1995

Procrustean Jurisprudence: Squeezing Legal Philosophy Into an Already Crowded Law School Curriculum

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THE SAD CONDITION OF JURISPRUDENCE AND SOME HOPEFUL SIGNS

Legal philosophy has been on the back burner in American law schools for some time. One could speculate and give many reasons for this. In part, it may have been due to an unfavorable climate of academic opinion, which generally does not see much benefit in conceptual niceties. Or it may be that the traditional ways of teaching the subject have seemed over-academic and unrelated to law practice. Or it may simply be that the law school curriculum has become overloaded; courses have to compete for space, and jurisprudence has lost out in the struggle. But whatever the reason or reasons may be, the bottom line is that legal philosophy is no longer considered an essential foundation for legal studies. It is a required course in only a very few schools, and mainly those with a religious affiliation. For the remainder, it survives as an elective which attracts relatively few students, and in some law schools it is not offered at all.[1] Even in Britain, where the system of legal education is more favorable to educational subjects,[2] two studies, ten years apart, show that while the subject is still thriving, there has been some decline in the perception of the importance of legal philosophy, and there is a growing tendency to make it an elective subject.[3]

There are, however, a number of hopeful signs. For several decades now there has been a general revival of interest in philosophy,

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1. This general overview is based on a review of a large number of law school catalogues (though by no means all of them) and also on information derived from colleagues and friends who have taken Jurisprudence seminars as to the number of students involved, which was commonly a dozen or less.

2. See footnote 15.

3. *See* Neil MacCormick, "The Democratic Intellect and the Law," 5 *Legal Studies* (1985), pp. 172-82. The report immediately precedes Professor MacCormick's article. *Ibid.*, pp. 151-71.

especially language philosophy, which has spilled over into legal theory. One result of this has been a bumper crop of very able legal philosophers whose writings have gained recognition both inside and outside the legal profession. Educators, including legal educators, have also begun to look more kindly on philosophy, and begun to view it as in some way educational, promoting lateral thinking, explaining the ideas which have produced our civilization and generally broadening the point of view. Prestigious law schools have been experimenting with required first year courses that could be more or less described as legal philosophy.[4] Particularly encouraging is the fact that there appears to be a renewed interest in jurisprudence among younger law teachers. A jurisprudence seminar in Philadelphia organized by the American Association of Law Schools in 1986 attracted a very large audience, and a large number of those attending were young law teachers who were considering teaching a course in jurisprudence.[5]

New Opportunities and Associated Risks

The reasons for this increased interest in philosophy in general and the philosophy of law in particular are not well established. The climate of opinion at present seems indeed to generally favor philosophers. After a long period in which their efforts were commonly regarded as misplaced and largely useless (providing unverifiable answers to pointless questions), their help is now being sought on all sorts of matters, especially those plagued with conceptual confusion or moral dilemmas. Philosophers are appearing on platforms at symposia on difficult topics and are being asked to serve on committees charged with the responsibility of making decisions in generally mind-boggling circumstances. Legal philosophy may also have received some help from the human and environmental rights controversies. An increased awareness of the conceptual and moral complexities involved in legal decision has made legal educators consider the possibility that courses in legal philosophy might render emerging lawyers more competent to deal with these difficult matters.

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4. Some of these, e.g. the University of Chicago, used mainly law and economics materials; the Columbia University experiment, with a new first year curriculum conceived by Dean Benno Schmidt and implemented by his successor, Dean Black, had an economics component but also included other topics. It had a mixed reception from both faculty and students. *See* "Columbia Law's Rocky New Course." *Manhattan Lawyer* (1990), p.6

5. Informal communication to me by Dean Susan Prager, then president of AALS.

Whatever the motivation, the fact that there is a new sense of the importance of the subject is good news for those who teach it. But despite the welcome possibility of new courses in jurisprudence being introduced and perhaps even required, we would do well to be a little uneasy. We are like the stand-in about to go on stage when the star has called in sick. We have a great opportunity, but if we fail we will neither easily nor soon get a second chance. Philosophy is an abstruse and abstract business, and it is doubtful that legal educators have any very precise notion as to its nature and its benefits. A new emphasis or an increased emphasis on jurisprudence, if it is indeed on the way, is likely to be only a trend. Those favoring it are hoping that it will add something to legal education and professional competence. If it does not appear to do so or for any reason proves disappointing to students and administrators, it will be relegated to the bench or even dropped from the roster. In plain terms, this means that if we do not have a very clear idea of what we are trying to do, and do not do it fairly well, the pressures of competing subjects in an already crowded curriculum are likely to push us into a back place in the law school scene—or out of the picture altogether.

There are a number of things that need to be done:

(1) We need to clearly explain what we mean by philosophy and legal philosophy, since even academics these days have very diverse and vague notions about such things.
(2) We need to lay out, as precisely as possible, the materials and methods that we propose to use and indicate the knowledge and skills that we expect to produce with them.
(3) Finally and most importantly, we must show how a sufficient offering in legal philosophy can possibly be squeezed into the core curriculum of law school.

Parts I and II will outline, and Part IV will explain more fully, what I take to be a reasonable and defensible position on the nature and the benefits of philosophy in general and legal philosophy in particular. Part III, the discussion concerning materials and methods, is essentially a description and evaluation of our jurisprudence program in Campbell University which demonstrates that such a course can be implemented without major curricular changes.

I. What is Philosophy?

A. The Job Description of a Philosopher

Jurisprudence being a brand of philosophy, we need to describe what kinds of activities we have in mind when we speak of

philosophizing in general and hopefully to indicate the benefits that are likely to accrue from them. There are probably as many versions of philosophy and philosophical method as there are philosophers; yet in spite of this, one can provide a notion of philosophy and philosophical method which commands wide if not universal agreement and which is satisfactory for legal purposes. This is possible because the European philosophical tradition has great common themes which have already been major influences in the development of both the common law and civil law systems.

The term philosophy originally meant any kind of systematic enquiry whatever. Plato remarked that one who loved truth loved every kind and variety of it.[6] A philosopher then was simply anybody who thought deeply and logically about anything. Even when the depositum of knowledge became large and special branches of learning became somewhat independent studies, this attitude continued to persist. The various researchers still considered themselves philosophers and simply added an adjective to show the kind of philosophy they professed. Newton, for instance, called himself a *natural philosopher*, not a physicist.[7]

In the rising tide of scientific positivism, which became particularly noticeable after the Darwinian controversy in the mid-nineteenth century, all this changed. The term philosopher became suspect in scientific circles, suggestive of armchair speculation, if not learned ignorance. Scientists no longer described themselves as philosophers and poured scorn on those who did.[8] Philosophers were more or less evicted from the field of scientific enquiry and left to dig in some other field (if they could find one). The identity crisis of the modern philosopher had begun.

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6. *Republic*. 474A. *Great Dialogues of Plato*, (W.H.D. Rouse, trans. 1956), p. 274.

7. The full title of Isaac Newton's *Principia* was *Mathematical Principles of Natural Philosophy* (1934).

8. T.H. Huxley, during the debate in the Royal society for the advancement of Science, in effect advised the Bishop of Oxford, and all like him, to refrain from interfering in things that they were not qualified to discuss. Implied in this was a profound suspicion of philosophy which can be seen in his remarks about Plato. "Plato was the founder of all the vague and unsound thinking that have burdened philosophy, deserting facts for possibilities, and then, after long and beautiful stories of what might be, telling you he doesn't quite believe them himself." Leonard Huxley, *Life and Letters of Thomas H. Huxley* (1900), p.451. He also quotes Sir Henry Holland as saying, "in my opinion Plato was an ass, but don't tell anyone I said so."

B. Various Solutions to the Identity Crisis in Philosophy

Modern philosophers have sought to identify their function in three main ways:

(1) *Falling back on cartesian dualism.* Descartes concluded that philosophy is the study of non-physical things (like the soul and God) which are not observable and above all not measurable.[9] This rigid dichotomy between mind and body was extremely influential until well into the nineteenth century but it does not do much for philosophers seeking their occupational identity. It is not denying the greatness and importance of Descartes to say that as a basic description of thinking and of the academic world, it is more or less defunct. I would not mention it at all but for the fact that some of its bones are still venerated[10] as precious relics.
(2) Philosophy can be viewed as considering the same topics as science, but asking different questions about them. A philosophical question may be defined in these terms as one that cannot be answered by the usual scientific methods of observation and crucial test. These odd questions are given equally odd names such as metaquestions (like the old metaphysics) or second order questions or parainvestigations. Typical examples would be "what" questions such as "what is matter?" or "what is energy?" There are also "how do we know?" questions such as "how do we know that the features which make a theory reasonable are themselves reasonable?" These cannot be answered by planning a course of investigations or designing a critical experiment. In short they seem altogether different from ordinary scientific questions. Unfortunately they are so odd and so difficult to answer that the suspicion

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9. Descartes distinguished sharply things known by the senses from those known by the mind. The senses acquaint us with physical things or bodies, whose essence is dimension and movement so that they are measurable. The business of science is the measurement of bodies, and so it is essentially mathematical. The mind on the other hand deals with immaterial things such as the mind or soul and God which do not have dimensions, are not measurable and are understood by a platonic form of reasoning, identifying necessarily true propositions or axioms and deducing consequences from them. The cartesian approach became so widely accepted in academic circles that psychology remained a part of the philosophy department in many universities until comparatively recent times. With the development of statistical mathematics, however, many previously non-dimensional things were reclassified as being measurable so that psychology, sociology and political science made their exodus from philosophy to find their proper place among the mathematical sciences. Philosophy was left then with God and the more ghostly aspects of the soul, a prospect which most philosophers have not found inviting and so have abandoned it to seek their identity elsewhere. *See esp.* his letters to Princess Elizabeth in *Descartes' Philosophical Writings* (Norman Kemp-Smith, ed. 1952), p.274.

10. For instance the notion that science consists of measurement, or as one of my medical teachers put it, "if you don't got numbers, you don't got nuthin'." This by the way is a nice example of the persistence, and therefore the importance, of philosophical ideas.

inevitably arises that they are improper questions, or pseudo-questions, or at least questions we can get along very well without asking.

(3) A third possibility is that the business of philosophy is providing a broad overall view of the universe or some segment of it such as "man" or "the human environment," an activity commonly described as *ontology* (rather like the old description of philosophy as "seeing things steadily and seeing them whole"). This approach has proved popular particularly in continental Europe and America. It is seen as filling in an important empty space left by the science and technology concentration of modern university education, which generally pays little attention to important questions about who we are and where we are headed. And despite doubts and suspicions about its credentials, especially on the part of language philosophers, a major branch of modern philosophy, *existentialism*, proceeds along these lines.

While there is a good deal to be said for the notions that philosophers are problem solvers or map makers, and most of them nowadays are one or the other, all of these answers to the philosopher's search for identity seem to me to be vague and unsatisfactory, and for the same reason. All of them discuss the function of philosophy by asking what is the proper "field" of philosophy, where philosophers, and only philosophers, may work. We may do better if we rephrase the question.

C. Exit the "Field" and Enter the "Jig-saw Puzzle"

The simplest way to meet the concern of the philosophers that they do not have a "field" like botanists or chemists, is to deny that they need one. Academia on the field theory is like a great realm or barony with major estates (the arts and sciences, etc.), which are in turn carved up into smaller farms or allotments, the domains of physics, law, psychology, etc., each of which has its own subject matter and its own methods. This kind of arrangement may persist as an administrative hangover from earlier times, but does not really represent the way in which the faculty divide up their research and teaching.

It might be better to take the analogy of a great jig-saw puzzle with pieces strewn all over the floor of a room, or to imagine that a huge machine from outer space has crashed and that its parts are scattered across a football stadium. Various groups of people can be imagined standing in different parts of the room (or stadium) wondering how the pieces might all fit together. The intellectual universe viewed in this way is a great mass of "data" which we believe hangs together in some manner, though we are not sure how.

Groups of researchers with common knowledge and skills are congregated at different points where the materials and the problems are of interest to them and where their approach holds promise of producing results. But there is no absolute reason why someone should not move around and work elsewhere. Researchers nowadays, in fact, rarely have individual fields totally distinguishable from those of their colleagues in other disciplines. People from different departments tend to work together, borrowing ideas and techniques from one another.

We should not then ask what is the particular and exclusive field of the philosopher or anyone else, for no one has a fee simple in academia; our tenure is at will, we are liable to be displaced at any time by more promising tenants. We may define philosophy, then, by identifying the kinds of questions that philosophers consider, and justify it by showing how the work of philosophers contributes to knowledge, and perhaps also by pointing out how it can be useful to researchers and teachers in other disciplines, including law.

D. Defining Philosophy as Reflective Thinking

Western philosophy began with people who were not content to ask conventional or practical questions. Their initial questions, asking "why do rivers run?", " why does water turn to ice?", "why are some actions right while others are wrong?" and so on, no doubt seemed as pointless and nonsensical to their contemporaries as the concerns of contemporary philosophers do in our own day. But their reflective spirit and their ability to view things from odd angles, which is the very essence of philosophy, is vital in any scientific enquiry, and there is no reason why a scientist should not feel honored, like Newton, to be called a philosopher in this sense.[11]

But what are the special functions of the philosophical specialist who studies and teaches in the Department of Philosophy, who is not a reflective professional, but a professional reflector?

Reflection involves creative imagination, but should not be equated with flights of fancy. It is indeed more like excavating than flying.[12]

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11. An interesting article on the nature and uses of Jurisprudence describes philosophy as reflective imagination. Thomas D. Eisele, "The Activity of Being a Lawyer: The Imaginative Pursuit of Implications and Possibilities," 54 *Tenn. L. Rev.*, p. 345.

12. The notion that Jurisprudence is digging rather than flying is well brought out by Eisele: "The idea that jurisprudence courses are meant to be broadening misconstrues what such a course can truly offer students, particularly students in a

Thinking about one problem uncovers a deeper one and so on. Anyone thinking about the basic concepts of their profession is already digging and will soon be led down to questions and problems which are common to several disciplines. Fruitful cross-fertilization often takes place at this level when thoughtful people in different disciplines discover that they have something in common, and ideas and techniques begin to flow from one area of research into another.

The activities of the pure philosopher can be considered to lie at a still deeper level. Thoughtful physicists, engineers, physiologists, or psychologists are liable to uncover very general but legitimate questions about basic terms and concepts that they work with in the course of their business. They may wonder, for instance, about the nature of mathematics. Or they may be confused by questions such as "what is light?" or "what is energy?" or "what is mind?" At this point, the thoughtful physicist or physiologist may begin to look at works on the philosophy of mathematics or become interested in the views of Descartes, Berkeley, or some other ardent soul who has struggled with these abstract questions. The term Philosophy (with a capital P) is particularly appropriate when reflection reaches basic premisses common to all, or at any rate most, intellectual enterprises. Some of the answers the Philosophers have proposed to reflective questions and, more important still, some of the techniques and doctrines that they have developed in the course of answering them, have proven extremely useful to all sorts of professional researchers, including legal theorists.

The usefulness of courses in philosophy to undergraduate students follows from this definition of philosophy as reflection on underlying premisses. Their value is not in broadening the mind or sharpening the critical faculties. It lies, rather, in deepening our understanding of the concepts and values that underlie literature and art, education, political institutions— in short all human activities. Such understanding of the roots and underpinnings of things is of value in itself, but it also tends to be interpretative, to allow us to see literature, architecture,

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professional school, who are trying to become professionals. The point of such a course is not to broaden their experience so much as it is to deepen their experience. . . . A jurisprudence course can make their responses less superficial and . . . more insightful professionally. Thus jurisprudence proceeds not by introducing law students to new or exotic ways of thought, but rather by bringing their attention back to the problems and ways of the law, and asking them, challenging them, demanding them, to give these problems and ways their complete attention. The idea is one of penetration and immersion, not expansiveness or release." *Ibid.*, p. 347.

politics, education, and pretty well everything else in new ways and to act accordingly. Philosophical ideas, therefore, tend to be most important, arguably the most important, influences governing change in any sphere of human activity. The fingerprints of Plato can still be seen on everything from intelligence testing and education to architecture.

Assuming some such idea of the function of philosophy and philosophers we may go further and consider the notion of professional philosophy, reflective thinking on the basic concepts underlying a particular occupation or activity, which in our case is the study and practice of law.

II. What is Legal Philosophy?

A. Legal Philosophy and the Philosophy of Law

The term jurisprudence was originally as comprehensive in law as was its cousin "philosophy" in science. It was used to refer to any body of organized law; no hard and fast distinction was drawn between the study of particular legal matters, such as criminal law, and the kind of wrestling with basic concepts that we might regard as legal philosophizing. Austin, however, described foundational thinking about the basic premisses of legal theory as *general jurisprudence* or simply jurisprudence, and since that time, the term jurisprudence (absent some qualifying term such as "medical" or "criminal") has come to be synonymous with legal philosophy. The terms *legal philosophy* and *Jurisprudence* (with a capital J) will therefore now be used interchangeably here to refer to reflection by the legal profession on basic notions and concepts underlying their own business.

The term *philosophy of law* (not legal philosophy) is sometimes used to refer to reflection on law for other than professional purposes. Philosophers, theologians, economists, political scientists, and all sorts of people have often included thoughts about law and definitions of law in their systems. This kind of activity is sometimes called *outsider* philosophizing about law as opposed to Jurisprudence, the professional or *insider* study. Another way of saying the same thing is to call the professional study *foundational*, reflecting on the presuppositions and premisses which underlie legal practice, and to describe the non-professional variety as *relational*, showing how law fits into the general scheme of things or how it can be seen from the perspective of other disciplines such as economics.

Much ink has been spilled debating the merits of these various ways of reflecting on law and their place in legal theory,[13] but there is no reason why they should be ultimately opposed to one another, for they are aspects or varieties of the same kind of activity. In practice, each acts as a resource and stimulus for the other. The foundational and professional study of law, the main emphasis here, is likely to be stimulated and helped by ideas adapted from other disciplines; in fact most creative changes in law have involved "foreign imports" of one sort or another.[14] Jurisprudence, then, whether insider and foundational or outsider and relational, is in essence the understanding of law in depth and so should have its place in legal education. It is unlikely, however, given the professional emphasis of the American law school and the time constraints that this places on the curriculum, that relational studies can make it in the core curriculum.[15] It will be argued and hopefully demonstrated later that foundational studies can be fitted in as required courses.

B. The Contributions of Jurisprudence to Professional Legal Competence

The most obvious value of Jurisprudence is that it provides understanding of law. Foundational studies emphasize the roots from which law developed and which continue to nourish it. Relational studies throw light on the law in another way, using ideas which it shares with other enterprises. One cannot claim to really know law without some appreciation of these roots and relationships. Academic purists therefore regard this kind of understanding as a sufficient justification for including Jurisprudence in the core curriculum,[16] but

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13. A review of this controversy, and a continuation of it, can be found in John Hurd, "Institutional Jurisprudence," 36 *Am. J. Juris.* (1991), p. 125.

14. The influence of platonic notions about reason and science on the development of Roman law and medieval common law, the effects of radical empiricism on Austin and the American legal realists, and the use of economic theory in the present century are notable, but by no means the only, examples of this tendency.

15. The situation is quite different in British law schools, where professional education is largely managed in law institutes following graduation from law school. This arrangement frees up a good deal of time, especially in four year law schools such as Queen's University, Belfast, my alma mater, where all sorts of relational studies can be included in the core curriculum or at least encouraged by requiring that one of a group of such electives be taken.

16. *See* Peter Mirfield, "In Defense of Modern Legal Positivism," 16 *Fla. St. U.L. Rev.* (1989), p. 985. *See* p. 386 where Professor Mirfield argues that there is probably no justification possible for legal philosophy other than that it aids understanding. He does, however, go on to admit that theory and practice ultimately contribute to one another.

there are other justifications. Those who have taken Jurisprudence courses have found them of value in practice, allowing them to view particular legal problems from various viewpoints and to analyze and explain complex conceptual matters in a lucid and succinct manner. A Jurisprudence course, even an elementary one, will also provide the ability to read and evaluate books containing philosophical ideas, and important works in any professional field tend to be of this type. However, the real importance of Jurisprudence lies in its ability to provide direction and purpose to professional activities. At the crossroads of life, individual lawyers and the profession as a whole begin to wonder where they are going and, in response to these concerns, must inevitably think—and think Jurisprudentially. Jurisprudence is then to law what the art of navigation is to sailing, and without it the law will be a "ship of fools."[17] Unfortunately, this kind of benefit is more easily seen after years in practice when immediate professional objectives have been reached and reflection is a more normal and natural process than it was in law school. But if the beginning is not made in law school and the basic intellectual tools for the job provided there, later reflection may not last very long, nor get very far.

III. Incorporating Jurisprudence into the Law School Curriculum

A. The Importance of the Link between Theory and Practice

There is traditionally some resistance on the part of students and even faculty to any proposal to introduce materials which do not directly and immediately relate to professional practice.[18] Most students come to law school, medical school, etc. primarily in order to learn how to function as lawyers, doctors, or whatever. This focus, while it is a powerful incentive to study hard, is sometimes a bar to education in depth. Students may wish primarily to learn rules and techniques and how to handle immediate problems. Any other form

17. The reference here is to Plato's analogy of the ship, the original "ship of fools." There was a navigator on board but the crew, totally ignorant of the art of navigation, were unable to discern the knowledgeable from the ignorant and kept electing the latter to the post of navigator. The point is that some knowledge of Jurisprudence is essential for all lawyers, just as some knowledge of navigation was needed for all crew members of the ship. *See Republic* Bk.VI. 486B-487B. *Great Dialogues of Plato*, p. 286.

18. Legal educators have the impression that this tendency has been strongly reinforced in the eighties, perhaps by the increasingly difficult job market.

of enquiry is liable to get less than their full attention unless it can be linked in some way to their future professional life.

Preoccupation with the professional and the practical on the part of students is simply a fact of life nowadays from which we cannot hope to escape. It can, however, be an ally as well as an enemy. Showing the professional relevance of any materials will greatly increase the energy and interest which the students will bestow on them. And connecting up with this basic professional interest is particularly important in any course not obviously related to practice. Medical educators are aware of this and are usually careful to link the more abstract subjects, such as pathology or epidemiology, to clinical classes in "combined clinical courses." The old theoretical courses in pharmacology (often called Materia Medica) have likewise generally been restructured, given a clinical orientation and retitled Therapeutics.

If law students are to enter the strange world of legal philosophy (other than by their own election) it is equally important to tap their clinical interest. The topics chosen in a Jurisprudence course, especially the early ones, should somehow be shown to arise naturally when some practical problem is being considered. How this should be managed is another matter, and it may be difficult. If it is not done at all, then the students (other than the enthusiastic few) will not learn well. But if it can be accomplished to any degree, then even the reluctant may be motivated to learn and perhaps become genuinely interested.[19]

B. What Materials Can Be Covered in the Limited Time Available?

There is a great deal to be said, given the time limits of the American situation, for concentrating on the familiar topics which

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19. In an unfavorable review of a set of American readings in philosophy intended to show its relevance to legal problem solving a British scholar expresses a contrary view:

> I am almost tempted to say that the value of legal theory lies precisely in the fact that it has no practical utility. Certainly its value does not lie in its capacity to prepare students for the practice of law, even practice at the problem-solving level. Rather, its value lies in that which it shares with, for example, theories of history or literary criticism, namely its capacity to advance one's understanding of the intellectual discipline which is its subject. ("In Defense of Modern Legal Positivism," p. 985.)

This way of looking at legal philosophy is more defensible in Britain, where training in the Institutes of Law bridges the gap between professional practice and the education in law provided in the Universities. Yet even in Britain, the practicing bar have for several decades been pressing for more relevance in law school studies.

have traditionally been the standard fare in elementary Jurisprudence courses. This kind of course has been much criticized as antiquated and irrelevant, but everything depends on how the materials are perceived and taught. The questions they raise are perennial and can be shown to be very relevant to the contemporary understanding of law.

The usual general questions relate to:

(1) *The definition of law.* The classical definitions of law can be taught in a dreary and trivial manner, like hanging out shirts in a row to see which one we might select to wear. But they are not mere verbal formulae, laying down conventional meanings for words; they are dynamic interpretative descriptions, invitations to view law in a certain way. It is no accident that new definitions of law have heralded radical changes in the way in which law was written, taught, and practiced.

(2) *The formal organization of a legal system.* Discussion of legal forms is the modern version of the old notion that the study of law is and should be scientific. New understandings of formal systems and their place in science should make this topic more alive and relevant than it ever was.[20]

(3) *The nature of values and their place in legal theory.* Lawyers increasingly find themselves in a polyvalent world where there is a constant clash of ideals and values. It is not surprising that they are becoming very concerned about moral questions and ethical theory; there has indeed been a great revival of interest in the old doctrine of Natural Law.

(4) *Specific legal doctrines which present conceptual problems.* Included here might be such topics as the doctrine of precedent or the hierarchy of legal authorities or the canons for the interpretation of statutes. It is not difficult to create interest in the classical discussions of such doctrines since they are both theoretically difficult[21] and practically important.

All of these items then can and should be shown to have relevance for jurisprudence (small j) and therefore to be important for every student of the law, not only those with a philosophical bent.

C. Integrating Jurisprudence into the Core Curriculum

When the School of Law was established at what was then Campbell College[22] in 1977, one of its major premises was that legal training

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20. I have discussed this topic at greater length in "Medieval Ratio and Modern Formal Studies," 38 *Am. J. Juris.* (1993).

21. *See* the exchange between Professor J.L. Montrose, Mr. A.W.B., and Prof. A.L. Goodhart in 20 *Mod. L. Rev.* (1957). Prof. Julius Stone has reviewed this discussion and added his own comments in 22 *Mod. L. Rev.* (1959), p.597-620.

22. The College became a University in 1979, and the law school was named the Norman Adrian Wiggins School of Law in 1988.

was incomplete without reflective thinking about law and legal concepts and that Jurisprudence should therefore be a required course. Ideally two courses were required, one in the first year to establish some sort of foundation and another in the third year when students would be in a better position to understand the materials and appreciate their relation to the other subjects. But in a curriculum where 60% of the other courses were also required, we had to settle for a great deal less, in fact a one hour course which is taken in the first semester of the first year. One would think that very little could be accomplished with such a tiny offering and one, moreover, which is given before the students have very much acquaintance with the law. With careful planning and execution, however, its effects can be maximized and indeed made quite significant.

The course is taught two hours per week for seven weeks rather than one hour a week throughout the semester. This arrangement is intended to focus attention on it during that period and to improve retention of materials between classes.

A class concerned with reflective thinking should obviously be divided into as many sections as possible to allow interaction between teacher and students, but only two sections with approximately fifty students each was deemed feasible. It had been hoped that with the improved facilities of our new building, a division into three or even four classes would have been possible, but there were other problems besides space, and the more ideal smaller class has not proved practicable. The formal classes have therefore been supplemented by seminars given by student teaching assistants who review the class materials and answer questions. Teaching assistants will normally have taken the Advanced Jurisprudence seminar and each of them conducts two seminars a week with groups of approximately twelve to fifteen students. The teaching assistants meet together with the instructor and discuss the seminar topic for one hour each week and are also supplied with teaching notes, both of which help to ensure reasonable uniformity of approach. This has been a most valuable part of the program, if the expressed response of the students and the reports of the teaching assistants are to be believed. The teaching assistants can generally understand the needs and difficulties of the students much better than the instructor (standing more nearly in their shoes) and are probably more readily believed than faculty would be when they tell their group that the subject is of importance. It is also very valuable for the teaching assistants who, like the rest of us, learn a great deal more than they teach.[23]

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23. I would like at this point to acknowledge my debt to my students, especially

It is very helpful if the instructor also teaches some other first year subject. The relevance of jurisprudential notions can then be illustrated in classes in Torts, Contracts, or whatever. The application of word calculus theory, for instance, a central theoretical notion in our Jurisprudence course in Campbell, can easily be demonstrated and seen in action during class. The instructor can devise, or have the students create, algorithms representing the law of nuisance or failure to warn or any other topic.

The cooperation of other faculty can similarly reinforce the ideas taught in the course and indeed continue its effects over the students' entire law school career. Concerted effort of this kind, however, is difficult to obtain. Many if not most faculty members have never taken a course in legal philosophy, have little idea of what it is about and very little notion of its importance. Two measures have been tried here to overcome this problem:

(1) Several years ago our annual faculty retreat took the form of a Jurisprudence course with sessions spread over several days, conducted by Professor Kent Greenawalt of Columbia University. All faculty attended most of the sessions and participation in discussion was good. It is debatable, of course, to what extent, if any, remedial measures such as this will make faculty in general able and willing to indicate jurisprudential issues when they arise in their classes. A more positive result may be possible in the future when, hopefully, more of them will have been exposed to Jurisprudence as students. Nevertheless, we felt it worthwhile to make this attempt. It certainly did not hurt the program and probably was helpful. At the very least it indicated that the Dean and the curriculum committee were serious in their stated intention to make the teaching of Jurisprudence an integral part of the whole educational program.

(2) More immediately effective was organizing a single seminar (one or two hours) where individual faculty members discussed a problem case, Lon Fuller's *Spelunkian Explorers*, with a small group (typically ten or twelve students). This was helpful in showing how a difficult decision inevitably leads to consideration of underlying ideas. It is probably even more useful in showing faculty support for the Jurisprudence program.

(3) A third, and I think most effective measure, has been to include some Jurisprudence materials in the orientation week for first year students. The immediate exercise of learning to brief a case (what is relevant and what is not) and determining what is

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those who have taken the advanced seminar and have acted as teaching assistants in the required elementary course. Their criticisms have almost invariably proved well-founded and their suggested improvements in class materials have, again almost invariably, been adopted and proved most helpful.

the holding in a case raises questions about "the rule in the case" (which we have inherited from Austin) and the "significant facts in the case" (left to us by Oliphant and the realists). The difficulties involved in Austin's and Oliphant's approaches to these matters are thus raised in advance and in relation to a very pressing practical question for the entering students, namely making their first attempts at briefing a case. We also use this occasion to introduce them to legal logic in the form of word games since the word-calculus version of deciding a case (mentioned in the next section) can be adapted to provide a fairly simple and certainly a more objective method of deciding what should be included in a brief and what may be omitted. They are encouraged to ask what little pieces of word logic are being applied or might be applied in the case, which technical terms are in question, and which facts might bring the case under these crucial words or exclude it from them.[24]

D. Developing Special Materials for a Required Course

There is no shortage of text books and even casebooks on legal philosophy, but almost all of them appear to have been designed for an elective course. As such, they presuppose an active interest in the subject and probably some familiarity with background notions as well. We quickly concluded that none of these were apt for our purposes and that we must develop our own materials.

It is not difficult nowadays to put together and customize a set of materials for any particular purpose. Items can be scanned or otherwise saved into computer memory and fairly easily formatted, supplemented, and generally edited until they are deemed suitable for whatever course we have in mind. We made several attempts in this direction but finally settled on a reasonably small book specifically aimed at students who are neither familiar with philosophical materials nor particularly interested in becoming so. The central feature of this book was a collection of stories, plays, etc. intended to introduce the topics and materials in an interesting and attention catching manner. These included a paternity case against John Austin (the father of English Jurisprudence) a "Greek" play entitled *Oedipus Lex*, and a panel game in heaven called *Name that Norm*. The book was therefore entitled "Jurisfiction." The fictions are followed by

24. I am grateful here for the imagination and effort of my colleague Professor Richard Bowser, both for his inclusion of Jurisprudential materials in the orientation courses and for his insight and help in producing them. Professor Bowser has also included explanatory materials in basic legal history (the other instrument of legal understanding) in the orientation instruction, which I think has also been very helpful.

classical readings in Jurisprudence with questions and comments appended. Short essays explaining background concepts and theories are also included.

The overall plan was six main sections allowing approximately two or at the most three classes for each. The first three main sections deal with the definition of law and the main readings here were Savigny's, *Vocation of our Age for Legislation and Jurisprudence*, John Austin's *Province of Jurisprudence Defined* and Hermann Oliphant's *Return to Stare Decisis*—all classics. Savigny's little treatise was chosen because it shows how discussion of a practical problem, in this case whether there should be a civil code or not, leads to discussion of an underlying conceptual problem, namely the definition of law. All of these, especially Austin, were rendered more user friendly by abridgement, providing section headings and replacing archaic terms with more readily understandable modern equivalents.

The final two main sections are devoted to value systems. Utilitarianism and contractarianism are considered together as prudential theories (i.e., based on the notion of rational self- interest) and the final chapter was devoted to natural law theory. These particular value theories were selected because all of them have featured importantly in legal theory in the past and continue to do so at present.[25]

The fourth chapter, concerning the formal organization of legal materials, is central not only in position, but also in function. It is used as the structural matrix around which all the other materials and concepts can be arranged. The formal theory employed is an adaptation of the later views of Ludwig Wittgenstein in which he stresses the use of logical games in any kind of thinking but especially scientific discourse. This approach to legal theory is most appropriate in the computer age and helps bring legal theory in line with organizational methods used in other learned professions. The decisional algorithms (essentially word games) favored in medical literature nowadays can be made over to represent both substantive and procedural law. Wittgenstein's ideas can also be used to provide a definition of law as *word calculus games applied to disputes to realize values*; this in turn can be used to compare and contrast other definitions of law. It shows how values and policies may be

25. It is interesting that Rawls' theory of justice was used to develop the health services rationing scheme in the State of Oregon to avoid some of the problems of the Canadian health system, which was based rather on Bentham's approach.

incorporated into legal theory,[26] provides a reasonable and workable theory of *stare decisis*,[27] and may even be used to explain difficult legal terms such as "reasonably certain" and "dead."

We have been using Jurisfiction for a number of years, and I think it has been largely successful as a means of making the course more interesting and more intelligible. Most importantly it has made it possible for "ordinary" law students, who have no previous exposure to philosophy, to go on to take and profit from an advanced course. A number of defects have emerged, however, which we are attempting to correct.

(1) Students have consistently complained of difficulty in understanding the theories of non-legal philosophers mentioned in the book and have suggested that short articles explaining their ideas would be helpful. Brief explanatory notes on general philosophical matters have therefore been appended to each chapter where appropriate. We also plan to add brief notes (approximately one or two pages in length) in the forthcoming version to deal with contemporary jurisprudential topics such as the economics and law and critical legal studies movements.[28]

(2) We have also found that there are more readings included than one can possibly discuss within the time limits of our course. We have therefore (reluctantly) removed some of the supplementary readings, such as Holmes' *The Path of the Law*, that were included in earlier versions of Jurisfiction but not reached in class. We would like to widen the spectrum of readings, and so provide the students with increased exposure to Jurisprudential literature by supplementing the main readings with short extracts only, the purple passages rather than entire articles. In this way a greater variety of materials can be included in the reasonable expectation that they will be read by the students.

(3) Finally, the questions and comments require constant revision. The general trend here has been to leave out the more fanciful and academic items and concentrate on questions which bring out

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26. Wittgenstein's dictum that a "rod is a lever used for a different purpose" implies that failing to consider ends and goals (including values) renders language meaningless (no rules without purposes). This simple point avoids much of the confusion that has marked the long debate on "legal positivism" by showing exactly how values, as ends and goals, function in legal discourse.

27. I have discussed the topic of law considered as ratio more fully in "Medieval Ratio and Modern Formal Studies."

28. In general we deal with current controversies and the writings of contemporary legal philosophers in the advanced Jurisprudence seminars rather than in the Elementary course. Undergraduate courses in legal philosophy are frequently centered around contemporary writings, and this approach seems to work very well, but there is usually a prerequisite philosophy course or two required in order to take these courses, a condition which does not apply in law school. There is also usually more time available for discussion.

important features of the texts or show how the theory impinges on practice. This is a wonderful place to introduce case law material. We have already made some use of cases, e.g., *Commonwealth v. Goldston*, 366 N.E.2d 744 (1977), where a battered and brain damaged patient was terminated by the physicians after four days on the ventilator. This allowed the defense to introduce a philosophical question namely "when is a dead man dead?" We plan to increase these offerings and would welcome news about good cases from teachers in other schools.

The Campbell experience has been outlined in some length here not because it is the only way or even the best way to organize a required course in elementary Jurisprudence, but simply to show that given the will there is a way.

IV. The Jurisprudential Functions of the Legal Profession

A. The Responsibility of the Legal Profession for Legal Theory

The emphasis thus far has been on the place of Jurisprudence in the law school curriculum. Yet the principal argument for including it as a required course in law school, namely that it is an essential part of legal theory (jurisprudence with a small j) argues that it affects the practice of law and so should be a matter for continued concern on the part of the practicing bar. That this is not felt to be the case is another hard fact of life and one that will be very difficult to overcome. Significant change will not really begin until law schools see the importance of this matter and take action accordingly. In the meantime, however, a number of things can and should be done.

(1) The most important of these, it is submitted, is that the attention of legal theorists should be directed to preparing and publishing studies directly aimed at practical problems showing how good theory can elucidate and resolve tangled legal questions. Impressive philosophical treatises and heated controversies (bloodless duels) carried on in learned journals have their uses in the advancement of learning but do not fulfil our responsibility to the profession as a whole.[29]

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29. Our philosophical edifices should be open and attractive buildings, after the manner of Plato, with open doors to encourage access, a simple floor plan so that visitors do not get confused or lost, and many illustrative windows to admit light. Unfortunately this style of writing has never been much in vogue with philosophers. Jurisprudents too often take aim at their colleagues rather than writing for the general legal reader, with the result that the emphasis is on attack and defense,

(2) Another important Jurisprudential project would be to use structural theory (formal theory) to improve legal analysis and legal writing. We think and write on legal subjects without much attention to considerations of logic (in the mathematical and formal sense of that term). Every learned discipline must develop ways to arrange its materials in proper form both for purposes of analysis and also so that we may communicate our views and findings to one another. Much of the criticism of legal formalism (e.g. that it is rigid and unrelated to life) arises from misunderstanding and sometimes even plain ignorance as to the nature and function of logical form. Proper formal structure is no more unrelated to life or resistant to social change than is language, which as Wittgenstein has taught us necessarily involves logical form. If we do not know how legal logic works or fail to keep the logical apparatus of the law current, we should not blame logic but ourselves for the bad results. And if we become more active in this matter, we should find that good formal structures would be as helpful in law as they have been in medicine and in science generally.

(3) Finally, it is the responsibility of the legal community, as it is of any other profession, to keep an eye on what is going on in other disciplines in order to see if there is anything that can be usefully incorporated into legal theory. This duty obviously devolves largely on those members of the bar, and there are quite a lot of them, who have expertise in areas other than law, e.g. economics, philosophy, medicine, computer studies, etc. If they were encouraged to make materials from their field of expertise available to lawyers in an understandable form, they might do so. There might even be enough of these lateral-thought materials to justify a journal (free-throwaway type) which would act as a forum where such ideas might be made available to the practicing bar rather than the academics only.

B. Some Caveats about the Usefulness of Legal Philosophy

A few things need to be said, by way of explanation at this point, about the use of philosophical materials (or ideas from outside

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especially the latter. Jurisprudential writings are commonly intellectual fortresses, forbidding rather than inviting, difficult to access, and filled with dark passages and spiral staircases if we do manage to gain entrance. Current works in legal philosophy are thus usually very difficult to read and also presuppose that the readers have some knowledge of the subject. Beginners, whether law students or interested lawyers, are liable to be daunted and turned off if they are introduced too early to contemporary writers. It is for this reason that I think that it is a serious tactical error to use contemporary materials in the required course. They are better reserved for the advanced seminar where even previously unphilosophical students enjoy trying out the weapons they have acquired in the introductory course and storming the battlements of these formidable strongholds. Students in the elementary course should, of course, be made aware that there are important contemporary jurisprudents and should know something, at least in outline, about what they are saying.

sources generally) in legal theory, especially in its professional forms.

(1) The effects of theory, especially when interpretative concepts are brought into legal theory from outside, may be malign. Imported ideas have a long history of producing ill and even catastrophic effects inside the host subject. Imperfectly understood and improperly applied—and which of them are not in the beginning—new ideas can be counterproductive and even destructive. Eventually, however, most of them find their proper place and their legitimate uses. We must look at the broad picture and consider the long-term advantages. Philosophy does not always enlighten any more than medicine always heals. But we would be no wiser to adopt an unreflective, unphilosophical approach to law than to abandon scientific medicine and let the treatment of disease proceed empirically by trial and error.

(2) Similarly it should not be assumed that philosophical investigations will definitely answer all basic questions or resolve all conceptual puzzles. One can indeed be confident that they will not. Conceptual reflection eventually reaches levels that make the most profound thinkers dizzy. To dig beyond a certain point is to come up against a hard layer of unanswerable questions and impossible paradoxes. It does not follow, however, that the effort expended in philosophical reflection is wasted or that the project is ultimately futile. Provisional answers and approximate formulations can be produced which are reasonably satisfactory and surely superior to dogmatic assumptions and unexamined covert premisses.

(3) One may wonder how complex conceptual studies can possibly be accommodated into legal scholarship much less legal education. Philosophical texts are difficult to read. The arguments proceed in a manner that must seem painfully slow and tortuous to the outsider. It takes a great deal of concentration and much endurance even for philosophers to follow these arguments through to the end. But there is no need for everyone to read them. The law is a corporate enterprise, a *collegium* in medieval terms, so that while each member should have reflected on the conceptual foundations of the law, everyone need not be a specialist in philosophy, economics, or any other interpretative tool. The more abstract studies can be delegated to scholars with special training and particular knowledge. It is, of course, an important part of the function of these persons, or some of them anyway, to interpret specialized materials and present them to their less fortunate (or more fortunate) colleagues in a usable form.

Summary and Conclusions

The sum and substance of what has been said already is that:

(1) There is presently a renewed interest in legal philosophy which creates new opportunities but also some concerns about the ad-

vancement of the study of Jurisprudence in the legal profession as a whole and especially in legal education.

(2) We need to make it clear to the profession and to ourselves what legal philosophy (Jurisprudence with a big J) is and what its essential connection is with the study and practice of law.

(3) Legal philosophy is not a "field" separate from other subjects, but an activity, reflecting upon and interpreting basic concepts in the law.

(4) The very nature of Jurisprudence as basic legal theory designates it not as an interesting extra, but as an essential element in the understanding of law. It would seem to follow, unless this can be miraculously interwoven into the other courses, that studies in legal philosophy should be part of the core curriculum in law school.

(5) It is possible with careful planning and faculty cooperation to include required courses in Jurisprudence without overloading the curriculum. Indeed given faculty cooperation Jurisprudential considerations can become a normal feature of every course in law school.

(6) Reflective thinking and facility in the use of conceptual materials (such as formal and moral theory) are needed by lawyers for several reasons, but especially to provide direction for the legal profession. Trial academies, judicial academies, emerging inns of court in the United States, and CLE providers should therefore be considering what they might do to improve the competence of their members in these directions. The emergence of court might also consider the improvement of conceptual skills as well as those of the courtroom and law office.

(7) It is impossible for any one person to keep up with developments in other disciplines, but the profession as a whole can keep reasonably well informed as to most things if we act together in an organized way. Lawyers with philosophical training or expertise of some other sort should be encouraged to take complex or abstruse materials from extralegal sources and translate them into forms that will render them usable by the profession as a whole.

The overall contention is that reflective thinking is as important in law as it is elsewhere and that foundational thinking (Jurisprudence as defined here) is critically important. And since Jurisprudential competence is neither innate nor produced by the everyday practice of law, it must be taught. This amounts to saying that a determined effort should be made to incorporate Jurisprudence into the core curriculum of every law school.