

A Story of Jurisprudence and True Philosophy

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Gerald J. Postema, [The Perils and Prospects of Critical History: Comments on Bernal, Naffine, Vatter, and Walton](#), 8 **Jurisprudence** 609 (2017).

This is a shaggy dog jot. It starts in the conventional way by identifying a recent piece of work that is recommended for the attention of the reader. However, in the course of justifying that recommendation there is a series of diversions to other works, which distracts from any sustained understanding of where exactly the virtue of the piece is to be found. But, like a shaggy dog story which finally reveals its point, there does eventually emerge a point to the recommendation; although, as with the simile, not the point that might have been anticipated.

The work cited is a response by Gerald Postema to critics in a symposium on the volume covering common-law legal philosophy in the twentieth century he has contributed to Springer's multi-volume *Treatise of Legal Philosophy and General Jurisprudence*. Within his coverage of that subject matter, Postema cites an article as a resource for unpacking the notion of true philosophy (*vera philosophia*) which he then utilizes in his own assessment of the achievements of common-law legal philosophy. This article by Donald Kelley in the 1976 *Journal of the History of Philosophy*,¹ has not, as far as I am aware, received much attention in mainstream Jurisprudence; and I have failed to uncover any real enthusiasm for it within more exclusive, niche jurisprudential concerns. It is, nevertheless, central to our present concerns.

The recent availability of Postema's volume in a far more affordable paperback version appears to have provoked discussion in the review pages of the core understanding of legal philosophy expounded by Postema in that work. Notably, Kevin Walton has challenged the basis of Postema's evaluation of the failings of common-law legal philosophy, and has in turn offered his own account of at least a virtuous legal philosophy (if not an account of true philosophy) by which the efforts of legal philosophers can be measured.² Postema has responded to Walton's criticism (Pp. 611-12), providing us with further thoughts on where the value of legal philosophy is to be found. The disagreement between Postema and Walton turns on how, and the extent to which, legal philosophy has attained the status of a "sociable science". This alternative depiction of what can be expected to be achieved by Jurisprudence, picked up by Walton, had been amplified in an article by Postema in the 2015 *Virginia Law Review*, subsequent to the initial publication of his *Treatise* volume.

There is a close connection in Postema's writing between a sociable science and *vera philosophia*, as signalling the appropriate aspiration for Jurisprudence. However described, the aspiration finds fulfillment in engagement with the matters that are core to understanding the human social condition. The debate between Postema and Walton fixes on which of these matters have been taken into account by twentieth-century anglophone legal philosophy, and the level of emphasis they have received. Their discussion also encompasses the extent to which legal philosophy has been receptive to the contributions of related disciplines in constructing a full and informative picture of sociability.

At this point, the prized accolade of *vera philosophia* appears attainable in different ways by Jurisprudence. Either by displaying an adequate grasp of its appropriate subject matter (sociability), or through a willingness to borrow from adjoining disciplines their coverage of the subject matter. Seen in this way, the prize might equally be offered to other disciplines, if only they provide adequate coverage, or form suitable alliances, to deal effectively with their own particular subject matters.

On returning to Kelley's article, we find a different criterion for awarding the honour of *vera philosophia* to

Jurisprudence. It is not on the basis of effective coverage, but on the provision of singular insight. Postema cites Kelley's article in advancing a noble philosophical vision for Jurisprudence contrasted with a narrow perspective on law found in blinkered professionalism – taking this to be the perspective of the *jurisperiti* (those merely learned in the law, or unthinking lawyers) in the denunciation from Budé that Kelley quotes. More than that is found in Kelley's article in distinguishing the true calling of *vera philosophia*. Kelley also quotes the words of Louis le Caron (at 270), to make the point that it is also to be distinguished from mere philosophy: “true philosophy is contained in the books of law and not in the useless and inarticulate libraries of philosophers, who in effect are men of great learning but incompetent in public affairs”.

On this account, Jurisprudence is not prized because it displays virtues that any branch of learning might attain. Far from it. Jurisprudence is distinct from general philosophy precisely because it can offer the insights that philosophy misses. The idea emerging from Kelley's survey of renaissance jurisprudence that Jurisprudence might have a unique perspective to offer between mere practice and mere philosophy is a tantalizing one. It seems plausible to suggest, on the one hand, that some kind of deeper theoretical reflection on the practice of law in regulating the social condition might yield more illumination than unthinking adherence to practice, while suggesting on the other hand that lofty philosophical speculation uninformed by a practical grounding is likely to be limited in the insight it can deliver.

It is one thing to state this as an aspiration for Jurisprudence; it is quite another thing to realize it. Kelley's article, to be blunt, does not get us beyond reporting an aspiration that culminated in the sixteenth century. There is no evidence for supposing that such an exalted aspiration for Jurisprudence was maintained over succeeding centuries, either in the common-law world or in the civil-law world, as the relevant volumes of the *Treatise* reveal.³ Instead of providing the clarity of *vera philosophia* to inform us of the human social condition, Jurisprudence or legal philosophy has fragmented into discordant voices. In his general editorial preface to volumes 9 and 10 of the *Treatise*, Enrico Pattaro suggests that one can detect different versions of legal philosophy, which he attributes to general philosophers, jurists, and legal philosophers in a narrow sense. More recently, quite bitter rivalries have surfaced between those who see Jurisprudence as, or not (just) as, legal philosophy.

One possible clue to explaining this state of affairs is furnished by another of Donald Kelley's works. In *The Problem of Knowledge and the Concept of Discipline*,⁴ Kelley suggests that the real factors shaping the substance of a discipline are to be found in the attitudes of those who exhibit mastery of the discipline and influence “disciples”. Different masters, different disciples, divided disciplines. If that line of argument is accepted, then one might reasonably question the value of noting efforts by its masters of a bygone age to elevate the discipline of Jurisprudence to a status it never actually achieved. And at the same time, question the emphasis given in a jot to an article that notes this very thing.

On further reflection, however, if we do take seriously Kelley's thesis in his later piece, over the responsibility of the masters of a discipline for shaping the ambition and scope of that discipline, then it might after all be relevant to have our attention drawn to an era when those leading the discipline had a far more ambitious vision for Jurisprudence than it enjoys today.

1. Donald Kelley, *Vera Philosophia: The Philosophical Significance of Renaissance Jurisprudence*, **Journal of the History of Philosophy** 267 (1976). [2]
2. Kevin Walton, *Gerald Postema on Genuinely Philosophical Jurisprudence*, 8 **Jurisprudence** 604 (2017). My own combined review of Postema's volume and Lobban's volume on the common-law legal philosophy of the preceding centuries can be found at the **Singapore Journal of Legal Studies** 387 (2017). [2]
3. Volumes 8, 9, 11 & 12 cover both common-law and civil-law worlds from 1600 to the twentieth century, with volume 10 dealing with the “The Philosophers' Philosophy of Law” for the same period. [2]
4. The opening chapter of his edited collection, **History and the Disciplines: The Reclassification of Knowledge in Early Modern Europe** (1997). [2]

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