claim to be Napoleon by pointing to various letters and emails in which you say just that. It is far more likely that the ascription must be grounded in its ability to make systematic sense of a broad swathe of otherwise puzzling features.²³ A regime's open disregard for moral considerations will therefore count against any ascription to the state of moral claims, whether they be claims of justice or of legitimacy.

Suppose that someone rejects the last argument and insists that the state's claims *can* be an isolated fact detachable from any broader interpretation of its conduct. We must then address some further problems. Must the state (in order *to be* a state) simply *claim* a monopoly or also *possess* it? The former requirement seems too easy to satisfy, for anyone can *claim* a monopoly of force (just as

²¹ Tony Honore, *Making Law Bind*, (Oxford 1987) p.32.

²² See for example Max Weber 'Politics as a Vocation' in H.H. Gerth and C. Wright Mills, *From Max Weber*, (London: Routledge 1948).

²³ Cf. Simmonds, *Law as a Moral Idea*, (Oxford 2007) pp.138-140.

anyone 'can call spirits from the vasty deep'²⁴). The latter requirement, by contrast, seems either impossible to satisfy (no state succeeds in *eliminating* the use of force by private citizens) or to return us to a vexing array of moral questions (if it is argued that the violence of the state is alone legitimate).

When Max Weber sought to define the state by reference to its claimed monopoly of physical force, he did so in consequence of his view that 'the state cannot be defined in terms of its ends'. He argued that there is 'scarcely any task that some political association has not taken in hand, and there is no task that one could say has always been exclusive and peculiar to' the state and its historical predecessors.²⁵ Nevertheless it has struck many as natural to suggest that, when we describe a system of governance or a community as a 'state', we view it in the light of certain moral goals, such as the service of justice and the common good. Whether such moral values are 'exclusive and peculiar' to the state seems less than decisive. For the idea of the state may involve certain values without the state being definable by sole reference to those values. The governance of the state may, for example, involve a claimed monopoly of force while also involving a claim to serve the common good. A state, unlike a robber band, claims to govern justly, and in the interests of all.²⁶ While all states will fall short of these goals to some extent, states which clearly do no more than pay lip service to the goals are, in a very straightforward sense, not 'really' states at all. They are not like broken clocks, which simply fail in their intended purpose, but like decorative clocks (e.g. the painted image of a clock) the function of which is to create an impression of being something which they are not.²⁷

It is most certainly true that, as J.N. Figgis put it, 'the actual world is the result of men's thoughts.'²⁸ But we must go further than any mere acknowledgment of the shaping influence of thought. For the institutions within which we live cannot be understood except by their orientation towards ideas, and the ideas in question often prove to be ideals. The mundane realities of our daily life point beyond themselves and can properly be understood only when that implicit reference to the ideal is fully acknowledged. We cannot truly understand our practices without a grasp of the values that they seek to express, and towards which they turn their gaze. But equally, we cannot truly understand our values without experience of the practices within which they are embodied.

Law revisited

Some legal theorists have suggested that the idea of 'law' plays no necessary or guiding part in legal thought, but is a fundamentally classificatory notion that simply serves to label a distinctive type of institution.²⁹ Such a view encourages the assumption that laws derive what authority they may possess, not from their status as law, but from the authority of their creators: perhaps from the

²⁴ Owen Glendower: I can call spirits from the vasty deep.

Hotspur: Why, so can I, or so can any man;

But will they come when you do call for them?

Henry IV Part I, Act III Scene I.

²⁵ Weber, op. cit. p.77.

²⁶ St. Augustine, *The City of God*, Book 4.

²⁷ For this useful analogy (combined, alas, with a questionable application of it) see Shapiro, *Legality*, (Cambridge, Mass.: Harvard University Press 2011) p.391. Compare Simmonds 'The Logic of Planning and the Aim of the Law' (2012) 62 *University of Toronto Law Journal* 255 at p.269n.23.

²⁸ J. N. Figgis, *From Gerson to Grotius*, second edition, (Cambridge 1916) p.2.

²⁹ For criticism of this view see Simmonds, 'Reflexivity and the Idea of Law' (2010) 1 *Jurisprudence* 1. Also Simmonds, 'Law as an Idea We Live By' in George Duke and Robert George (eds.) *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge 2017) at pp.264-268.

lawmaker's expert knowledge and consequent ability wisely to guide conduct into the paths of reason; or perhaps from fact that the lawmaker's decrees serve to coordinate the behaviour of the populace in beneficial ways.³⁰ But this entire approach is back to front. We ordinarily assume that lawmakers derive their authority from the law, not the reverse; and the decrees of officials gain their authority from their status as law, not from the expertise of their authors. Within a polity governed by law, the status of a rule as law is critical to its claim upon our conduct. Thus the conduct of citizens and officials within a polity governed by law is always shaped by reference to the idea of law.

Finnis (describing the view of Max Weber) tells us that 'authoritative coordination is legal in character when it operates not by way of an attitude of obedience to persons but of a disposition to comply with "the law", a legally established order of consistent, abstract rules (normally established intentionally) and principles to be applied to and followed in particular cases – so that those in authority are regarded as "officials" whose office or authority is defined by these rules, and who are to be obeyed only when they act within their legal powers.'³¹ Such an idea of law as a consistent order of rules and principles is a guiding ideal rather than a given reality: it guides judicial decisions, as well as the efforts of treatise writers to render consistent and orderly the often chaotic and fragmentary materials of case and statute; and it is the imperfectly understood vision that underlies the citizen's ascriptions of authority to those who wield lawful power. A legal system exists in so far as people frame their actions, not by reference to decrees or threats or wise prescriptions, but by reference to the idea of law. Here we find the source of philosophical puzzles regarding law (e.g. how does law authorise the very acts whereby law is created?) but also the key to law's moral significance.

Within the ideas that give meaning to political life, law occupies a central but an ambiguous place. Law appears, on the one hand, to be entangled with power and coercion, produced by decree and backed by violence. But, on the other hand, it is quite commonly thought of as an expression of justice and rectitude, a body of standards with which all citizens are expected to comply and to which they may appeal when they seek to defend their rights against the tyrant and the oppressor. Law is thought of as a tool that may be employed for good purposes and for bad and it is for that reason held answerable to standards of justice drawn from outside the law. Yet law is also thought of as a profoundly significant form of moral association, guided by values that are internal to the character of juridical thought. Similarly, the lawyer is thought of as a technician who designs methods for achieving independently conceived goals, but also as the custodian for a distinct set of values. Thus law seems to be both the antithesis and the perfection of governance by force; both the embodiment of an attainable justice, and the product of sheer power; both a morally neutral instrument and the rich articulation of a moral idea.

One way of trying to accommodate the duality of law's appearance is by distinguishing imperfect human law from deeper standards of justice, or of natural law, that institutions should reflect if they are rightly to command our allegiance and fulfil their own pretensions to rectitude. So it is that, in Sophocles's *Antigone*, we find a powerful assertion of the claims of a higher or 'natural' law to override the ruler's decrees: a conception of justice and right against which all human enactments must be measured. Recent theories have tended to replace the language of higher law with a language of 'normative standards' or 'critical morality'; but, in substance, the underlying picture remains the same. Thus we find the claim that law 'holds itself subject to certain normative standards', although

³⁰ Joseph Raz, *The Morality of Freedom*, (Oxford 1986) Chaps. 2-4.

³¹ Finnis, *Natural Law and Natural Rights*, (Oxford 2011) p.267. As Finnis points out, Max Weber elsewhere defines 'law' by reference to the availability of organised sanctions, but adopts a more subtle and wiser view when he seeks to distinguish the legal type of authoritative coordination from other types.

its success in complying with those standards is a variable and contingent matter.³² We are encouraged to conclude that those who see moral authority as somehow integral to the status of law are making an all-too-obvious error: they simply confuse what may sometimes be the case (the requirements of law may sometimes correspond with the relevant 'normative standards' of justice and the good) with what must necessarily be the case. Or they conflate the idea that law makes a 'claim' to moral authority (or to justice) with the assumption that such claims are soundly based. Law, we are told, is necessarily bound up with certain structures of power, but it has moral force only in so far as it mirrors standards derived from elsewhere. It claims a moral authority that it may not possess.

Jurisprudential thought has often seemed overly concerned with this supposed relationship between positive law (the laws created by human lawmakers) and a 'higher law', or 'natural law', or 'normative standards' from which positive law derives its legitimacy and moral force. Such a focus, if unqualified by an acknowledgment of law's transformative significance, can become a source of impoverishment. But, in recent times, it has become still more narrowing, as questions concerning the status of such normative standards have been largely shunted out of jurisprudence into the supposedly separate disciplines of moral or political philosophy. The constricted outlook that results from this too easily suggests that the core questions for jurisprudence concern the way in which we choose to extend or apply the label 'law'. Should we think of law as truly law only when it more-or-less satisfies the standards to which it is answerable? Or should we employ the concept of 'law' in a morally neutral way, so that it applies to all institutions with certain characteristic features quite independently of the normative standards, or natural laws, which could lend moral authority to the law? Such questions are not without their importance, but they capture only the most superficial aspect of law's problematic status.

It is often assumed that the notion of a 'higher law', to which positive law is answerable, serves to distinguish the tradition of natural law thought from the tradition of legal positivism: legal positivists are assumed to deny the existence of any such higher law. But this is really a confusion. The most influential strands of thought within *both* traditions emphasise the answerability of positive law to critical moral standards which are independent of positive law. Legal positivists might be less likely to speak of those moral standards as a 'higher law' but this terminological difference is of uncertain import at best. In the case of both traditions, the emphasis upon law's answerability to independent values has tended to obscure the way in which certain values are conceivable only as facets of the form of human association that is constituted by the development of law. Though a human product, and an all-too-fallible institution, law does not merely import or reflect (or stand answerable to) values from elsewhere, values with which it may at best achieve a contingent convergence. Rather, by its very nature, law transforms the relations of those it governs, and opens up new possibilities for human flourishing. In creating a distinctive form of association, the governance of law also gives rise to distinctive critical values to which the law is itself answerable. Those values can be said to be internal to the idea of law itself. To investigate the nature of law is not to contribute to a taxonomy of institutions, but to seek an improved understanding of the good by reflecting upon this aspect of our shared project of endeavouring to realise the good.

Something of the transformation wrought by legal institutions can be seen, for example, in Aeschylus's play *The Eumenides*, when the Furies are renamed the 'kindly' or 'gracious' ones on agreeing to accept and be bound by the decision of a lawful Athenian jury. Once disciplined by the requirements of legal process, vengeance is transfigured into the justice that obtains between fellow citizens, thereby creating the domain of public concern that is the state. This might at first be thought of simply as an

³² Joseph Raz, *Between Authority and Interpretation*, (Oxford 2009) p.2.

improvement in the circumstances of social existence, replacing disorderly violence with orderly standards and regularity. It might even be portrayed as enabling people better to comply with reasons that applied to them quite independently of, and prior to, the law.³³ But it is hardly enlightening to approach the matter in this way. Law ultimately derives its authority, not simply from its capacity to coordinate conduct, or from its deployment of expert knowledge, but from the way in which it calls into being a distinctive and valuable form of moral association. That form of association is one in which reflection upon the nature of law plays a key part.

Those who are friends will from time to time need to reflect upon the nature of friendship. For friendship, while based in the slowly acquired bonds of memory and attachment, is structured and formed by an ideal of friendship towards which we aspire while inevitably falling short.³⁴ However much their conduct may be shaped by unreflective affection and spontaneity, it is always the case that friends may from time to time need to ask themselves what is required of them by the very idea of friendship. They then ask 'What would a true friend do, in these circumstances?' Those who could never need to ask such a question are clearly not friends. Something similar is true of communities governed by law, for law is a principal expression of civic friendship. To be governed by law, rather than by the dictates of the powerful, we must reflect upon the idea of law. Forms of legal thought which seek to eschew such reflection simply confuse law with technocracy and power. For a community that espouses law, the jurisprudential debate concerning law's nature must be central.

³³ Joseph Raz, *The Morality of Freedom*, (Oxford 1986) Chaps. 2-4.

³⁴ See Kant's remarks on this, discussed in Simmonds, 'Law as an Idea We Live By' in George Duke and Robert George, *The Cambridge Companion to Natural Law Jurisprudence*, (Cambridge 2017) at p.265.