Law and the perils of philosophical grafts

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Charles Foster and Jonathan Herring are to be congratulated on their useful presentation of the roles played by concepts of personhood and identity in English medical law.[1] However, I fear that the project they have undertaken here is misconceived. It is an interesting and important misconception, which is widely shared in the literature on medical law and ethics; but a misconception it remains.

The problem is this. What we call 'the Law' is in fact a complex assemblage of institutions, rules, accredited persons, practices and systems. What it is not is a self-sufficient, integrated and self-interpreting system of doctrine. As such it does not have a clear structure which we can excavate and the idea that we can find concepts which explain and unify that structure at some deep level is thus quixotic. To approach 'the Law' in that way is to pursue a chimaera. We should instead think of 'the Law' as Wittgenstein taught us to approach a language.[2] We can find concepts through investigation of language in practical use, but the normative rules governing those concepts are governed by the linguistic practices of the community of competent users of the language, not in some space of 'meta-rules'. And those linguistic practices are essentially finite and subject to change. There is no metaphysical exterior to a language (and thus, no metaphysical exterior to 'the Law') which fixes the correct application of concepts once for all and in an unambiguous way.

When we look at the law in this way, as most sociologists of law and many writers on jurisprudence and on the common law do, the approach taken by Foster and Herring seems to be fundamentally mistaken.[3–5] We should not expect to find concepts of identity, personhood or autonomy in the law, except inasmuch as they are explicit constructs in legal language, or concepts with reasonable stable usage in ordinary language taken up in legal language and reasoning. Foster and Herring perform an important service in showing us that there is no such stability, either in legal or ordinary language. We have to rely, instead, on interpreting these concepts as we find them in their specific contexts of use, without forcing generalisations about such uses beyond those contexts of use. This is unsurprising: this is the method of the common law itself. Lawyers work hard to fit the case in hand into the texture of statutes and decided precedents, and, on occasion, to disapply precedents. But the work of finding and applying the law to cases is dominated by argument about the identification and application of rules, about consistency in such application and about coherence within systems of rules. Occasionally extralegal concepts may be introduced into discussion in an explanatory way to show why a set of rules coheres in the way that it does, and further to indicate how a body of rules might be elaborated or clarified. But the practice of law then returns to the body of rules, and such extra-legal concepts sit, at most, as unhappy grafts onto the legal system unless and until taken up, perhaps in legislation, in a form which the legal system can 'digest'.

A case in point is the concept of 'autonomy'. While the body of law relating to consent is enormous, and discussions of autonomy as the moral foundation for consent are similarly extensive, it is consent which is entrenched in legal discourse, in case law and in legislation, in large part because while 'consent' can be tested in various ways in litigation, 'autonomy' is more elusive. Consent is the name of a range of acts recognised in the law, and required in the common law and legislation in various settings, and on which evidence can be laid as to whether or not consent was given, whose scope can be tested in various ways and so on. So while the concept of 'autonomy' has an explanatory role in discussions *of* the law, it plays at most a small part *in* the law.

Some discussions of medical law proceed as if medical law was the fleshly manifestation of some ideal medical ethics. Medical ethics is seen as intellectually and metaphysically prior to medical law. The law can then be criticised to the extent that it fails to embody this ideal medical ethics. Quite obviously this is an unhistorical fiction. But it also fails as an ideal, because it fails to understand the specific characteristics of law. Take the concept of 'personhood'. The concept of 'legal personality' is well known within legal doctrine, though fraught with complexity. But what the law does not seek to do, once for all, is define personhood or import a theory of persons. This is just as well, since, as Foster and Herring show us, no simple and commonly existed theory of persons has been achieved. And this leaves the law with significant flexibility and the ability to respond to particular cases as they arise.

In conclusion, it is important that the law and philosophy talk to one another. But as Wittgenstein said: philosophical problems arise when language goes on holiday.[2] I would be cautious about letting the law go on a holiday.

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REFERENCES

1 Foster C, Herring J. *Identity, personhood and the law*. London: Springer, 2017.
2 Wittgenstein L. In: Hacker PMS, Schulte J, eds. *Philosophical investigations*. 4th edn. Oxford: Blackwell, 2009.
3 Cotterrell R. *The sociology of law: an introduction*. 2nd edn. London: Butterworths, 1984.
4 Latour B. *The making of law: an ethnography of the conseil d'Etat*. Cambridge: Polity Press, 2009.
5 Llewellyn KN. In:Sheppard S, ed. *The bramble bush: the classic lectures on the law and the law school*. Oxford: Oxford University Press, 2008.