INAUGURAL PROFESSORIAL LECTURE -

LAW, ETHICS AND INSTITUTIONAL REFORM: FINDING PHILOSOPHY, DISPLACING IDEOLOGY

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INTRODUCTION:

Before starting to write this lecture I asked some colleagues what an inaugural lecture should be. One described it as an opportunity to give your considered view of your discipline and where it should be going. Another told me that it was a time when the university invites you to "profess" - "it has anointed you as a professor and presents you to the world in the expectation that you will have something useful to say."

I must say I treat all this with a fairly robust scepticism. I am not, by nature, a hierarch and I am wary of the tendency to listen with greater intent to professors than others. I am very conscious of the fact that I will be asked to speak in public many times a year when I have at most a day or two to prepare. I compare this with the position ten years ago when I would have been asked to speak in public two or three times a year despite having 100 days to prepare.

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But I have not changed. The fact that I am a professor carries with it the ever present possibility that I may be wrong for the simple reason that I have less time to contemplate my errors. In my defence, it might be suggested that I could rely on accumulated wisdom. However, the gradual accretion of considered thoughts is as likely to lead to intellectual ossification and dogmatic reassertion.

It might be suggested that one continually questions one's own ideas and is continually dissatisfied with their content and expression. All that is true, but I must admit that the longer one goes on subjecting one's ideas to self-criticism and challenge, the less likely those challenges are to succeed - a reason, I suspect, why we are so ready to subject them to those challenges. Indeed, the elevation to a chair always carries with it the attendant danger of complacency and smugness. Philosophers are under a particular professional disability in this regard. As the stock in trade is argument there is a professional tendency to stick to positions once taken and to respond to attacks with new sets of arguments. To some extent it is true that being a philosopher means never having to admit you are wrong!

Having said all that, I have taken this opportunity to "profess", not because this is a key point at which those long encrusted thoughts magically transform themselves into wisdom but because it is a convenient point in an academic life to reflect on what brought you to think as you do and to see where those thoughts are taking you or, to put it another way, to provide a statement of where my thinking has taken me, how I got there, and why.

This makes the lecture something of a personal intellectual journey. It is a thought path along which I have travelled - sometimes running with expectation and assurance, sometimes walking gingerly, sometimes getting nowhere. Tonight, I will take you along that thought path - without dwelling on the stumbles, the wrong turns, the dead ends and the occasional laybys.

This is, inevitably, a personal journey because knowledge is always perceived from the point of view of a participant. Knowledge is what is known, and knowing is an active pursuit of an individual with a history.

I will explain how I came to believe in the value of applying philosophy to public affairs in general and law in particular. I will indicate some of the areas in which applied philosophy might make a contribution and discuss a few examples of those. In so doing I will suggest a role for philosophy in assisting the process of reforming Australian institutions - by co-ordinating legal regulation, ethical standard setting and institutional design. In particular I will look at the role of applied philosophy in attempting to resolve what I consider the biggest question currently facing the West. In so doing, I will look at the potential danger of applying philosophy to public affairs - its ready degradation into simplistic ideologies.

LEARNING TO APPLY PHILOSOPHY

The Vortex between Law, Ethics and Politics

Like many of the most fruitful journeys, it was never planned to happen the way it did and I would have been astonished to be told at the beginning that it would end up here.

My conversion to law occurred in the second year dissection room of the Melbourne Medical School. At school, I had enjoyed Sciences almost as much as I had Humanities and I had stuck with the sciences "just in case". I was later that way inclined and ended up in what I imagined to be the most humane of the sciences. By the middle of the second year, I had established a reputation as the quickest dissector in the lab - not the best, mind you - but far and away the quickest. I could complete the week's dissection between 9.15 when the lab opened and 10.35 when we had to scrub the formalin off our hands before our first lecture.

One hundred and fifty years ago, these skills could have made me (and I say this with all due modesty) the greatest surgeon in Melbourne. Before the introduction of anaesthetics, speed was of the essence and I could have been in and out of the patients before they died of shock and blood loss on the table. But this was not the early nineteenth century and sheer speed had given way to the modern surgical values of care, diligence and accuracy. Clearly, time had passed me by. As I was wondering what a man out of his time could do, idly gazing around the dissecting room, I noticed something very interesting. Many of my colleagues had none of my virtues of speed - they would have been, quite literally, a dead loss 150 years ago. But they did not appear to have any of the modern virtues of care, diligence or accuracy to compensate.

And then it dawned on me. There would be a good living to be made suing my erstwhile colleagues on behalf of the estates of their dead victims! And that is how I came to law - or at least that is the way I like to tell it!

In fact, I did not pursue a career as a lawyer chasing hearses[1]. Instead I was drawn to the kind of Applied Jurisprudence that lies at the vortex where law, philosophy and politics meet - and I admit that those delights were exercising a pull even at the time that I was slicing through the finer points of anatomy. Since then, my academic career has been one of thinking, writing and teaching about that vortex and this lecture consists in some of the reflections on that process to which I have been drawn.

"Grand Theory" - the Disorder of Law

After completing degrees in politics, philosophy and law, my post-graduate study was concerned with what is generally called "grand theory" - questions about the nature of law and, in my case, whether law

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1 Whether this is better than the legendary (and partly mythological) American "ambulance-chaser" is a hypothetical left to you.

could be better understood as some kind of system or as a disordered set of rules, principles, institutions and persons.[2]

I looked at the various theories of law. Most of them attempted to portray law as a system of rules, principles or institutions. Legal positivists saw law as a system of rules.[3] Legal rules were seen as ordered by a strict and determinate hierarchy of the sources of authority of those rules. Others like Ronald Dworkin saw law as a system of consistent and coherent principles ordered according to their meaning so that there was always one right answer to any legal question.[4] Most of the more "sociological" theories are essentially "functionalist". They saw law as a system of institutions like courts, legislatures and correctional agencies. Each member of such institutions performs a role that enables the institution to perform its allotted "function" within the legal system.[5] In turn this meant that the legal system could fulfil its functions within the larger social system (for example, reducing conflict).

It was here that I gained my first insight into jurisprudence and legal theory and one of the most common problems with grand theories. Each of the theories encapsulated one or more important insights about law. It was that insight, the apparent kernel of truth[6], that explained their on-going appeal. But it was also upon that insight that the entire theory was constructed. Unfortunately, as I discovered with these and so many other theories, that insight is rarely strong enough to bear the weight of the theory that is built upon it. An idea that provides an important insight

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2 The D.Phil thesis was entitled *Law Without Order* and the book was entitled *The Disorder of Law*, Oxford, Basil Blackwell, 1989.

3 As expounded by Hart, McCormack, Harris and Raz - see *Id* at Chapter 3.

4 *Id* at Chapter 4.

5 *Id* at Chapter 5.

6 I am not saying that this *is* a "truth", a most problematic claim.

into one part of the law and answers some questions about it, does not ring true when applied to the rest of the law, or answer a range of other questions.

Consider positivist theories of the legal system[7]. Rules play an important part in the thinking of lawyers and the source from which they appear to come are important. Furthermore, there is generally a clear pecking order among the most commonly used sources (constitution, legislatures, sub-ordinate legislatures, common law etc). However, the hierarchies are not always clear and inconvenient rules from higher authorities are subject to being distinguished or interpreted. The hierarchy of sources and the rules that lawyers derive from them are an important part of the law but are insufficient to comprehend it[8].

Turning to the insights that lie behind Dworkin's system, judges do attempt to make rules consistent and coherent. However, they do not have to do so. It is common for them to bide their time, waiting for some more cases before overturning an inconsistent judgement.

Much the same is true of the insights of functionalist theories. It is true that legal institutions do many of the things that are identified as functions. But they also do the opposite. They can create conflict as well as resolve it, they can re-enforce communal norms as well as challenge and upset them. Indeed, I argued that it was at least as helpful to see law as unsystematic in the ways claimed by the systems theorists, as it was to say that it was systematic.

The second insight I had was the inadequate way that institutions were treated in contemporary legal and political philosophy. Functionalist theory from both the right and the left treated them as groups of people whose actions were co-ordinated to achieve designated functions. The

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7 *Above* n.3.

8 It hardly needs saying that rule and source remain, like most concepts in legal philosophy, fiercely contested and highly problematic.

only difference was the description of the functions that each was supposed to perform and the normative judgements that was applied to those functions. In fact, institutions are far more complex organisms made up of people with their own values, goals and agendas which are at best only congruent and at worst in open conflict. Accordingly, institutions frequently achieve the goals set for them and their opposite.

My third insight is a corollary of the second. It is remarkable how often the left and right can make different versions of the same mistake. Although left and right may occasionally appear to be locked into an ideological debate to the death, to carry on a debate requires more shared assumptions than might be appreciated.

The thesis was developed and later published under the title "The Disorder of Law"[9] and I was well pleased with its reception among legal philosophers. This is not to say that I won many converts. Most of the existing theorists clung, like true philosophers, to their pre-existing theories. In attacking each one I naturally had the others on side. But when I came to the conclusion that the errors they were making were common errors - ie. the assumption that law was a systematic phenomenon - I had the level of agreement to be expected.

One thing, however, surprised, intrigued and rather delighted me. When I outlined the theory to members of the profession they almost always endorsed it whole-heartedly. Their experience had far more resonance with my theory of a disordered set of rules, principles and institutions rather than with an ordered one. As a consequence, solicitors did not see themselves as plugging into a system of rules, principles or institutions to give their clients definitive guidance on the precise meaning and effect of the law. They related better to the role that my theory identified for them - as assisting clients to steer a course that was well clear of areas of uncertainty, away from the institutions of law. As I used

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9 *Above* n.3.

to put it, the good solicitor does not so much advise the precise course for the client to steer between Scylla and Charybdis. The best advice is normally to "sail around Sicily"[10]. It may cost more, it may take longer, but clients have a better chance of reaching their destination unbloodied by a costly brush with a legal institution.

When the client is already involved in a dispute or seeks advantage in sailing close to the precise limits of the law, the lawyer will do their best to navigate the course that is most likely to succeed - but with a list of caveats as long as the faces of those who have ignored such caveats and lost. The reason for those caveats is that legal advice does not involve the application of science to a system of rules, principles and institutions, but a keen knowledge of the vagaries of rules and principles that produce a storehouse of debating points for either side and the dynamics of institutions that provide opportunities and dangers for clients.

From Pure to Applied Legal Philosophy

This gave me great confidence in the general theory I had developed. However, I must say that I did not relish the idea of spending the next twenty years splitting hairs in academic journals on the fine points of general theory. I was far keener to apply the techniques and insights of legal, ethical and political philosophy to some of the challenging issues of the time. By the time I had finished my general theory book "The Disorder of Law" in 1988, there was no shortage of such issues. One obvious issue that I had wanted to tackle ever since 1982, was the use of retrospective legislation. This had become topical when the Fraser government moved to recoup the tax avoided in the so-called "bottom of the harbour" schemes.[11] Legal philosophy even made it into Hansard

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10 Based on the common reading of the Iliad that places Scylla and Charybdis in or near the Straits of Messina (see *Brewer's Dictionary of Phrase and Fable*, 8th ed., London, Cassell, 1963, 850).

11 *Taxation (Unpaid Company Tax) Assessment Act* 1982 (Cth).

when one senator[12] distinguished himself by quoting from Lon Fuller's *Morality of Law*. Fuller tells a parable of a king who attempts to make all rules retrospectively and consequently fails to make law. The Senator naturally failed to pick a number of the subtleties of Fuller's argument - notably that it was only if *most* of the legislation was retrospective that it would not be law. More importantly he, or his research assistant, failed to pick up the fact that a few pages after the quoted passage, Fuller insists that none of his arguments against retrospectivity apply to *tax* legislation. Fuller argues that a law which imposes tax on past financial gains (which were tax free at the time they accrued) is not retroactive because tax laws always operate prospectively; that is, they tell the taxpayer how much tax to pay in the future, albeit that the amount may have been calculated by reference to past transactions.[13] Fuller's simple reason is that taxation laws never tell us what we should have done yesterday. They only ever tell us what tax to pay tomorrow. Despite this rather inauspicious effort by the Senator, the potential contribution of legal and ethical philosophy to issues such as this was clear. An examination of the statute books shows a great deal of retrospective rule-making, most of it completely uncontroversial. Judicial development and clarification of the law is always and inevitably retrospective. Rather than condemning retrospective law-making outright it was worthwhile to ask what are the objections to retrospective rule-making ? What are the justifications ? And when must retrospective rule-making be condemned and when can it be justified or even commended.[14] This raises further

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12 Senator Crichton-Browne, 19 November 1982, *Commonwealth Parliamentary Debates: Senate*, vol.96, 2599.

13 L.L. Fuller, *The Morality of Law*, rev.ed., New Haven, Yale University Press, 1969, 59.

14 Although these ideas were formed during 1983 and formed the basis of a series of lectures I delivered to my classes, the research on the extent of retrospective rule making and the final development of the argument was delayed until 1990. With the assistance of a grant from the Victoria Law Foundation, I wrote a paper

questions about how the rule of law should be characterised in a legal world that admits of retrospective rule-making.

Many other questions suggested themselves during the 1980s and early 1990s. I list seven that have fascinated me and on which I have worked in the last five years:

- The growing international emphasis on Human Rights and Gareth Evans' attempt to introduce a Bill of Rights into Australia raised questions about the nature of rights, conflicting rights claims and the best measures for their protection.[15]
- The tenth anniversary of Whitlam's sacking raised questions about the alleged contradiction between federalism and responsible government in the Australian Constitution.[16] It does not appear that they will be resolved before the twentieth anniversary.

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outlining the general ideas that was delivered to the 1990 Law and Society Conference at Griffith University. During 1991, Andrew Palmer did the detailed work of surveying retrospective legislation in Australia and Victoria during the 1980s and examining the extent of explicit overruling in the Australian High Court and Victorian Supreme Courts. These form the basis for two jointly written articles: A.Palmer and C.Sampford, "Retrospective Legislation in Australia: Looking back at the 1980s" 22 *FLR* 217; and A.Palmer and C.Sampford "Judicial Retrospectivity" forthcoming *Griffith Law Review*. The arguments will appear in my book on *Retrospectivity and the Rule of Law* being written under contract with Oxford University Press.

15 C.Sampford, "The Dimensions of Liberty and their protection by courts" (1986) 4 *Law in Context* 29 ; and C.Sampford "The Dimensions of Rights and their protection by Statute", in C.Sampford and D.J.Galligan (eds.), *Law Rights and the Welfare State*, Sydney, Croom Helm, 1986, 170.

16 C.Sampford, "The Senate and Supply: some awkward questions" (1987) 13 *Monash University Law Review* 119 ; and C.Sampford, "Responsible Government and the logic of Federalism" 1990 *Public Law* 90.

- The attempts during the 1980s to codify the conventions of the Australian Constitution also raised issues about the nature of constitutional conventions and the best way to make them effective.[17]
- Questions about the legitimate role of the High Court and the nature of judicial interpretation were raised by the controversies surrounding the High Court including the taxation decisions of the 1970s, their reversal in the 1980s, the fresh start with section 92,[18] and the clean slate given to the Federal Parliament to legislate into domestic law any treaties entered in good faith.
- Coups in Fiji, Thailand, Africa, the Caribbean and the Spanish speaking countries raised questions about the nature and justification of *coups d'etat* and whether states could be better protected from them.[19]
- The disasters of the 1980s raised questions about the conduct of some businessmen, auditors and, yes, it must be said, some of their legal advisers. How could such conduct be improved and what is the relationship

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17 "'Recognize and Declare' - an Australian Experiment in the Codification of Legal Conventions" (1987) 7 *Oxford Journal of Legal Studies* 369 ; and C.Sampford and D.A.R.Wood, "Codification of Conventions in Australia" 1987 *Public Law* 231.

18 *Cole v Whitfield* (1988) 165 CLR 360.

19 C.Sampford, "Coups d'etat and Law" in E.Attwooll (ed.), *Shaping Revolution*, Aberdeen, Aberdeen University Press, 1991.

between the duty to one's client and/or shareholders and more general duties?[20]

- Closer to home were questions of legal education raised by the Pearce Report. It had argued that Australian Legal Education did not pay sufficient attention to the "critical and theoretical" dimensions of Legal Education. What were those dimensions and how could they be incorporated into the legal curriculum. More generally, what were the purposes of legal education and how could they be best fulfilled?[21]

- As Australia moves to the second century of federalism, we need to ask the questions we should have asked ourselves at federation. What are the values that should underlie the Constitution?

- More particularly, how do we deal with the manifest injustices we perpetrated upon the original inhabitants of this country?

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20 C.Sampford, "The Future of Business Ethics: Legal Regulation, Ethical Standard Setting and Institutional Design" (1992) 1 *Griffith Law Review* 56 ; and C.Sampford and T.Coady *Law, Ethics and Business*, Sydney, Federation Press, 1993.

21 C.Sampford and D.A.R.Wood, "Legal Theory and the Law Curriculum" (1987) 61 *Law Institute Journal* ; C.Sampford and D.A.R.Wood, "'Theoretical Dimensions' of Legal Education' - a response to Pearce" (1988) 62 *Australian Law Journal* 32; C.Sampford and D.A.R.Wood, "Legal Theory and Legal Education - the next step" (1989) 1 *Legal Education Review* 107; C.Sampford, "Rethinking the core curriculum" (1989) 12 *Adelaide Law Review* 38; and C.Sampford, *Editorial* (1992) 1 *Griffith Law Review* v.

- How do, and how should, judges decide controversial cases?[22]

The relevance of legal and ethical philosophy to these issues was obvious and I joined or started debates on them even before I had finished my book on general theory. The range and scope of these issues also meant that it was clear that they could not be tackled by one person alone, so a lot of my energies went into helping to establish institutions in which they could be pursued - the Centre for Philosophy and Public Issues at Melbourne, the National Institute for Law, Ethics and Public Affairs and, of course, the Griffith Law School itself.

However, the way in which legal and ethical philosophy could assist was not immediately clear. One could write articles in academic journals but it was not obvious how, if at all, this could have a positive effect on the issues that concerned us and those who could make a difference to the problems covered.

One traditional model was rejected out of hand. Philosophers could not expect to descend from their ivory towers and tell politicians, businessmen, even Law Deans, how to behave and what to do. Plato had suggested that his ideal Republic would be ruled by philosopher kings. This has always had a totally understandable attraction to philosophers. However, its attractiveness to others is unsurprisingly limited with only rule by econometricians being guaranteed a lower popularity.

Nor was it sufficient to take the theories that were the result of philosophical speculation and debate and apply them directly to modern day problems and deduce the correct answer. The theories that philosophers construct are generated from the consideration of simple examples. In philosophy lectures the standard example of a physical

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22 The last three issues are being addressed in the *Constitutional Theory* project of the National Institute of Law, Ethics and Public Affairs.

object was a chair; the standard example of a mental event was a pain. I sometimes wondered if the pain was the feeling they had when contemplating the chair they did not have (but that would have spoiled the chair example because it would not have been a physical object). There is good reason for this. It is far easier to tease out difficult principles when considering simple examples. But when it comes to applying them to the more complex problems which real people face everyday, these theories cannot be applied by a simple process of logical deduction. Applying a general principle to a specific fact situation is a creative act - something that legal philosophers come to realise when looking at legal decision making. Methodologically, applied philosophy is somewhat akin to common law reasoning. You apply a general principle to the problem at hand. In attempting to apply the principle, greater specificity will be required and different interpretations may lead to different results. Furthermore, the application of the general principles to difficult practical problems may reveal difficulties with the general principle that were not obvious when it was constructed out of a consideration of pains and chairs.

It is for this reason that I have sometimes referred to applied philosophy as the "common law of the mind". And it is one of the reasons why lawyers are becoming increasingly important parts of applied philosophy units. Not only is legal regulation a part of the solution to many problems of applied philosophy (most notably in bioethics): the *methodology* is similar to that of legal reasoning.

There is a very important consequence of adopting this methodology for applied philosophy which constitutes the next lesson I learned - *applied philosophy does not merely require applied philosophers who are willing to apply their theories to the practical problems with which we are confronted, it also requires the participation of what I call "reflective practitioners", people who are used to the complex problems of everyday life, who are keen to reflect upon them and to consider the*

insights of the philosophers who have had the luxury of quietly considering the issues in general terms.

Thus if you are to investigate problems of business ethics, it is not sufficient to have some able philosophers who want to "road test" their theories in the complex problems of modern business. It is necessary to add business executives, lawyers, criminologists and management theorists. If you are going to investigate problems of protecting societies from *coups d'etat*, you not only need legal and political philosophers but politicians, political scientists, judges, a head of state and senior members of the military. If you are going to investigate the way that justices of the High Court reason, you not only need theorists of legal reasoning but political scientists, judges and barristers.

What is needed is a dynamic interchange between the engaged academic and the reflective practitioner. Each brings different knowledge, experiences and perspectives to the discussion of the same problem. If each can see that problem from the perspective of the other, each can learn a great deal.

Of course, realising the need for such interchange does not solve the question of how to achieve it meaningfully. Many philosophers are sceptical of whether businessmen have any ethics and are the first ones to trot out the tired old jokes about business ethics. And many businessmen are even more sceptical of the contribution that can be made by academics. Bringing together such different groups of people is often attempted. Grasping the perspectives of the others is the difficult part. It would not be too great a generalisation to say that if you get them together without alcohol, they all go away angry with the others for not appreciating their point of view. On the other hand if you do give them plenty of alcohol, they are no more enlightened about the point of view of the others but go away thinking that they are all jolly good chaps just the same. Either way nothing is achieved.

Here I learnt much from Tony Coady from the Melbourne Centre for Philosophy and Public Issues. On his visits to the Maryland Center for Philosophy and Public Affairs he learnt much of how they attempt to address the same problem in workshops. To assist practitioners and academics from a variety of disciplines to understand each others point of view requires a process. First, all papers are circulated in advance, then commentaries on those papers by those from a different discipline are circulated. At the workshop, papers are not read but discussion led by the commentator with the intention of identifying issues for debate within the group. After such exchanges, the papers become essays in a book that is informed by genuine interdisciplinary debate.

These kinds of workshops can provide key points of reference in applied philosophy projects. The applied philosophers can road test their theories and the reflective practitioners can start putting into practice some of the things they have learnt. In some cases, they provide contacts with the relevant business or profession so that a Centre or Institute like ours can begin direct remedial work with willing patients.

What Applied Philosophy can do - Questions not answers

One thing workshops like these, and applied philosophy in general, does not purport to do is to provide definitive, clear-cut answers. The role of applied philosophy, like philosophy in general, is to help us sort out the questions, define alternatives and then assist us to think through to our own conclusions.

If you get the impression that philosophers seem to be professionally more interested in asking questions than answering them, there is more than a grain of apparent truth. This is partly in deference to philosophical tradition. I have never forgotten the time a professor opined to the class that the real test of a philosopher at the end of a four year degree was not that he could furnish four good answers but that he could pose four good questions. A cynic in the class called Sampford suggested that this was a matter of philosophical job protection. A philosopher who *answers* a

philosophical question puts philosophers out of work whereas a philosopher who poses a question provides new work for his fellows for years, even centuries. Accordingly, philosophers who are praised by their colleagues are those who pose juicy questions and anyone who purports to find an answer is immediately pounced upon by his colleagues.

However, my reasons for emphasising the questions are not because of concerns for the employment of fellow philosophers[23] or even for the employment of our philosophically literate law graduates. I would argue that the most important part of applied philosophy in general, and ethics in particular, lies in asking ourselves basic questions about what we are doing, giving honest answers, and in trying to live by those answers. We must ask the right questions, rid ourselves of misleading assumptions. We must critically assess our proposed answers, ensuring that the answer we propose really does constitute a reply to the question we posed and if not, find out to what sort of a question would the suggested solution be an answer. Finally, and perhaps most importantly, applied philosophy can rid us of the unfounded arguments with which some would seek to close off debate on the issues.

This is not to say that we should not ourselves reach conclusions, argue vigorously and act upon those conclusions. But the greatest service that an applied philosopher can perform is to help others identify the key questions and help them work through their own answers.

I will now work through some of the examples cited above.

SOME EXAMPLES OF APPLIED PHILOSOPHY:

The Critical and Theoretical Dimensions of Legal Education

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[23] Nor are they because of adherence to the professional ethics of philosophers - which might amount to the same thing.

The Pearce committee criticised Australian legal education for failing to provide a "critical and theoretical dimension" but failed to deal with two key issues - what are the critical and theoretical dimensions of legal education and how do you incorporate them into the curriculum. Most of the subsequent debate concerned what should be included in a compulsory legal philosophy course or courses and when those courses should be offered. It was generally thought that having Jurisprudence in first year was too early because the students did not have enough knowledge of law to know what they were questioning. It was generally thought that having Jurisprudence in the final year is far too late as students have already too set in their ways. When Karl Llewelyn grappled with these problems he suggested the historic compromise that Jurisprudence appear in the middle. This is all very well in a three year course: but in the four year courses that are typical of most Australian Universities, Jurisprudence would end up in the long summer vacation!

The approach I took involved engaging in that most annoying of philosophers' habits. I suggested that if you are consistently getting wrong answers you are probably asking the wrong questions. The question was not where to put the subject Jurisprudence but how to integrate the skills and techniques of jurisprudence into the law course as a whole. Once the question was reconstructed as a question about the whole law course, the inadequacy of answers based on single subjects was abundantly clear. There are several possible answers but all competent answers must look to the curriculum as a whole rather than merely adding an individual component. My approach involved three stages:

1. The first year course introduces students to a full range of jurisprudential questions that are on the agenda of the law school in the context of a substantive law subject covering Contract along with an introduction to Torts and Equity. At the same time

it will introduce students to the range of answers provided by current theories.

2. In later year subjects, it is not possible to raise, let alone deal with, all of the "jurisprudential" issues in every area of law as most of the time will be spent on the substantive law. However, lecturers are encouraged to take up one or two of the broader range of jurisprudential, institutional and historical issues, depending on their theoretical interests and the nature of the relevant subject. In a well balanced law school, that will mean that most of the questions will be asked again in at least one core subject.

3. Within the penultimate year, there should be a core subject that asks the full range of jurisprudential questions - but this time about the whole of law rather than about a single subject within law.[24]

Having proposed an answer to that question, I was emboldened to go on to look at other problems with current law schools and propose some solutions to them. In particular I looked at questions about the way that law and legal practice are changing and the kind of curriculum that will

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[24] See C.Sampford and D.A.R.Wood, "Legal Theory and the Law Curriculum" (1987) 61 *Law Institute Journal*; C.Sampford and D.A.R.Wood, "'Theoretical Dimensions of Legal Education'- a response to Pearce" (1988) 62 *Australian Law Journal* 32; and C.Sampford and D.A.R.Wood, "Legal Theory and Legal Education - the next step" (1989) 1 *Legal Education Review* 107.

Note that at Griffith, where law is integrated with other disciplines (politics, environmental science, Asian studies, international business, media and accountancy), this subject also examines the theoretical issues raised by the discipline within which it is integrated.

be required for educating tomorrow's lawyers.[25] I will not dwell on these issues here other than to say that it is a lesson to all that the asking of questions and the posing of answers can be a particularly dangerous pastime because someone may challenge you to put in practice the answers you propose!

However, there are two points that I wish to emphasise. The key idea is to expose students to a range of critical questions about the nature of law and their practice within it and to answers offered by current legal theory. Not every teacher will be a supporter of every theory. The way I suggest that they deal with theories to which they are particularly unsympathetic is to ask themselves this question - what was the key insight into the nature of human beings, social relations or the laws that govern them that has led so many to adopt it.

This is not a matter of "200 million Leninists can't be wrong". They were wrong, terribly wrong, at large. But they were right about some things and it is what they were right about that explained their appeal. It might appear that this idea could be expressed by the old cliche of not throwing the baby out with the bathwater. However, we might have little time for the baby. It may have grown into a monster that needs to be destroyed. However, we should appreciate that there was an important insight, an apparent kernel of truth, in the rejected theory that could well form a part of the student's own emerging theory.

The second point is that we want students tentatively to choose and cautiously to review the answers that most appeal to them. We should expect them to come out with a range of views. I would regard it as a failure if they all came out thinking like me or, if it were possible, thinking like us.

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[25] See C.Sampford, "Rethinking the core curriculum" (1989) 12 *Adelaide Law Review* 38; C.Sampford, *Editorial* (1992) 1 *Griffith Law Review* v and the Griffith curriculum appended to it.

Business and professional ethics

Again, many of those here tonight will have heard me before on this issue. In each area of ethics which I have discussed - business, legal and public sector - I have asked a number of questions and suggested broadly similar answers.

Although the first thing we do when we are confronted by sub-standard conduct is to reach for the statute book, this is rarely sufficient by itself. If we just make rules, we quickly find that law by itself cannot produce behavioural change.

By the same token purely ethical standards only restrict the conduct of lawyers who are already ethical. They impose no effective constraints on the unethical lawyers who are at the root of the problem. Thus it is commonly argued, ethical standard setting and legal regulation must be mutually supportive.

However, even the best combination of laws and ethical standards will be defeated by an institutional environment which is not conducive to legal and ethical compliance. To take a legal example, even the best codes and the strongest support for a high ethical culture would be undermined by a reporting system in which fees and billable hours were the sole criterion of advancement and partners did not want to know how they were achieved.

It is for these reasons that I argue that the solution to maintaining and improving the conduct of lawyers lies in a combination of legal regulation, ethical standard setting, and institutional design.

The key question is how the three can indeed be co-ordinated. For me, there is a clear answer to this question in all the areas I have looked at. That answer lies in looking at the *justification* of the relevant institution or professional activity. This justification provides a positive guide as to what the institution should aim for and achieve, rather than merely

advising as to what it should avoid. First, those justifying values provide the basis and purpose for the legislation and regulations that govern that institution's creation, existence and conduct. In so doing it provides a basis for the purposive interpretation of that regulation - ie. the enforceable codes. Secondly, those values provide the positive guide that should be at the centre of ethics. They set out the positive standards which lawyers should follow and by which they should judge themselves and be judged by their peers. Finally, these values set out a basis for evaluating the structure of the institution in that they set standards for the criticism and reform of legal and social institutions.

This approach does not give a neat and instant answer - a key part of the process requires that the institution or profession under consideration reconsiders the justification for its existence as a prelude to considering whether it must reform the laws, ethics and institutional arrangements that govern it.

Mabo and claims to compensation

Mabo[26], and the way we respond to it, constitutes some of the most fertile ground for questions about the way we have treated our native population to date, and the way we should treat them in future. For an applied philosopher there are some weighty issues. What are the principles that can be used when a people have been so cheated and systematically discriminated against? These are not principles of *distributive justice*, principles about how society's goods are divided. They are principles of *corrective* justice - largely uncharted philosophical territory.

Judicial Decision Making

This leads us on to another issue that has been raised by Mabo and a number of other high profile cases. The question is often put in terms of whether judges make law or apply law. However, this is clearly the wrong

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26 *Mabo v Queensland (2)* (1992) 175 CLR 1.

question. The real issue is how can seven judges read the same material, listen to the same arguments, sit in the same court-room and come to as many as seven different judgements *and feel compelled to do so.*

This is one of the longest standing questions in jurisprudence. There are many answers with which we must grapple. But there are two answers that are just not in the running:

- that there is only one right answer and most or all of the judges are wrong; AND
- that they just make it up as they go along.

This is one of the issues that we will be tackling in our constitutional theory project at the National Institute for Law, Ethics and Public Affairs.

THE BIG QUESTION FOR WESTERN LIBERAL DEMOCRACIES - WHERE DO WE GO FROM HERE?

The largest question applied philosophy will have to tackle is one that faces Western liberal democracies in the wake of the end of the Cold War - where do we go from here? Or, more to the point: if the West triumphed in the Cold War, why doesn't it feel like we won? The collapse of the Leninist oligarchies in Eastern Europe gave great joy to all lovers of liberty and democracy. But victory has not been sweet for the victors in the Cold War and even less so for those who have been supposedly liberated.

There are two different ways of seeing the clash of ideals that characterised the cold war. One way is to emphasise the values that Europe discovered in the eighteenth century and were championed by Adam Smith and John Stuart Mill. The whole tide of socialism is seen as a terrible mistake that is now over and we can return to the verities of the

eighteenth century, brought up to date by the econometric work of the 1980s.

Naturally enough, my analysis is rather different. The eighteenth century produced some powerful ideas - emphasising, celebrating and justifying the role of the individual in law, politics and economics. From them we have received our ideals of human rights, democracy, and the potential of markets - ideals we retain to this day and ideals that are worth fighting and dying for (although I am glad that, as an applied philosopher, this view is unlikely to be put to the test). In economics they emphasised the potential of markets to increase human wellbeing by allowing individuals to trade to their own advantage. In law, they gave us the idea of the Rule of Law in which laws would be predictable and allow law abiding individual citizens to know the legal space in which they could play out the game of life. In politics, the stirring words of the American Declaration of Independence still ring clear: "we hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of happiness" (they sure don't write preambles like that any more!) Most importantly of all they gave us the idea that the ultimate justification of society was what it did for the individuals who were part of it.

However, these eighteenth century liberal ideals were subject to sustained attack from several quarters because of the limitations to those ideals. First, markets work well to allocate efficiently where there are large numbers of more or less equal players. However, they can work very inefficiently and with the most profound injustice where the key players are few and the power of the players is disproportionate. Secondly, individuals may be the point of, the justification for, the *raison d'etre*, of human society. But society cannot be described or understood merely in terms of individuals. Western society is a society of organisations. Despite all the rhetoric, we live our lives largely in (and, to a significant extent, through) the organisations where we grow up,

work, play and procreate. Organisations dominate virtually every area of social life and simultaneously sustain and infuriate us by providing the best and the worst experiences of our daily lives. The problems and opportunities of modern Western life are provided by organisations. Modern life as we know it, is only possible with organisations. There is no point in idealising about a society of individuals. We must reform our organisations and make them work. Our goal must be to avoid the harm while seizing the benefits that only organisations can provide - of making organisations operate to enhance rather than reduce the life of the individuals they are supposed to serve. This is true of the organisations of government, business, religion and family. Ignoring the existence of organisations can be profoundly unjust - as when some pretend that individuals and organisations can be equal in bargaining power.

Thirdly, concepts of individual rights were framed by eighteenth century gentlemen like Rousseau, Franklin, Hamilton and Paine. They saw the greatest threat to life, liberty and the pursuit of happiness as coming from the state. For articulate men with more than adequate means, that was the only threat. Accordingly they conceived of human rights in terms of protection from the interference of the state in the actions of men. Over the past 200 years, political experience has pointed to the different threats to the ability of men and women to fulfil their goals. Such threats could come from other individuals and especially combinations of individuals in corporations, trusts and unions. And the greatest threat of all lay in an insufficiency of resources to pursue those goals. Such threats were not felt by the proponents of the original Rights Bills who already had the material resources to pursue their life goals and who had little experience of large scale non-state organisations. However, appreciation of these threats led men to claim rights to be free from these threats. There remained the traditional view of rights - of space in which to play the game of life. These were usually called "freedoms", "liberties" and "negative rights" . In addition, there were claims to protection from the stronger players, especially when they

played in teams. And finally there were rights to the equipment, the resources with which to play that game. Under a variety of names - "economic", "socio-economic", "welfare rights" - the importance of these last rights was more widely appreciated. In fact, many saw them as more fundamental than the traditional, essentially negative, rights.

In most western countries more liberal and humane capitalism emerged to deal with the objections to, and problems generated by, less complicated forms of earlier capitalism. It had different names - "liberalism" in America, "the welfare state" in Europe and Australia - and the differences between parties tended to be on the balance between welfarist ideals and market forces.

It held increasing sway until it ran into difficulties in the 1970s that could only be described as minor in comparison to the depressions of earlier capitalism and, it cannot be said too strongly, far less than the difficulties we currently face. Nevertheless, some of those opposed to the welfare state developed a superficially forceful diagnosis of, and cure for, those problems. Governments had too much power, a power that public choice theory claimed was exercised by minorities against the interests of the majority. Even when wielded for the best of intentions, government interventions only made things worse because the wrong people were attracted to government and even the best lost their edge when they lacked a direct pecuniary interest. What was needed was a return to a simpler and purer form of capitalism in which virtually all goods and services would be allocated by the market.

In the sense that this view failed to address the objections and problems that had led so many to abandon such theories, it could be called "primitive" (Galbraith's term[27]) "infantile" or "vulgar" capitalism. In preferring the last mentioned term, I am not merely showing an aesthetic and moral distaste for the particular mixture of intellectual inadequacy and self interest that characterises the Anglo Saxon

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[27] See *Guardian Weekly*, 4 February 1990, 10.

conservative reaction of the 1980s. The term is primarily chosen to highlight the parallels between it and what we used to call "vulgar Marxism", whose decline has been going on for much longer and is now uncontested, and whose end is more clearly in sight.

Vulgar Marxism was based on a superficial reading of Marx that he would have totally disavowed. Similarly, vulgar capitalism was based on a superficial understanding of Adam Smith and John Stuart Mill with which they would have been equally horrified. Both made claims to be a science. Both claimed to have discovered laws governing behaviour and the operation of society - vulgar Marxists on the basis of class and economic determinism of the base, vulgar capitalists on the laws of the market. Both approach the world with a rigid set of assumptions and tend to blame the impurity of the real world when it does not behave as expected. Both find it easy to prove their conclusions within their own frame of reference because all their conclusions are already bound up in their assumptions. The Marxist pseudo science went so far as to predict the imminent end of history. That has now been outbid by the claim that history has already ended![28]

Both vulgar capitalism and vulgar Marxism tend to compare the idealised version of their own system with the actual and imagined workings of their opponents. Vulgar Marxists were notorious for comparing a highly overblown image of the West as a den of corruption in which money always won out to an ideal socialism rather than the grim societies they had produced themselves. Similarly, vulgar capitalists are always talking about how an ideal market is superior to the defects of actual public institutions. Where vulgar Marxists claim that the money power will always win out in the West, vulgar capitalists claim that public choice theory demonstrates that the interests of the majority will be frustrated by minorities. The Marxist ideal did not take into account the

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[28] Francis Fukuyama, *Guardian Weekly*, 31 December 1989, 15.

problem of the self interest of those who were supposed to lead others for the benefit of all; vulgar capitalists ignore the influence of private power and ideology on the operation of markets.

Both talk of democracy but seek to redefine or constrain it in the interests of the powerful groups who benefit from the implementation of their policies. The vulgar Marxists claimed they were true democracies in which all institutions were controlled by the people. However, the people were led by the party who made all relevant decisions. The vulgar capitalists like to claim that the market is "democratic." However it is extremely important to distinguish the voting principles of the "democratic" market. Instead of one person/one vote, the principle becomes one dollar/one vote. Unless the wealth distribution is extremely egalitarian, the latter is a denial of democracy on virtually any definition of, and justification for, democracy. This has an obvious attraction for those who possess more than the average number of dollars. Democratic institutions are a permanent threat to them because the majority will have less than average wealth and income and may attempt to at least partially turn their votes into dollars.

Vulgar capitalists even share one of the vulgar Marxists most criticised mistakes. Marx is often criticised for saying that the economy which he called "the base" determined "the superstructure" of culture and law. This is regarded as nonsense because the economy cannot exist without the law. Vulgar capitalists make exactly the same mistake when they try to conceive of the economy separately from the law and complain of the way the law interferes with it. Both treat the economic base as given and prior and dislike the law. The only difference is that vulgar Marxists dislike the base and blame it for the law whereas capitalists love the base and blame "socialists" for engaging in the unnatural act of legislation and passing all those terribly unnatural laws.

Vulgar Marxists and capitalists claimed a degree of rigour and coherence and consistency. The dogmatic repetition of simplistic

nostrums is consistent but it is neither clever nor sophisticated. It is merely the dogmatic repetition of simplistic nostrums.

Vulgar Marxists and capitalists share even less attractive features. They tend to be brutal, intolerant of dissent, bellicose and adventurist. This reflects another similarity. Vulgar Marxists predicted the withering away of the state, yet ran some of the most repressive and comprehensive states in human history. Vulgar capitalists excoriate the excesses of the state, portray it as the enemy of liberty and argue for a minimalist state. Yet Margaret Thatcher concentrated state power, built up its repressive arms, tried to keep it beyond legal control, and used it more ruthlessly than any of her predecessors. Across the Atlantic, the Reagan administration also built up the state's overt and covert military capacity, attempted to avoid the legal controls that he could not remove, and used it contemptuously ignoring International Law and opinion. Thus it would be wrong to dismiss either vulgar Marxism or vulgar capitalism as paper tigers on the grounds of their intellectual inadequacy as they have real teeth and have generated enough supporters with a will to use them.

Vulgar Marxism and vulgar capitalism are intended as examples of, and the latter a prime current manifestation of, ideologies to be displaced rather than philosophies to be discovered. In so doing, I am not intending to make a precise distinction and apply a pejorative to those things that fall on the disapproved side of the distinction. I am using the term as a reminder of how applied philosophy may lose its way and forget its prime purpose.

Philosophy emphasises the question and analyses the alternative answers. It begins to degenerate into ideology when it presses an answer to the exclusion of everything else. It presses an answer that was carefully constructed in response to one question at one time and in one place to apply to all problems at all times and in all places. In its worst form it presses the answer in ignorance of the question and to the forceful exclusion of all other answers.

We must rediscover philosophy and we must be wary of its ready political degradability into ideology.

What can applied philosophy do?

Let me be more precise about what applied philosophy may do. Clearly we must be wary of claims that it can provide a ready solution to all of life's problems. That is the province of ideology which philosophy must help to counter. However, in addressing and proposing some answers it can do much. It can:

- analyse the debate in a manner similar to the above;
- expose unwarranted assumptions of those engaged in the political and ideological argument;
- note the illegitimate arguments;
- identify inconsistencies;
- identify some of the silly arguments;
- identify the apparent kernel of truth, the key insight that lies behind the long term popularity of each ideology. In so doing, it is possible to rescue the original philosophy from the ideology and begin to apply it to practical problems of the day.

Finally, and most fundamentally, it can consider the possible syntheses of the eighteenth century liberal ideals with the ideals propounded in the nineteenth century reaction. There is not sufficient time to discuss and give examples of all of these moves. But I will mention a few examples before dwelling on the last.

Unwarranted assumptions

One example of a common and unwarranted assumption in current political discussion is that there is a clear distinction in virtue or

efficiency between so called "public" and so-called "private" enterprise. This has been subjected to much useful criticism from philosophers.[29]

Illegitimate arguments

That there are many illegitimate arguments in the current ideological debate hardly needs restating. Two that are deserving of particular attention are the 1980s catchwords: "there is no alternative" [TINA] and "there is no money".

TINA is, and was, patently false. If you look around the rest of the western world, it is clear that there are other alternatives. What is more, they are more successful than the path from which it is claimed there is no alternative. The only meaning that I can give to this common phrase is "I can think of no other alternative". This is not a statement of resolve and clear sighted vision but merely of a lack of imagination. It is an admission of narrow mindedness, ignorance and ideological obsession.

As to the "There is no money" argument, as Wojciech Sadurski points out this is put as an empirical statement about what you can do. In fact it is a statement of priorities. It is perfectly legitimate to argue for priorities in government expenditure or between taxation/government expenditure and low taxation/individual choice. However, these are priorities that have to be argued for, rather than ignored by a claim of impossibility.

Asking embarrassing questions

Sometimes it is fun to turn an argument against those who use it. Most of the time it is just sport, but sometimes there is an important point to be made. Those who believe that everyone acts in their own selfish interests advocate free market policies as the best for the society. However, it is not unreasonable to ask whether those who advocate those

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[29] See discussion of some of those contributions and my own reworking of it in C.Sampford, "Law, Institutions and the Public Private Divide" (1992) 20 *FLR* 185.

policies are themselves pushing self interest instead of truth - consciously or otherwise. Indeed if they were not doing so then they would be acting, in their own terms, irrationally. If we are to take their theory seriously, then we must take their suggested prescriptions with extreme scepticism.

There is a potential reply. It is in the self interests of such pundits to be right, as in the long term they could be proven wrong. However, we should treat this riposte with care. The long term is obviously very long term. Fourteen years of relative decline by the English speaking democracies which have followed these policies is certainly long enough for me. Secondly, when they are proven wrong, as in the case of the float of the dollar, they always argue that the problems were caused by something else. Thirdly, it must be pointed out that there are a lot of short term advantages of telling people what they want to hear. In a market for ideas, people tend to buy the ideas that suit them and find plenty of eager, even sincere,[30] suppliers.

Identify some of the absurd arguments and concepts

Much of the talk about the market has an extraordinarily anthropomorphic ring to it. We hear of the "judgement" of the market, the "discipline" of the market, the view that the market will take. There is a clear reason why this is an attractive form of terminology. Having given up a form of regulation based on an attempt to further rational goals it is comforting to think of the market as if it were some kind of rational, even if not benign, phenomenon.

However, it is completely contrary to the whole concept of the market that it would take a view. The whole idea of a market is that it is the result of many people taking different views. Where the market operates as a herd following the same view then it will not work well. Indeed, it is clear that it does sometimes operate that way because opinion leaders affect the views of so many.

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30 Though not always. The wealthy tend to pay better for the ideas they like.

The synthesis

Most importantly of all, applied philosophers should attempt to rescue insights on which competing theories are based and build them into a new synthesis. I will not pretend that I can here offer you the synthesis of liberal, economic and social democratic theories underlying the contesting vulgarisms into which the ideas of Smith, Mill and Marx have descended. But I can offer some pointers.

1. We must look to the insights, the apparent kernels of truth, that lie behind the support for vulgar capitalism, vulgar Marxism and other ideologies that press their answers upon us:

- *the liberal ideal*: Human beings have goals, interests, capacities. It is fulfilling for them to be able to plan their lives. It is good to maximise the range of actions citizens may choose to perform by the specification, elaboration and protection of the widest range of rights and liberties that can be enjoyed by all. This is not only good for the individuals who possess these rights but also for the interests of other citizens and society as a whole (as the classic argument for freedom of speech goes). Most fundamentally, the liberal ideal encapsulates the eighteenth century realisation that the purpose of society should be to serve its citizens, not the other way around.

- *the democratic ideal*: Rules should be made by those who are governed by them and decisions should be made by those who are affected by them. This is not only a right of citizens, it is also a more effective way of governing society and the institutions that comprise it because it mobilises the ideas and wisdom of its

members and generates support for the decisions reached.

- *the market ideal*: The stock of goods is maximised if citizens can exchange what they have for what they want more. The infinite variety of choices can generally be better reflected by the market than detailed planning of production, distribution, exchange and investment.

- *the socialist ideal*: Human beings are social animals descended from social primates. This has both negative and positive dimensions. In negative terms it is essential that we never were nor could have been individuals outside of society who could even conceivably contract with each other for the kind of society in which we should live. In positive terms, human beings can only achieve their potential and personal fulfilment through groups.

- *the institutional ideal*: We live our lives by and through institutions which simultaneously threaten individuals but also provide possibilities for the generation of ideas, experiences, effective action and fulfilment inconceivable for individuals acting alone.

- *the environmental ideal*: We are a part of our environment, not masters of it to dispose as we will.

2. While recognising these fine values, we must look to the limitations of those ideals and the conditions of their fulfilment.

3. We may then begin to blend these insights together. Some of the most promising suggestions are as follows:

- *Extension of the concept of human rights*: Identify the key value underlying claims of human rights as the ability of individuals to further their life plans by ensuring that they can engage in activities that support and enrich their lives. This is not a matter of dignifying every claim by anybody to anything as a right. Indeed, it is the opposite because these kinds of rights will necessarily be limited. This should not be seen as a retreat from rights but a preference for rights that all can enjoy over those rights that only a few can enjoy.[31]

- *Extension of the concept to group rights* but in a novel way: Group rights should not be seen as the rights of groups which may be used against individuals. Group rights should be seen as flowing from the elementary fact of nature that human beings are social animals and can only be fulfilled through participation in group life. Accordingly, group rights should be seen as rights of individuals to the benefits of participation in group life that are respected and supported by the community. This means that those groups in which people find themselves by birth or traditional association should receive a degree of concern and respect.

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[31] See C.Sampford, "The Dimensions of Rights and their protection by Statute" in C.Sampford and D.J.Galligan (eds.) *Law, Rights and the Welfare State*, London, Croom Helm, 1986, 170 for an example of this approach.

- *"Guided markets"*: Those of you as old as I may remember Indonesian President Sukarno's concept of "guided democracy". I have always considered that notion to be dangerous humbug and justifiably maligned. However, I have recently come to the view that guided markets make a lot of sense. The idea is that you establish conditions under which there will be vigorous competition within a field so that success is not guaranteed for any player but that a successful provider of a designated product or service will not be undermined by a sudden and major shift in the exchange rate or changed conditions of competition.

- We must look seriously at the interaction between what I call "the democracy of the vote" and "the democracy of the dollar": If we believe in the latter (ie. markets), we must be vigilant lest the unequal outcomes of the latter do not unduly intrude into outcomes of the former.

I am not suggesting that all these ideals can be comfortably synthesized. Even less am I suggesting that there is one correct synthesis - though if I finalise my own construction and it survives my self-criticism, I will be as wedded to mine as anyone else's. But I would urge that the debate should be *between syntheses* rather than between vulgar capitalism and some other applied philosophy stripped for battle as an ideology.

CONCLUSION

At the end of this journey I do not profess to give you the answers. I am sure that the former professor of philosophy would be pleased that I am at least holding my own in terms of questions asked and answers

given - I am doing my bit to keep philosophers in work. But I can summarise the tentative conclusions ten years into an academic career.

- Each theory encapsulates one or more insights into human beings, and/or the social arrangements in which they live. That apparent kernel of truth explains its popularity. But that kernel can rarely bear the burden of the theory which is constructed upon it.
- The inadequate treatment of institutions in legal theory and in western thought in general.
- The range, breadth and interrelationship of these issues means that they cannot be tackled by one person alone but need an institution.
- Philosophers use simple examples to generate theories which may reveal difficulties when confronted by real life problems.
- Applied philosophy requires engaged academics and reflective practitioners.
- Applied philosophy is principally about questions, not about answers.
- The solution to many of the West's current problems requires a combination of legal regulation, ethical reflection and institutional design. Law can only provide part of the answer. We must take the dynamics of institutions far more seriously.

Legal, ethical, and political philosophy can and must assist in this process - not by providing all pervasive answers but by emphasising the question and analysing the alternative answers. However, it is clear that the answers do not lie in simplistic versions of eighteenth century

philosophers. They lie in a synthesis of the insights found in the various theories that have been in constant competition since then.

Applied philosophy degenerates into ideology when it presses an answer to the exclusion of everything else - including, ultimately, the exclusion of the question. It presses an answer that was carefully constructed in response to one question at one time and in one place to apply to all problems at all times and in all places. We must rediscover philosophy and we must be wary of its ready political degradability into ideology.

I would say to you, as I say to our students - consider the question, look at the alternatives, choose a tentative working answer on which to act, but be constantly self critical of the answer you adopt. I shall attempt to do the same. Because although I have come here to profess, what I profess most earnestly is a wariness of those who profess too much.

It is also significant that what started as an individual journey has become an institutional one and to a large extent it is not just my journey any more. Some of you are intimately associated with that journey. Others can be, I hope, at least, fellow travellers.