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THINKING PHILOSOPHICALLY ABOUT LAW: THE ROLE OF MORAL AND POLITICAL REASONING IN SHAPING THE LAW

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This paper explores the different ways in which ideas from moral and political philosophy underpin the development of the law. The shape of the substantive law can be seen to reflect assumptions and choices about core philosophical notions such as the moral obligation of one person to another, the attribution of responsibility for conduct and the nature of the relationship between the individual and the state. And the task of adjudication often calls for the exercise of moral judgement, either explicitly or implicitly. It follows, I contend, that lawyers need to develop the capacity to think philosophically about law. This means having sufficient philosophical awareness, understanding and fluency to engage with the ideas which are in play. Building that capacity should be one of the goals of legal education.

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> The aim of this subject is twofold — first, to develop in students a high-level understanding of how legal rules embody, and reflect, important philosophical and moral notions which are themselves examinable; and, second, to develop in students a sophisticated approach to thinking about legal questions which employs philosophical rigour.

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Contents

I Introduction 230
II The Philosophical Content of Law 231
III Explicit Philosophy 237
IV Criminal Law 240
V Political Philosophy in Play 242
VI Thinking Like a Philosopher 246
VII Philosophical Self-Awareness 248
VIII What Does This Mean for Legal Education? 249

I Introduction

An examination of any area of substantive law reveals that ideas drawn from moral and political philosophy underpin, and explain, how the law has developed. Mostly, the work which those ideas do is hidden from view; less often, philosophical concepts are made explicit in the language which legislators and judges use.

It follows, I will contend, that a capacity to think philosophically about law is essential for both understanding and applying law. This is what I will call 'the philosophical imperative'.

In this sense, 'thinking philosophically about law' requires the lawyer to be *aware* that philosophical ideas are almost always at work in legal doctrine and, very often, in judicial decision-making; to have a working *understanding* of those philosophical ideas; and to have sufficient *fluency* in philosophical language and method to be able to formulate advice to a client, and advocacy to the court, accordingly.

In what follows, I will chiefly be concerned to explore the different ways in which philosophical ideas are deployed in the shaping and application of legal rules, as that is the starting point for the philosophical imperative.

But, later in this paper, I use the phrase 'thinking philosophically about law' to mean quite different things. I use it to mean thinking and writing about law *like a philosopher*, deploying the habits of mind — analytical rigour, logical argument and linguistic precision — which characterise analytic philosophy.

And I use it to mean philosophical self-awareness *as a lawyer*, understanding the moral and political dimensions of the choices to be made about what kind of law to practise, how to practise it and on behalf of what types of clients.

After considering those different meanings, I will argue, finally, that legal education must itself take account of the philosophical imperative.

II The Philosophical Content of Law

Substantive legal rules can be seen to rest on assumptions, conceptions and choices which can properly be characterised as philosophical in nature, concerning (for example):

- how we assess right and wrong;
- the moral obligation of one individual to another;
- the attribution of responsibility for conduct (including questions of causation, agency and free will);
- the nature of the relationship between the state and the individual; and
- how we satisfy ourselves that we know things, and what it is to know something.

Tort law, for example, is philosophically rich:

> The law of torts concerns the obligations of persons living in a crowded society to respect the safety, property, and personality of their neighbors, both as an *a priori* matter and as a duty to compensate for wrongfully caused harm, *ex post*. Tort law, in other words, involves questions of how people should treat one another and the rules of proper behavior that society imposes on each citizen for avoiding improper harm to others, and for determining when compensation for harm is due. Moral philosophy (ethics), and to some extent political philosophy, are themselves concerned with principles of proper conduct. And so both fields, tort law and philosophy, involve a search for norms of proper behaviour — norms that may be used for evaluating the propriety or wrongfulness of particular instances of harmful conduct.[1]

The concept of autonomy is a foundational idea in the law of torts, though its importance is largely hidden from view. Thus, it has been said that the 'fundamental doctrines [of tort law] are structured to advance autonomy'.[2] On this view, the law of torts *protects* a person's autonomy by deterring others — by

[1] David G Owen, 'Foreword: Why Philosophy Matters to Tort Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995) 1, 7.

[2] John B Attanasio, 'The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability' (1988) 74(4) *Virginia Law Review* 677, 683.

creating the risk of liability — and seeks to *restore* a person's autonomy through compensation when it has been violated.[3] At the same time, of course, tort law *constrains* autonomy by imposing limits on freedom of action.

In recent years, appellate courts have explicitly invoked the idea of autonomy as a *limiting* factor in the tort of negligence, that is, as a reason for not imposing a duty of care or for limiting its scope.[4]

In the first category are judgments holding that:

- police officers owed no duty of care to an overtly suicidal person, even though they had statutory power to 'apprehend a person who appears to be mentally ill [and to be] … likely to attempt suicide';[5]
- a proprietor of licensed premises owed no duty of care to protect obviously intoxicated patrons against risks of physical harm arising from their consumption of alcohol on the premises;[6]
- an international sporting body owed no duty of care to protect players against risks of physical harm (for example, by monitoring and adjusting the rules to avoid risks of unnecessary harm).[7]

In the second category are decisions dealing with the scope of the duty of care owed by an employer to its employees. These are cases where an employee has suffered psychiatric injury as a result of having been (foreseeably) exposed, through her work, to traumatic or distressing events.[8] The courts have regarded the employee's autonomy as an 'important value' counting against the holding

[3] Ibid 685, 688–90.

[4] See, eg, *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 248–9 [87]–[91] (Gummow, Hayne and Heydon JJ) ('*Stuart*'); *Cole v South Tweed Heads Rugby Club Ltd* (2004) 217 CLR 469, 477 [14]–[15] (Gleeson CJ), 483 [38] (McHugh J) ('*Cole*'); *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 406 [38] (Gummow, Heydon and Crennan JJ) ('*CAL*'); *Agar v Hyde* (2000) 201 CLR 552, 561–2 [15] (Gleeson CJ), 583 [90] (Gaudron, McHugh, Gummow and Hayne JJ) ('*Agar*').

[5] *Mental Health Act 1986* (Vic) s 10(1)(b); *Stuart* (n 4) 224–5 [5]–[11] (French CJ), 251–6 [99]–[120] (Gummow, Hayne and Heydon JJ).

[6] See, eg, *Cole* (n 4) 478 [17]–[19] (Gleeson CJ); *CAL* (n 4) 413–17 [52]–[57] (Gummow, Heydon and Crennan JJ, French CJ agreeing at 396 [1], Hayne J agreeing at 417 [62]–[64]).

[7] See, eg, *Agar* (n 4) 564 [23] (Gleeson CJ), 584 [92] (Gaudron, McHugh, Gummow and Hayne JJ), 599–600 [123]–[124] (Callinan J).

[8] See, eg, *The Age Co Ltd v YZ (a pseudonym)* (2019) 60 VR 189, 190–2 [1]–[13] (Niall, T Forrest and Emerton JJA).

that the employer has a duty to monitor the employee's mental health or to intervene if there are signs of deterioration.[9]

In *Stuart v Kirkland-Veenstra* ('*Stuart*'), a decision in the first category, two police officers came upon a man who had — as he admitted to them — been on the verge of committing suicide. He told them that he had changed his mind, so they let him leave. Later that day he killed himself. His widow sued Victoria Police in negligence.[10]

The threshold question was whether the officers owed her husband a duty of care.[11] The High Court concluded that they did not.[12] The significance of autonomy as a limiting factor appears from the joint judgment of Gummow, Hayne and Heydon JJ, as follows:

> The duty which the plaintiff alleged the police officers owed her late husband was a duty to control *his* actions, not in this case to prevent harm to a stranger, but to prevent him harming himself. On its face, the proposed duty would mark a significant departure from an underlying value of the common law which gives primacy to personal autonomy, for its performance would have the officers control conduct of Mr Veenstra deliberately directed at himself.
>
> Personal autonomy is a value that informs much of the common law. It is a value that is reflected in the law of negligence. The co-existence of a knowledge of a risk of harm and power to avert or minimise that harm does not, without more, give rise to a duty of care at common law. As Dixon J said in *Smith v Leurs*, '[t]he general rule is that one man is under no duty of controlling another man to prevent his doing damage to a third'. It is, therefore, 'exceptional to find in the law a duty to control another's actions to prevent harm to strangers'. And there is no general duty to rescue. In this respect, the common law differs sharply from civil law. The common law has been described as 'individualistic', the civil law as 'more socially impregnated'.

[9] *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports ¶81–919, 70,353 [44]–[46] (Keane JA, Jerrard JA agreeing at 70,344 [1], Douglas J agreeing at 70,370 [111]); ibid 222–3 [171].

[10] *Stuart* (n 4) 223 [1]–[3] (French CJ).

[11] Ibid 223–4 [4].

[12] The Court reversed a decision of the Victorian Court of Appeal over which the author presided: ibid 242 [63] (French CJ), 256 [121] (Gummow, Hayne and Heydon JJ), 266 [150] (Crennan and Kiefel JJ), revd (2008) 23 VR 1, 19 [76] (Warren CJ, Maxwell P agreeing at 23 [95]).

> It may be said that the notion of personal autonomy is imprecise, if only because it will often imply some notion of voluntary action or freedom of choice. … [E]xpressed in the most general way, the value described as personal autonomy leaves it to the individual to decide whether to engage in conduct that may cause that individual harm.[13]

Similar views were expressed in *Reeves v Commissioner of Police* ('*Reeves*'), a decision of the House of Lords concerning the suicide of a person in police custody.[14] The custodial authority conceded that it had breached its duty of care but argued that the deceased's voluntary act had broken the chain of causation.[15] Lord Hoffmann acknowledged that this argument was

> based upon the sound intuition that there is a difference between protecting people against harm caused to them by third parties and protecting people against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions. This philosophy expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed.[16]

These were, of course, cases which turned on the autonomy of the person to whom the duty of care was said to be owed. Interestingly, the hostility of the common law to the imposition of affirmative duties — such as a duty to rescue — is said to rest on respect for the autonomy of the putative *duty holder*.[17] Absent a pre-existing relationship, the law holds that a person who sees another person at risk is free to decide not to become a rescuer or otherwise to intervene.[18]

[13] *Stuart* (n 4) 248 [87]–[89] (emphasis in original), quoting *Smith v Leurs* (1945) 70 CLR 256, 262 (Dixon J), Basil S Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (Hart Publishing, 2002) 90.

[14] [2000] 1 AC 360, 365 (Lord Hoffmann).

[15] Ibid 368.

[16] Ibid.

[17] Douglas Hodgson, 'Rescue of Persons and Property in Comparative Common Law and Civil Law Context' (2011) 19(3) *Tort Law Review* 125, 126.

[18] *Stovin v Wise* [1996] AC 923, 930–1 (Lord Nicholls, Lord Slynn agreeing at 928), 943–6 (Lord Hoffmann, Lord Goff agreeing at 928, Lord Jauncey agreeing at 928); *Childs v Desormeaux* [2006] 1 SCR 643, 660–1 [39] (McLachlin CJ for the Court); ibid 125–6.

Autonomy is a philosophically rich concept, and both its meaning and its implications are contestable. As the passages from *Stuart* and *Reeves* illustrate, the common law's conception of autonomy is highly atomistic. It views the individual as self-sufficient, abstracted from the family and social relations in which people live.

But there are other, quite different, conceptions. For example, the feminist conception of autonomy is relational. On this view, since

> relationships of care and interdependence are valuable and morally significant, then any theory of autonomy must be 'relational' in the sense that it must acknowledge that autonomy is compatible with the agent standing in and valuing significant family and other social relationships.[19]

That different conception of autonomy can be seen at work in, for example, occupational health and safety law, which imposes a statutory duty on an employer to ensure that an employee does not take unreasonable risks.[20] As advertisements about workplace safety emphasise, that restriction on the individual's freedom of action is justified by a recognition that the death of a worker has profound implications for the worker's family.[21] It is also justified by a recognition that the employment relationship itself compromises an employee's capacity to protect their own interests.[22] Relevantly, the imposition of the statutory duty on the employer does not infringe the employee's 'relational autonomy'.

Nor is 'autonomy' a state of being which can be said definitively to be either present or absent. Joseph Raz, for example, has defined three 'conditions of autonomy', each of which must be satisfied if a person is to be

[19] Natalie Stoljar, 'Feminist Perspectives on Autonomy', *Stanford Encyclopedia of Philosophy Archive* (Web Page, 11 December 2018) <https://plato.stanford.edu/archives/win2022/entries/feminism-autonomy/>, archived at <https://perma.cc/PF4Y-4FT8> (citations omitted). See also Ji-Young Lee, 'Relational Approaches to Personal Autonomy' (2023) 18(5) *Philosophy Compass* e12916: 1–14, 1–6.

[20] *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321, 331 [44], 332 [50] (Maxwell P, Buchanan and Redlich JJA).

[21] See, eg, WorkSafe Victoria, 'Who's There TV Commercial 2011' (YouTube, 20 December 2010) <https://www.youtube.com/watch?v=ffC9FfMYpW4&ab_channel=WorkSafeVictoria>, archived at <https://perma.cc/KEX8-XP8W>.

[22] *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 24–5 [44]–[46] (Gaudron J), 42–6 [104]–[113] (McHugh J, Gleeson CJ agreeing at 13 [3]), 85 [233] (Kirby J).

autonomous, that is, the 'maker or author' of their own life.[23] They must have:

- the 'mental abilities to form intentions of a sufficiently complex kind, and to plan their execution';
- 'adequate options' to choose from; and
- independence, that is, freedom from 'coercion and manipulation' from others.[24]

On this view, whether a person is autonomous is highly dependent on both the person's capacity and their circumstances. And different people will be autonomous to varying degrees. So, if 'autonomy presupposes full capacity to make choices', how is that capacity to be assessed?[25] What would justify a court concluding that a person was 'not autonomous, or fully autonomous'?[26]

There is a further conundrum. Autonomy is an important concept in other areas of judge-made law. Equity frequently intervenes, under the rubric of unconscionable conduct or undue influence, to save a person from the consequences of an ill-advised transaction.[27] It is striking that what justifies the equitable intervention is 'an ascendancy by the stronger party over the weaker party such that the relevant transaction is not the free, voluntary and independent act of the weaker party'[28] or the existence of a 'disabling condition or circumstance … which seriously affects the ability of the innocent party to make a judgment as to his [or her] own interests'.[29] How does this conception of autonomy compare to that at work in the common law of negligence?

This brief survey of the work which autonomy is called on to do in shaping tort law — and of its conceptual complexity — underlines the philosophical

23 Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) 372.

24 Ibid 372–3.

25 *Stuart* (n 4) 249 [91] (Gummow, Hayne and Heydon JJ).

26 *CAL* (n 4) 406 [38] (Gummow, Heydon and Crennan JJ).

27 See, eg, *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 476–81 (Deane J, Mason J agreeing at 461, Wilson J agreeing at 468) ('*Amadio*'); *Thorne v Kennedy* (2017) 263 CLR 85, 111–13 [63]–[65] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

28 Sir Anthony Mason, 'The Impact of Equitable Doctrine on the Law of Contract' (1998) 27(1) *Anglo-American Law Review* 1, 6–7, citing *Amadio* (n 27) 461 (Mason J), 474 (Deane J).

29 *Stubbings v Jams 2 Pty Ltd* (2022) 399 ALR 409, 419 [45] (Kiefel CJ, Keane and Gleeson JJ), quoting *Amadio* (n 27) 462 (Mason J).

imperative. In order to engage effectively with the legal questions, the lawyer needs philosophical awareness, understanding and fluency.

III Explicit Philosophy

Certain statutory provisions explicitly invoke philosophical concepts. Under the *Administration and Probate Act 1958* (Vic), for example, the court may order that provision be made out of a deceased estate for the 'proper maintenance and support' of a person for whom the deceased 'had a moral duty to provide'.[30] As McMillan J said in *Morris v Smoel*, the basis of the jurisdiction is 'the enforcement of moral obligations',[31] demanding a 'broad evaluative judgment' and an assessment of whether or not a testator 'has failed in his or her moral duty'.[32]

Although the philosophical idea — 'moral duty' — is here in plain sight, it is imperative that both lawyer and judge first recognise it as such. Then, in order to discharge their respective professional duties, they need a working understanding of what is meant by 'a moral duty to provide' and sufficient fluency in the language of ethics to be able to articulate why there has, or has not, been a breach of that duty in the circumstances of the case.

The same is true of statutory provisions which use the language of conscience. For example, s 21(1) of the *Competition and Consumer Act 2010* (Cth) sch 2 provides that '[a] person must not … engage in conduct that is, in all the circumstances, unconscionable'.[33] As the courts have recognised, 'unconscionable conduct' means conduct 'against conscience'.[34]

Given that 'against conscience' is an explicitly moral standard, judges must necessarily engage in moral reasoning when applying that standard in evaluating past conduct. The lawyer must therefore ensure that a client who seeks advice on a proposed course of action is aware of the moral dimension of the prohibition.

[30] *Administration and Probate Act 1958* (Vic) ss 91(1), (2)(c).

[31] [2014] VSC 31, 11 [32] ('*Morris*'). See also *Whitehead v State Trustees Ltd* (2011) 4 ASTLR 528, 541–2 [42]–[47] (Bell J).

[32] *Morris* (n 31) 12 [34].

[33] *Competition and Consumer Act 2010* (Cth). Similar provisions exist in the financial services context: *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA–12CB.

[34] *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 17 [14] (Keifel CJ and Bell J), 59 [153] (Nettle and Gordon JJ).

The lawyer may have to bring her own moral intuitions and dispositions to bear in advising her client about what to do — or not to do — and about the moral judgement a judge might make should the client's conduct be challenged on grounds of conscience. In this way, the lawyer's discharge of her professional duty requires philosophical as well as legal fluency.

The philosophical imperative applies equally to law schools. They must equip their students with the aptitudes — awareness, understanding and fluency — which professional competence in this field of law requires. Matthew Harding and I have argued that

> law students should be equipped not only with an understanding of the elements of unconscionable dealing as laid out in cases such as *Amadio*; they should also appreciate that the conscience-based doctrine applied in that case, and in analogous cases, demands active moral engagement on the part of those who propose to transact with vulnerable people. Legal training should both enable and encourage young lawyers to bring their moral sensibilities to bear on their advisory work, and legal practices should cultivate a culture of moral awareness and engagement.[35]

Recognising the existence, and the importance, of one's own moral intuitions is a gateway to philosophical awareness. When the lawyer recognises that she has an intuitive response to a particular question — for example, whether criminal responsibility should turn on intention or outcome — she begins to appreciate that what a judge decides in a case will often owe a great deal to that judge's moral intuitions about what would constitute a just outcome in the case.

This is particularly so in hard cases, where the applicable legal rule does not provide a clear answer to the legal question in dispute. This problem of indeterminacy may arise because the rule is formulated in general terms — for example, 'maintain a safe system of work'[36] — or because the rule is, as HLA Hart said, 'fundamentally *incomplete*: it provides *no* answer to the questions at issue'.[37]

The most obvious examples of indeterminate legal rules are those imposing standards of 'reasonableness'. Judges must frequently apply such rules in the

[35] Chris Maxwell and Matthew Harding, 'Private Law, Conscience and Moral Reasoning: The Role of the Judge' (2022) 46(1) *Melbourne University Law Review* 123, 151, citing *Amadio* (n 27) 467 (Mason J).

[36] *Occupational Health and Safety Act 2004* (Vic) s 21.

[37] HLA Hart, 'Postscript', ed Penelope A Bulloch and Joseph Raz, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 238, 252 (emphasis in original) ('*The Concept of Law*').

field of negligence law, where judgements of reasonableness are called for in formulating the duty of care and determining questions of breach.[38] The same is true of critical procedural questions such as when a cause of action accrued and whether a limitation period should be extended. Under certain Victorian provisions, the first question turns on the judge's view of whether 'all reasonable steps' had been taken,[39] the second on the judge's view of what is 'just and reasonable … [having] regard to all the circumstances of the case'.[40]

As John Gardner noted, the 'moral case' for such standards is that 'if justice is to be done according to law, the law needs to save some space within its own rules for sensitivity to the particular facts of particular cases'.[41] What follows from such indeterminacy, of course, is that the act of adjudication involves the exercise of moral judgement, as Jeremy Waldron has pointed out:

> [M]any of the rules and standards … of positive law actually require those who administer them to exercise moral judgement. … [T]here are inevitably such gaps in positive law and such indeterminacy in the meanings of the legal rules as to make their administration in fact impossible without the exercise of moral judgement.[42]

How vital it is, then, for the lawyer — whether giving advice in advance or developing submissions to the judge — to be aware of this moral dimension, and to have sufficient understanding and fluency to be able to fashion appropriate arguments.

[38] See, eg, *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J); *Tame v New South Wales* (2002) 211 CLR 317, 379 [185] (Gummow and Kirby JJ). See also Chris Maxwell, 'Too Much Law?: Risk, Reasonableness and the Judge as Regulator' (2009) 14(2) *Deakin Law Review* 143, 152–8.

[39] See, eg, *Limitation of Actions Act 1958* (Vic) s 27F(2) ('*Limitations of Actions Act*'), cited in *Moore v Escott* [2022] VSC 353, [24] (O'Meara J) ('*Moore*').

[40] See, eg, *Limitation of Actions Act* (n 39) s 27K, cited in *Moore* (n 39) [153] (O'Meara J).

[41] John Gardner, 'Reasonable Person Standard' [2019] *International Encyclopedia of Ethics*: 1–9, 5. See also John Gardner, *Torts and Other Wrongs* (Oxford University Press, 2019) 273.

[42] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 166.

IV Criminal Law

Our system of attribution of criminal responsibility is grounded in moral and political judgements — almost never acknowledged as such — about the types of conduct to be criminalised, about what will count as a defence or excuse, and about who is a proper subject of the criminal law.[43] And these judgements vary over time, according to what the legal philosophers RA Duff and Stuart P Green call 'the shifting sands of historical contingencies — of political, social, and economic forces'.[44]

The offence of felony murder is a good example. At common law, an unintentional killing during the commission of a felony was murder if the felonious act involved violence or danger to some person.[45] In England, this offence was abolished by statute in 1957 'in deference to the conviction that it [was] unjust or in some way inconsistent with enlightened principles of punishment'.[46] In Victoria, by contrast, the common law rule was given legislative force in 1981[47] and the offence — now referred to as 'statutory murder' — is regularly prosecuted.[48]

Moral reasoning can also be seen to have underpinned the famous 'Menhennitt ruling'. In a case where a doctor was prosecuted for unlawfully terminating a pregnancy, Menhennitt J invoked notions of necessity and proportionality to mark out an area of morally — and therefore legally — justified conduct.[49] His Honour ruled that the conduct would not be 'unlawful' within the meaning of the offence provision if the doctor had a reasonable belief that the termination was *necessary* to avert serious harm to the woman, and that the medical intervention was *proportionate* to the danger.[50]

[43] HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 2nd ed, 2008) 6–24 ('*Punishment and Responsibility*'); John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) chs 4–6.

[44] RA Duff and Stuart P Green, 'Introduction: Searching for Foundations' in RA Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011) 1, 1.

[45] *Ryan v The Queen* (1967) 121 CLR 205, 240–1 (Windeyer J).

[46] Hart, *Punishment and Responsibility* (n 43) 62.

[47] *Crimes Act 1958* (Vic) s 3A, as inserted by *Crimes (Classification of Offences) Act 1981* (Vic), cited in Penny Crofts et al (eds), *Waller & Williams Criminal Law: Texts and Cases* (LexisNexis, 14th ed, 2020) 403 [5.84].

[48] See, eg, *DPP (Vic) v Perry* (2016) 50 VR 686; *R v Duca* [2019] VSC 371, affd (2020) 62 VR 214.

[49] *R v Davidson* [1969] VR 667, 667, 670–2.

[50] Ibid 672.

The moral dimension of criminal law is made quite explicit in the sentencing process, where the court must assess the 'moral culpability' of the offender, as an integral part of the decision on penalty.[51] In effect, the court is 'making a moral judgement on behalf of the community about the degree of blameworthiness to be attached to the offender for the offending conduct'.[52]

The harshness of that moral judgement may be moderated if, for example, the offender's mental functioning was impaired at the time of the offending and the impairment can be seen to have had a 'realistic connection' with the offending.[53] And there is now a developing jurisprudence on the relevance of profound childhood deprivation to moral culpability. As the Victorian Court of Appeal said in 2021:

> It is the mark of a humane society that the moral judgment expressed through sentencing should take account of the lifelong damage that may result from exposure to violence or abuse or parental neglect in an offender's formative years.[54]

We do not often reflect on the philosophical conception of human capacity which underpins these judgements: the notion of the rational agent with powers of cognition and volition, the ability to exercise judgement and self-control, and the ability to anticipate and evaluate consequences.[55] As Nicola Lacey suggests, 'the basic moral intuition is that it is only legitimate to hold people criminally responsible for things which they had the capacity to avoid doing'.[56]

There is, however, no escape from criminal responsibility, and no reduction in moral culpability, if it is the offender's voluntary choices — for

[51] Judicial College of Victoria, *Victorian Sentencing Manual* (Online Manual, 4th ed, 20 July 2023) 102–3 <https://resources.judicialcollege.vic.edu.au/article/669236>, archived at <https://perma.cc/3VJJ-C3CS>. See, eg, *DPP (Vic) v Neethling* (2009) 22 VR 466, 474 [38]–[39] (Maxwell P, Vincent JA and Hargrave AJA).

[52] *DPP (Vic) v Herrmann* (2021) 290 A Crim R 110, 114 [14] (The Court) ('*Herrmann*').

[53] *R v Verdins* (2007) 16 VR 269, 274–5 [23]–[26] (Maxwell P, Buchanan and Vincent JJA); *R v Vuadreu* [2009] VSCA 262, [37] (Ashley and Weinberg JJA).

[54] *Herrmann* (n 52) 121 [46] (The Court).

[55] Chris Maxwell, 'Criminal Responsibility and Human Capacity: Why Impaired Mental Functioning Affects Moral Culpability' (2023) 30(4) *Psychiatry, Psychology and Law* 4, 7. See, eg, *Byast v The Queen* (2021) 98 MVR 266, 278–9 [40]–[42] (Maxwell P and Emerton JA).

[56] Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press, 2016) 29. See, eg, *Rowan (a pseudonym) v The King* [2022] VSCA 236, [156] (Kyrou and Niall JJA, McLeish JA agreeing at [228]).

example, to drink alcohol or take drugs — which impair their capacity for rational decision-making.[57] In those circumstances, the offending conduct is seen as having been within the offender's control.[58]

Related questions arise concerning the culpability of corporations. GR Sullivan argues that corporations are not proper subjects of the criminal law.[59] His argument is that 'criminal law is essentially a system of … blaming and shaming which has its philosophical roots in a conception of agency and responsibility which simply cannot be extended, by metaphor or analogy, to corporations'.[60]

Nicola Lacey disagrees. In her view, corporations can be comfortably accommodated within criminal law's consequentialist principles.[61] And she points to the 20th century development — through case law and by legislatures — of 'rules of attribution': artificial rules which attribute states of mind to corporations.[62] These rules can be seen to reflect a moral judgement that a corporation — as 'a collectivity with its own legal and moral identity'[63] — should face criminal liability for harm caused by the intentional or negligent conduct of its officers.[64]

V Political Philosophy in Play

Political philosophy can be found in unexpected places. For example, the law of property involves trade-offs between competing values such as liberty, equality and distributive justice. These tensions become particularly acute in relation to questions of inheritance of property.[65]

[57] *The Queen v O'Connor* (1980) 146 CLR 64, 71–2 (Barwick CJ); *R v Redenbach* (1991) 52 A Crim R 95, 99 (The Court).

[58] Ibid.

[59] GR Sullivan, 'The Attribution of Culpability to Limited Companies' (1996) 55(3) *Cambridge Law Journal* 515, 516.

[60] Nicola Lacey, '"Philosophical Foundations of the Common Law": Social Not Metaphysical' in Jeremy Holder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford University Press, 2000) 17, 27 ('Philosophical Foundations of the Common Law'), discussing ibid.

[61] Lacey, 'Philosophical Foundations of the Common Law' (n 60) 28.

[62] Ibid 28–9.

[63] Ibid 25.

[64] Ibid 38–9. See, eg, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256, 282–7 [99]–[117] (Maxwell P, Neave JA agreeing at 344 [360]).

[65] Daniel Halliday, *Inheritance of Wealth: Justice, Equality, and the Right To Bequeath* (Oxford University Press, 2018) ch 1.

Administrative and constitutional law are more obvious sites of ideas from political philosophy. Defining the proper scope of judicial review, for example, raises fundamental questions about the separation of powers and about the relationship between the individual and the state.[66]

What has been described as 'the "judicial revolution" in English administrative law'[67] — from *Ridge v Baldwin* ('*Ridge*')[68] in 1964 through *Anisminic v Foreign Compensation Commission*[69] in 1969 to *Council of Civil Service Unions v Minister for the Civil Service*[70] in 1985 — can be seen as an exercise in normative political philosophy. In that series of decisions, the House of Lords in effect asserted that the proper functioning of parliamentary democracy required a much stronger role for the judiciary in holding the executive accountable for its decisions.[71] Put simply, they changed the balance of power.

In the view of Keith Mason, this occurred because the judges 'came to realise that Parliament had ceased to be truly effective. Responsible government was responsible in name only. And the judges set about creating new standards of public accountability, fairness and competence'.[72] To similar effect, Peter Cane suggests that the judges were 'more prepared to fill the power vacuum created by the weakness of ministerial responsibility to the legislature'.[73]

And there were moral judgements involved, too. As recently as 1932, a UK Committee reviewing ministerial powers said that natural justice 'must be regarded as belonging to the field of moral and social principles and not as having

[66] See, eg, *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–8 (Brennan J).

[67] Bernard Schwartz, *Lions Over the Throne: The Judicial Revolution in English Administrative Law* (New York University Press, 1987) 3.

[68] [1964] 1 AC 40 ('*Ridge*'), discussed in ibid ch 1.

[69] [1969] 2 AC 147 ('*Anisminic*'), discussed in Schwartz (n 67) ch 2.

[70] [1985] 1 AC 374 ('*GCHQ*'), discussed in Schwartz (n 67) ch 7.

[71] See *Ridge* (n 68) 113–18 (Lord Morris, Lord Reid agreeing at 80–1, Lord Hodson agreeing at 135, Lord Devlin agreeing at 138); *Anisminic* (n 69) 174 (Lord Reid, Lord Pearson agreeing at 215), 182 (Lord Morris), 194–9 (Lord Pearce), 207–8 (Lord Wilberforce, Lord Pearson agreeing at 215); *GCHQ* (n 70) 397–9 (Lord Fraser), 404–7 (Lord Scarman), 408–9 (Lord Diplock), 417–18 (Lord Roskill).

[72] Keith Mason, *Constancy and Change: Moral and Religious Values in the Australian Legal System* (Federation Press, 1990) 50.

[73] Peter Cane, *An Introduction to Administrative Law* (Oxford University Press, 3rd ed, 1996) 373.

passed into the category of substantive law'.[74] On this view, *Ridge* was a decision which brought legal and moral principle into alignment.[75]

Statutory interpretation also raises normative questions of political philosophy. As the High Court said in *Zheng v Cai*:

> [J]udicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. … [T]he preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.[76]

How a court approaches the interpretive task gives implicit expression to the court's view of that constitutional relationship. I have argued elsewhere that close adherence to the words actually used in the statutory text acknowledges the proper limits of the judicial role, by preserving a clear distinction between interpretation and legislation.[77] It also increases certainty and predictability in interpretation and enhances the comprehensibility of statute law.[78]

Justice Gageler postulates a necessary fluidity in the judicial role as a constraint on governmental power. In 2009, while his Honour was still Commonwealth Solicitor-General, Gageler J set out a broad, normative theory of the role of judicial power in our political system:

> You start with the notion that the *Constitution* sets up a system to enlarge the powers of self-government of the people of Australia through institutions of government that are structured to be politically accountable to the people of Australia. You recognise that, within that system, political accountability provides the ordinary constitutional means of constraining governmental power. You see the judicial power as an extraordinary constitutional constraint operating within that system, not outside it. You see the judicious use of the judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining governmental power. You see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as

[74] United Kingdom, *Committee on Ministers' Powers* (Cmd 4060, 1932) 75–6.

[75] *Ridge* (n 68).

[76] (2009) 239 CLR 446, 455–6 [28] (The Court).

[77] Chris Maxwell, 'The Quest for Certainty and the Limits of the Judicial Role' in Jeffrey Barnes (ed), *The Coherence of Statutory Interpretation* (Federation Press, 2019) 112, 113.

[78] Ibid.

> appropriate where political accountability is either inherently weak or endangered.[79]

The fullest judicial exposition of Gageler J's view is in *McCloy v New South Wales*, a campaign finance case:

> The ever-present risk within the system of representative and responsible government established by Chs I and II of the *Constitution* is that communication of information which is either unfavourable or uninteresting to those currently in a position to exercise legislative or executive power will, through design or oversight, be impeded by legislative or executive action to an extent which impairs the making of an informed electoral choice and therefore undermines the constitutive and constraining effect of electoral choice. …
>
> The judicial power, insulated from the electoral process by the structural requirements of Ch III of the *Constitution*, is uniquely placed to protect against that systemic risk. …
>
> The risk has been demonstrated by experience to be greatest in respect of legislation which has as its subject matter the restriction of political association or the restriction of communication within a category of communication which has an inherently political content. …
>
> Whatever other analytical tools might usefully be employed, fidelity to the reasons for the implication is in my view best achieved by ensuring that the standard of justification, and the concomitant level or intensity of judicial scrutiny, not only is articulated at the outset but is calibrated to the degree of risk to the system of representative and responsible government established by the Constitution ...[80]

On this view, the implied freedom of political communication requires lawyers and judges to understand the strengths and weaknesses of the different branches of government and the attendant risks to the system of government.[81]

Philosophical reasoning of a different kind was called for in *Monis v The Queen*, where the High Court had to decide whether a prohibition on offensive

[79] Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138, 152.

[80] (2015) 257 CLR 178, 227–8 [115]–[117], 238 [150] (Gageler J).

[81] See also *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 69–71 [93]–[96] (Gageler J).

speech was compatible with the implied freedom of political communication.[82] At stake were competing conceptions of reasonable limits on political discourse in a democracy.

Three judges held that the law was invalid, as offensive speech was an inherent aspect of political communication, and the aim of 'promoting civility of discourse' was not a legitimate basis for the prohibition.[83] The three other judges held that the law pursued the legitimate aim of protecting people against the intrusion of offensive communications into the home and hence was valid.[84]

Neither of these conclusions follows directly from the text and structure of the *Australian Constitution*. Each rests on substantive, and contestable, judgements about democratic government, freedom of expression, and Australia's political culture.[85]

I turn now to the second meaning of thinking philosophically about law.

VI Thinking Like a Philosopher

What I came to learn as a practitioner, and was acutely aware of during my 17 years as a judge, was the absolute importance of clear thinking, clear writing and clear argument. These are, of course, the hallmarks of the best philosophical writing.

Hart's famous article, titled 'Positivism and the Separation of Law and Morals', is a model of lucidity, brevity and effective use of language.[86] The same is true of the entirety of his famous work, *The Concept of Law*.[87] Hart was, of course, a philosopher first, then a barrister, and finally Professor of Jurisprudence.[88]

[82] (2013) 249 CLR 92, 105 [2] (French CJ) ('*Monis*'). See also *Coleman v Power* (2004) 220 CLR 1, 32–3 [35] (McHugh J).

[83] *Monis* (n 82) 131–4 [66]–[74] (French CJ), 160–73 [171]–[214] (Hayne J), 178–9 [236] (Heydon J).

[84] Ibid 212–16 [343]–[352] (Crennan, Kiefel and Bell JJ).

[85] Adrienne Stone, '"Insult and Emotion, Calumny and Invective": Twenty Years of Freedom of Political Communication' (2011) 30(1) *University of Queensland Law Journal* 79, 90–1.

[86] See generally HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593.

[87] See generally Hart, *The Concept of Law* (n 37).

[88] See generally Nicola Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (Oxford University Press, 2006).

In his book, *Jurisprudence: Theory and Context*, Brian Bix argues that reading philosophy and participating in philosophical discussion develop the ability to analyse and to think critically and creatively about the law:[89]

> Philosophy trains one to think sharply and logically; one learns how to find the weaknesses in other people's arguments, and in one's own; and one learns how to evaluate and defend, as well as attack, claims and positions.[90]

In his article 'Philosophy and Law', John Gardner argued that both legal and philosophical training 'are distinctive in being training in *argument as such*, argument as a transferable skill'.[91] He suggested that, given their intellectual affinities, law and philosophy should form a breakaway union, distinct from both social sciences and humanities, to be called 'a School of Argument'![92]

What I find so attractive about analytic philosophy is that it seeks to distil a phenomenon or a concept to its essence and thereby open the way to a better understanding of the world. The object of this kind of conceptual analysis is to simplify and clarify. The tools employed are linguistic clarity and logical rigour.

Given that law *is* language — in statutes, in judgments and in legal argument — and given that clarity promotes understanding, these are tools of the first importance for lawyers.

I found that distillation and simplification were essential to the work of judging. So often, in order to decide the case at hand, I found myself searching for the guiding principle which would explain the varied outcomes in previous cases. I needed to be able to understand the general proposition(s) which emerged from, and explained, the multitude of individual decisions. So, when counsel would say, 'every case is different', I was immediately on the hunt for relevant similarities![93]

Once the principle was elucidated, it could be applied to the resolution of the present case, whether directly or by extrapolation or by qualification of its scope. Consistency and coherence of approach are, of course, key aspirations of the rule of law.

[89] Brian H Bix, *Jurisprudence: Theory and Context* (Thomas Reuters, 8th ed, 2019) xvi.

[90] Ibid.

[91] John Gardner, 'Philosophy and Law' in Simon Halliday (ed), *LawBasics: An Introduction to the Study of Law* (W Green, 2012) 16, 23 (emphasis in original).

[92] Ibid.

[93] See, eg, *Haden Engineering Pty Ltd v McKinnon* (2010) 31 VR 1, 3–4 [1]–[8] (Maxwell P); *Nash v The Queen* (2013) 40 VR 134, 136–7 [6]–[12] (Maxwell P); *Tawfik v The Queen* (2021) 64 VR 561, 564 [9]–[12] (Maxwell P).

Now to the third and final meaning.

VII Philosophical Self-Awareness

Philosophical self-awareness means recognising that decisions about what kind of legal work to do, and how to do it, necessarily involve moral and political choices. The law graduate's choice as to where to seek employment as a lawyer is a moral choice. It is a choice to put her legal skills at the disposal of the clients of that legal employer, whether private or public and, hence, to facilitate their various commercial, governmental or regulatory objectives.

And, once in that employment, she will not necessarily be able to object to working for a particular client whose activities she finds personally objectionable.

In their book, *Inside Lawyers' Ethics*, Christine Parker and Adrian Evans illustrate the moral character of legal practice by identifying four different types of lawyer, two of which are instructive here.[94] The first is what they call 'the responsible lawyer', who 'focuses on maintaining the institutions of law and justice in their best possible form', so as to preserve the social goods that the legal system attempts to serve.[95] On this view, the maintenance of fidelity to law is 'a moral enterprise in itself'.[96]

The second is 'the moral activist', who has her own 'convictions about what it means to do justice in different circumstances and … [seeks] out ways to act out those convictions' as a lawyer.[97] This may mean taking on pro bono work for what she believes to be a just cause, or advocating for law reform or — in the lawyer–client setting — engaging in what the American ethicist, David Luban, calls 'client counselling', that is, 'discussing with the client the rightness or wrongness of her projects, and the possible impact of those projects on "the people"'.[98]

Learning how to approach these moral choices is another reason for learning to think philosophically about law. Coming to understand that lawyers and judges are moral agents, with moral responsibilities, is likely to reshape one's whole approach to legal practice.

[94] Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 3rd ed, 2018) 36–7.

[95] Ibid 40.

[96] Ibid 41.

[97] Ibid 44.

[98] David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988) 173.

VIII What Does This Mean for Legal Education?

Once it is accepted that philosophical ideas are in play at every stage of the development and application of substantive law, the implications for legal education are obvious. Both the content and method of law teaching must take account of the philosophical imperative, that is, they must recognise that a properly-trained lawyer needs philosophical awareness, understanding, and fluency.

As I have sought to demonstrate, the capacity to think and reason philosophically is essential if the lawyer is to understand fully how a legal rule has come to take its present form, and what its guiding purposes are. And — most importantly — it is essential if the lawyer is to fulfil her professional duty as adviser and advocate and — one day — as adjudicator.

Traditionally, most law teaching has been concerned with what the rules are, and what they mean. The philosophical inquiry is quite different. It is directed at understanding *why* the rules are the way they are, at exposing and scrutinising the philosophical assumptions on which the rules rest and the norms used for evaluating 'the propriety or wrongfulness of particular instances of harmful conduct'.[99]

That question involves both reflective inquiry (what does it say about our society that the rules are the way they are? Whose assumptions are given primacy?) and normative inquiry (should the rules be the way they are? What other foundational ideas might we choose? How differently would the law operate if we made different choices?).

By identifying the philosophical assumptions and choices which underlie the rules, law students are in a better position to evaluate them critically. They come to realise that the foundational ideas are contestable, and changeable, and that they can be participants in that contest and can contribute to that process of change.

For example, bringing a philosophical dimension to the teaching of the law of torts would open up a host of questions. Is it descriptively correct that tort law rests on conceptions of autonomy? If so, is that philosophical foundation normatively sound? What about the moral norms of corrective justice and distributive justice which others see as central to tort law?[100] Is it true that 'the

[99] Owen (n 1) 7.

[100] John Gardner, 'What Is Tort Law For? The Place of Distributive Justice' in John Oberdiek (ed), *Philosophical Foundations of the Law of Tort* (Oxford University Press, 2014) 335, 337.

concept of fault … imbues tort law with [a] deeply moral flavor'?[101] Or that tort law 'misses the moral target of culpability entirely'?[102] If the common law has traditionally been 'individualistic', should that continue to be the case?[103] Might it be time for a more 'socially-impregnated' approach?[104]

Students will learn that, once the philosophical door is opened, the capacity to reason philosophically develops quite readily. They will come to realise that concepts like autonomy and culpability and corrective justice are readily accessible, and that their own ideas and intuitions are as valid as those of any other student — or judge, for that matter.

And they will experience the kind of exhilaration which goes with the discovery of a new language, of new insights, of new understanding.

[101] Attanasio (n 2) 692–3

[102] Gerald J Postema, 'Introduction' in Gerald J Postema (ed), *Philosophy and the Law of Torts* (Cambridge University Press, 2001) 1, 3.

[103] *Stuart* (n 4) 248 [88] (Gummow, Hayne and Heydon JJ), quoting Markesinis and Unberath (n 13) 90.

[104] *Stuart* (n 4) 248 [88] (Gummow, Hayne and Heydon JJ), quoting Markesinis and Unberath (n 13) 90.