LEGAL REASONING AS A TYPE OF PRACTICAL REASONING

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I

In this paper, I shall attempt to defend the view that legal reasoning is a type of practical reasoning. My defense will primarily take the form of an exposition of the nature of philosophy offered by the English Utilitarian Henry Sidgwick. I am inclined to accept his distinction between theoretical and practical reasoning and, on the basis of this distinction, to locate legal reasoning in the sphere of the practical rather than the theoretical. I have tried to anticipate and answer some objections that might be raised against this view, although I am certain to have left much ground uncovered in this regard. I conclude the discussion with some reasons for finding the view presented useful and relevant to the contemporary scene.

II

Sidgwick views philosophy as the *scientia scientiarum* ([1]). Conceiving of the sciences as sets of connected knowledge, Sidgwick maintains that if we imagine them as rising from the particular to the general, we may consider these sets in turn connected by philosophy at the higher end. It is not his view that philosophy ignores the phenomena with which the sciences deal. But rather the primary concern of the philosopher is with fundamental principles, methods and conclusions. Each of the sciences presents us with some understanding of our universe. Philosophy is concerned to help us understand our understanding of it. As such, it performs an essential unifying function:

> The important distinction is that the sciences concentrate attention on particular parts or aspects of the knowable world, abstracting from the rest; while it is, in contrast, the essential characteristic of Philosophy that it aims at putting together the parts of knowledge thus attained into a systematic whole; so that all methods of attaining truth may be grasped as parts of one method; and that all the conclusions attained may be presented, so far as possible, as harmonious and consistent.

The distinction between philosophy and the sciences at issue here rests on the difference between the sorts of questions raised. For example, the physics student wants to know what laws there are governing the behavior of physical things. But the philosopher wants to know what the nature of "substance" itself is.

Having thus distinguished philosophy from the sciences, Sidgwick proceeds to a distinction between theoretical philosophy and practical philosophy. Here too, the distinction is based on the kinds of questions asked, rather than the answers that might be given.

The term 'theoretical philosophy' applies to our systematic knowledge of what is, has been or will be — so far as we can forecast what will be. The term 'practical philosophy' applies to our systematic knowledge, our system of reasoned judgment, as to what ought to be. The fundamental distinction here is between questions about "what is" and questions about "what ought to be". With its concern for "what ought to be", practical philosophy includes the study of fundamental principles in Ethics and Politics and Jurisprudence. As such it is roughly equivalent, according to Sidgwick, to moral, political, and legal philosophy.

It is important to observe, at this point, that the distinction mentioned earlier between philosophy and the sciences obtains in both the realm of theoretical philosophy and the realm of practical philosophy. Theoretical philosophy faces the task of unifying the systems of knowledge commonly called 'sciences' or 'positive sciences'. Practical philosophy is confronted with a similar assignment with regard to "the systems of knowledge or reasoned thought distinguished as Ethics, Politics and Ju-

risprudence." There is, then, a difference between Ethics and moral philosophy, Politics and political philosophy, and Jurisprudence and legal philosophy ([2]). This difference deserves a closer scrutiny.

The essential difference is that moral, political and legal philosophy belong to the province of philosophy, specifically practical philosophy, whereas Ethics, Politics and Jurisprudence, strictly speaking, do not. It will be remembered that, for Sidgwick, the central concern of practical philosophy is with the fundamental principles, methods and conclusions of the "sciences". Ethics, Politics and Jurisprudence provide the philosopher with the data or phenomena, so to speak, for philosophizing, but they are not *per se* philosophical disciplines ([3]).

The distinction between Jurisprudence and Legal Philosophy, according to Sidgwick is the most obvious:

> I have spoken of Ethics, Politics and Jurisprudence. The last mentioned is clearly distinguished in ordinary thought from Philosophy. There are, no doubt, philosophical jurists, but all jurists are not as such philosophers: it is recognized that a man may have a sound knowledge of law — even of the conception and rules of law in general, as distinct from the law of a particular state — without being a philosopher.

The distinction referred to in this passage can be clearly seen in terms of the sorts of questions raised: the jurist wants to know what laws exist, the philosopher wants to know what the nature of law itself is.

In Ethics and Politics the concerns are similar to those in Jurisprudence. Sidgwick notes that it is generally recognized that it is the business of Ethics to supply an answer to questions as to the details of right conduct or duty — so far as they are legitimate questions to ask. But this is not the business of moral philosophy, which is primarily concerned with the general principles and methods of moral reasoning and only with details of conduct in so far as the discussion of them affords instructive examples of general principles and methods. Similarly, Politics aims at determining the rules for governmental action and the construction of governmental organs. But poli-

tical philosophy aims at unifying the principles and methods of reasoning directed to practical political conclusions.

If we grant Sidgwick's distinction between theoretical and practical philosophy, we may find ourselves in agreement with the suggestion that legal reasoning is to be properly located in the province of practical philosophy. Its bedfellows are moral reasoning and political reasoning. If we grant Sidgwick's distinction between legal philosophy and Jurisprudence, we may be inclined to further specify the locale of legal reasoning as belonging to the sphere of legal philosophy.

III

There are at least two objections which may be raised to Sidgwick's classifications. It may be objected that this distinction between theoretical and practical reasoning does not hold. Specifically, it may be urged that since legal reasoning concerns itself mainly with legal theories, it is misleading, and perhaps false, to claim that legal reasoning does not fall within the scope of theoretical reasoning.

This objection has force only if we ignore the grounds upon which Sidgwick draws this distinction. It is not *per se* a distinction between theory and practice. He readily acknowledges the theoretical aspects of practical philosophy as well as the practical aspects of theoretical philosophy. The grounds upon which Sidgwick's distinction is based is the readily acknowledged distinction between fact and ideal, i.e. between "what is" (has been, will be) and "what ought to be". Practical philosophy, for Sidgwick, is "the supreme architectonic study of ultimate ends", of the principles of what ought to be ([4]). Certainly there are theories about what ought to be and Sidgwick was quite familiar with most of them, but the direction of such theories toward practical conclusions, in Ethics, Politics and Jurisprudence is what prompted Sidgwick to draw the line where he did.

A second objection may be forthcoming from those whose sympathies lie with "legal positivism". It can be said of John

Austin, for example, that he considered philosophy of law to be concerned only with positive law, "as it necessarily is", not as it ought to be. And so it would seem, on a first glance, that legal reasoning belongs to the domain of theoretical reasoning, rather than practical reasoning. But Austin was one of Sidgwick's "mentors" and Sidgwick claims to be following Austin in his conception of a legal system.

The apparent inconsistency dissolves when it is understood that both Austin and Sidgwick conceived the main task of legal philosophy to be the analysis of certain notions which pervade the science of law. Legal philosophy concerns itself with fundamental principles, methods and conclusions pertaining to the study of law. Sidgwick's approach to law, like his approach to government, is never in terms of the sort of considerations prevalent, for example, in Natural Law theories. His notion of "what ought to be" includes what is commonly judged to be "good" so far as attainable by human action. And by the term 'good' he means the "ultimate good on the whole", good on the whole for human society. These utilitarian notions are not likely, I take it, to be alien to the thought of men like Austin.

IV

I want finally to suggest some reasons for thinking that the classifications offered in this paper might be appealing to us today.

(1) The distinction offered by Sidgwick between philosophy and other disciplines seems to anticipate, in many respects, at least one contemporary view of this same distinction ([5]).

(2) The view offered here commends itself to the more scientific, less metaphysical, approach to legal theory. At the same time it enables one to introduce contemporary moral perspectives into discussions of legal theory, should that be desired.

(3) It provides a most useful way of sorting out the various sorts of questions which come up in discussions of law and corollary issues. If we have a clear notion of the kind of

question being asked, we can perhaps eliminate much of the confusion that arises as the result of a more holophrastic approach.

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NOTES

([1]) SIDGWICK's general view of philosophy and his discussion of its subdivisions can be found in his book: *Philosophy: Its Scope and Relations* (London: 1902).

([2]) The term 'jurisprudence' has been used to refer both to "the philosophy of law" and "the study of a legal system". Sidgwick confines the term to the latter rendering and clearly intends to distinguish it from philosophy.

([3]) Admittedly, SIDGWICK does not always follow his own lead here, especially with respect to the distinction between 'Ethics' and 'moral philosophy' (See *The Methods of Ethics*, London, 1874).

([4]) As a Utilitarian, SIDGWICK's fundamental principle is the Principle of Utility. He stresses this principle in his discussion of Law and Government in the early chapters of *The Elements of Politics* (London, 1891).

([5]) For instance, see Alan WHITE's view of the distinction between philosophy and other disciplines in Chapter 1 of *The Philosophy of Mind* (New York: 1967).