

Three Lectures on Law and Philosophy

The Honourable Malcolm Rowe*

I. INTRODUCTION

In the fall of 2022, I delivered three lectures that dealt with law and philosophy. The first, “Law, Ethics & Philosophy”, was to the incoming class at Osgoode Hall law school. The second, “A Traditional Liberal Perspective”, was the William Lederman lecture at Queen’s University. The Third, “The Death of Socrates”, dealt with freedom of expression; it was delivered at Dalhousie University. My remarks at Osgoode and Queen’s are consolidated in Part II: “A Traditional Liberal Perspective”; Part III is “The Death of Socrates” shortened.

II. A TRADITIONAL LIBERAL PERSPECTIVE

My remarks are from a traditional liberal perspective. In your studies, you will be introduced to contemporary perspectives, some of which differ markedly from that which I will outline. By their nature, normative philosophical questions can have no correct or final answers. Yet, understanding the traditional liberal perspective is of considerable value as it situates law within the framework of liberal democratic society. It helps one to understand how things came to be as they are in Canada. For myself, I see liberal democracy as embodying great wisdom.

1. Legal Philosophy

I commend to you the importance of legal philosophy. In so doing, I underline the difference between what “is” and “what ought to be”. By what “is” I mean understanding the nature and functions of law. This is descriptive, rather than the normative question “what law ought to be”.

As to what “is” law, there are two classic texts: H.L.A. Hart’s *The Concept of Law*¹ and Hans Kelsen’s *Pure Theory of Law*.² Hart was English; Kelsen was Austrian. Not surprisingly, Hart’s description of a legal system has an English common law sense about it, while Kelsen’s looks remarkably like a supremely well-organized and thoroughly logical continental civil code. I find Hart more direct and concrete, while Kelsen is more abstract and formally logical. Both works inform what makes up a legal system. For less theoretical perspectives, I commend to you writings by three judges: Richard Posner (U.S.), Lord Bingham (U.K.) and Robert

* Puisne Justice, Supreme Court of Canada.

¹ H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012).

² Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967).

Sharpe (Canada).³

I turn now from the descriptive “what is law”, to the normative “what law ought to be”. This engages theories of justice. I urge you to take a broad and historical perspective. You will consider contemporary writers like Richard Delgado and Kimberlé Crenshaw on topics like critical race theory and intersectionality.⁴ Do not neglect more traditional writers like Lon Fuller, John Finnis, Ronald Dworkin, Neil MacCormick, Jeremy Waldron and my favourite, John Rawls.⁵

An aging Voltaire wrote, “The more I read, the more I acquire, the more certain I am that I know nothing.” Like Voltaire, as I grow older, I don’t “believe” in more things or hold stronger views. Rather, my views incorporate additional perspectives. No individual or group, however well-intentioned, is the holder of “truth” or the oracle of “justice”. Rather, ideas of justice change with societal change. The law needs to develop as part of this.

2. Legal and Political Philosophy: Rawls versus Marcuse

There is an overlap between ideas of justice under law and of what makes for a good society, the former being in a sense a subset of the latter. Let me illustrate this by contrasting the views of John Rawls, a liberal legal philosopher, and Herbert Marcuse, a Marxist political philosopher.

The overlap between legal and political philosophy is implicit in the title of John Rawls’ *Political Liberalism*. In it, he addresses what is needed for the functioning of a liberal democratic society. Rawls identifies two things necessary for such a society to be sustained: first, widely held ideas of what is good need to overlap, thus constituting the basis for a shared “reasonable pluralism”; and, second, attitudes and practices of most citizens in which they accept and accommodate differences in the outlook of others.⁶ In “Overlapping Consensus”, he wrote:

The virtues of political cooperation that make a [liberal democratic] constitutional

³ See, e.g., Richard A. Posner, *Law, Pragmatism and Democracy* (Cambridge, MA: Harvard University Press, 2003); T. H. Bingham, *The Rule of Law* (London: Allen Lane, 2010); Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (Toronto: University of Toronto Press, 2018).

⁴ See, e.g., Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 3d ed. (New York: New York University Press, 2017); Kimberlé Crenshaw, *On Intersectionality: Essential Writings* (New York: The New Press, 2022).

⁵ See, e.g., Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1965); John Finnis, *The Collected Essays of John Finnis*, vol. I-V (Oxford: Oxford University Press, 2013); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Oxford University Press, 1994); Jeremy Waldon, *Liberal Rights: Collected Papers 1981-1991* (Cambridge: Cambridge University Press, 1993); John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005).

⁶ John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005).

regime possible are great virtues. I mean, for example, the virtues of tolerance and being ready to meet others halfway, and virtues of reasonableness and the sense of fairness. When these virtues are widespread in society and sustain its political conception of justice, they constitute a very great public good, part of society's political capital.⁷

There are two corollaries to this. First, it will be difficult to sustain a liberal democratic system if divisions in society become so widespread and so profound that a basis for "reasonable pluralism" no longer exists, because a shared common ground gives way to opposing extremes. And second, the system will not endure if the "virtues of political cooperation" are abandoned.

Let me contrast Rawls' views with those of a leading member of the Frankfurt School of Critical Theory, Herbert Marcuse. In his 1965 essay "Repressive Tolerance", he wrote:

[T]olerance cannot be indiscriminate and equal with respect to the contents of expression, neither in word nor in deed; it cannot protect false words and wrong deeds which demonstrate that they contradict and counteract the possibilities of liberation. Such indiscriminate tolerance is justified in harmless debates ... But society cannot be indiscriminate where ... freedom and happiness themselves are at stake: here, certain things cannot be said, certain ideas cannot be expressed, certain policies cannot be proposed, certain behavior cannot be permitted without making tolerance an instrument for the continuation of servitude.⁸

The good society as conceived by Marcuse differs fundamentally from that conceived by Rawls. Marcuse has no desire to foster "reasonable pluralism", nor does he value the "virtues of political cooperation". We are fortunate to live in a society founded on the ideas expressed by Rawls.

3. No "Correct" or Final Answers

These disagreements demonstrate the uncertainties inherent in legal and political philosophy. Sir Isaiah Berlin in his *Four Essays on Liberty* wrote: "No perfect solution is, not merely in practice, but in principle, possible in human affairs, and any determined attempt to produce it is likely to lead to suffering, disillusionment and failure."⁹ Berlin decried what he saw as the fallacy in the "jig-saw puzzle view of ethics and politics" in which "all true answers fit with one another [and] the problem is merely to arrange the fragments ... in the unique way in which they compose the total pattern that is the answer to all our wants and complexities".

I agree with Berlin that for ethical and moral questions, no "correct" or final answers are possible. This leads me to approach such questions as I would science,

⁷ John Rawls, "The Idea of an Overlapping Consensus" (1987) 7:1 *Oxford J. Legal Stud.* 1 at 17.

⁸ Herbert Marcuse, "Repressive Tolerance" in Robert Paul Wolff, Barrington Moore, Jr. & Herbert Marcuse, *A Critique of Pure Tolerance* (Boston: Beacon Press, 1965) at 88.

⁹ Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1990).

an approach based on scepticism, empiricism and inductive reasoning. Voltaire said it well: “Doubt is an uncomfortable condition, but certainty is a ridiculous one.” Being uncertain, I am guided by that combination of principle and practicality called pragmatism.

4. Liberal Democracy in Canada

In turn, this inclines me toward liberal democracy, an approach to organizing society that has at its foundation a pragmatic approach. Underlying liberal democracy is a view that the state should provide a structure under the rule of law in which individuals and groups can pursue their chosen ways of living and of thought. It does not seek to provide a pattern of living for the whole of society. This implies certain limits on the role of the state, but is fully consistent with collective responses to social needs, such as in the Scandinavian countries. While the *Canadian Charter of Rights and Freedoms*¹⁰ is broader in scope, embedded in it are these ideas.

One can readily point to the failings of liberal democracies, just as one can readily conceive of utopian alternatives. But what other system has achieved so great a degree of individual liberty, so high a degree of prosperity and so open a system in which to pursue justice? Over time, liberal democracies are able to understand themselves differently, to adapt, to become more inclusive and more just. The structure of our institutions, the principles of our laws and the good faith of citizens can serve us well as society appreciates new perspectives. Thereby, step by step, meaningful progress can be achieved.

Critical thinkers, being mindful of injustices past and present, can be dismissive of liberal democracy. In their view, how can one value a system under which such wrongs occur? And, is it not necessary to create a new system so as to ensure that further wrongs do not occur? To this, my response is that liberal democracy is a vessel that is filled by successive generations with the aspirations of that generation. As those aspirations change, so will the outputs of the system. Liberal democracy provides a means to achieve change in an open, stable and orderly manner.

Ours is a good country, one that warrants our devotion. But such devotion needs to be founded on a mature understanding of history and how people, in all Canada’s diversity, live today. We should not tell ourselves comforting fairy tales, just as we should avoid empty negative rhetoric. Rather, we should seek to achieve an inclusive, fair society, while being practical and realistic.

5. American Public Affairs

Liberal democracies can each follow their own path. Accordingly, I would caution against being preoccupied by American public affairs. Our history is different. Our institutions are different. Our culture is different. While Americans will always be

¹⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

our neighbours, we should always be ourselves. If we become too much taken up by controversies in the U.S., we will import their problems and their responses into how we view ourselves. If we approach issues as if we are part of one North American society, then we will become so. And, if we become so, we diminish who we are as Canadians. It is nevertheless a reminder that the principles of liberal democracy require continued commitment and nurturing to flourish.

6. The Judicial Role

Let me say just a few words about courts in a liberal democracy. On occasion I have been asked what I want to achieve in my time on the Supreme Court of Canada. I confess that initially I was confused by the question. It seemed to suggest that I should have a list of changes to the law that I am seeking to achieve by the exercise of judicial authority. But I do not see this as my role, to be an advocate while sitting on the bench.

Upon reflection, I have settled on an answer. First, the courts should function as an adjudicative institution by contrast to the functions of the legislature or the executive. Second, doctrinal clarity is cardinal; the law should be comprehensible and predictable. Third, coherent, consistent and rigorously analytical methodology is required for the proper exercise of judicial authority.

The development of the common law and constitutional law should parallel changes in society. If judges fail to be mindful of changes in society, the law could stultify rather than facilitate such changes. But being mindful of this is not the same as imposing changes because I personally would prefer them. For me, the proper operation of the legal system, as one of the principal institutions of the state, is an end in and of itself. That is what I seek to achieve as a judge.

This engages questions of legitimacy. Those who are elected exercise broad authority, the exercise of which is legitimized through elections. Politicians can be voted out and replaced by others. The exercise of judicial authority does not rest on a similar foundation. Quite properly, judges have no electoral mandate. Rather, our legitimacy rests on the principled application of sound methodology. When we act within that role, we have institutional legitimacy.

7. Continuity, Change and Optimism

I want to end this portion with a perspective that I seek always to bear in mind. While there is considerable continuity in Canadian society, it is also remarkably different from when I was a boy. Canada was then and is today a free and prosperous society. But it was certainly not inclusive. Nor had we begun to bind up the wounds of our wrongs, especially with Indigenous peoples. We had not acknowledged many grave errors. Today, I am confident that we have the will to go forward, step by step, to achieve reconciliation and a more inclusive society and, by so doing, to become our better selves. Canada is an example of how progress can occur within liberal democracy.

Le Canada de nos jours est une société plus réfléchie et inclusive. Nous nous

sommes engagés sur une voie que favorise la diversité où chaque personne peut être appréciée pour ses qualités.

Quand j'étais enfant, le Canada était un pays où il faisait bon vivre. Aujourd'hui, on y vit encore mieux. Et je suis optimiste pour l'avenir.

III. THE DEATH OF SOCRATES

1. What Led to the Death Sentence for Socrates

An important feature of liberal democratic society is freedom of expression. I will focus on this idea for the remainder of my remarks.

As described by Plato in his *Apology*,¹¹ in 399 B.C.E., Socrates was condemned to death for false teachings and for impiety. In his defence, Socrates said that by posing questions he had not misled others. Rather, he had sought to help them to better understand themselves. In the end, Socrates' conviction followed from his failure to honour the gods in the conventional way. What is noteworthy is that he offered no defence based on liberty of expression. That was because no such general concept existed in the ancient Mediterranean world. Nor did it exist in Eastern philosophies, such as Confucianism, or in religiously based societies where harmonious integration of the individual into the life of the community is the over-arching goal. By following the evolution of liberty of expression, it is possible to understand its continued role in contemporary society.

2. Origins of Freedom of Expression in the Enlightenment

The first great work advocating freedom of expression was John Milton's *Aeropagitica*, published in 1644.¹² The main object of Milton's work was to oppose the requirement that books be "licensed" before their publication. He wrote: "There it was that I found and visited the famous Galileo, grown old, a prisoner to the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers [of books] thought."

Milton spoke of the need for freedom of expression to advance learning. "Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion ... is but knowledge in the making." Milton advocated liberty of expression as the highest freedom. "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

John Locke expressed similar views in *A Letter Concerning Toleration*, published in 1689.¹³ Locke argued that while public disputes could help people discover the truth, coercion merely silences them. "It is one thing to persuade, another to

¹¹ Thomas G. West, *Plato's Apology of Socrates: An Interpretation, with a New Translation* (Ithaca, N.Y.: Cornell University Press, 1979).

¹² John Milton, *Aeropagitica: A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, to the Parliament of England* (London: printed 1644).

¹³ John Locke, *A Letter Concerning Toleration* (printed 1689).

command: One thing to press with Arguments, another with Penalties. . . . For Laws are of no force at all without Penalties, and Penalties ... are not proper to convince the mind.”

While the English Bill of Rights of 1689 provided for freedom of speech in Parliament, it did not establish the principle generally. However, in practice, liberty of expression was achieved during the 1700s in England and its North American colonies. For example, in 1735, colonist John Zenger was charged with seditious libel for criticizing the British Governor of New York.

His lawyer argued to the jury:

It is a right, which all free men claim, that they are entitled to complain when they are hurt. They have a right publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbours upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.¹⁴

Zenger was acquitted. Through similar cases in England, notably relating to John Wilkes, liberty of expression was achieved in practice.

In this period, leading thinkers in Europe, notably Voltaire, championed liberty of expression. He said, “The right to free speech is more important than the content of the speech.” Also, “What is tolerance? It is the consequence of humanity. We are all formed of frailty and error; let us pardon reciprocally each other’s folly”. And, “Think for yourself and let others enjoy the privilege of doing so, too.” Voltaire popularized English liberalism, especially the writings of John Locke.

3. American Independence

In the fledgling United States, James Madison, Alexander Hamilton and John Jay took inspiration from Locke and advocated liberty of expression in the Federalist Papers.¹⁵ Madison, Hamilton and Jay wrote in favour of guarantees of certain “inalienable” or natural rights, notably liberty of expression. This led to the adoption in 1791 of the U.S. Bill of Rights, including in the First Amendment protections for liberty of expression. Similar protections for freedom of expression were incorporated in “The Declaration of the Rights of Man and the Citizen” adopted early in the French Revolution. Such protections were swept away in the Reign of Terror and the French Empire under Napoleon.

4. John Stuart Mill

The greatest statement of liberty of expression is John Stuart Mill’s *On Liberty*,

¹⁴ Vincent Buranelli, *The Trial of Peter Zenger: Edited and with an Introduction* (New York: New York University Press, 1957).

¹⁵ Alexander Hamilton, James Madison & John Jay, *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federal Convention, September 17, 1787*, vol. I-II (New York: J. & A. McLean, 1788).

published in 1859.¹⁶ Here are two quotes that hark back to Milton and Locke.

Mill wrote, “Every man who says frankly and fully what he thinks is . . . doing a public service. We should be grateful to him for attacking most unsparingly our most cherished opinions.” Antoine de Saint-Exupéry said something similar: “Si tu diffères de moi. . . loin de me léser, tu m’enrichis.”¹⁷ He who differs from me, far from harming me, enriches my understanding.

Returning to Mill, he also wrote:

The only way in which a human being can make some approach to knowing the whole of a subject, is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise man ever acquired his wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner.¹⁸

This harks back to what Milton wrote in the *Aeropagitica*.

5. Albert Camus and Jean-Paul Sartre

Let me move forward a century to highlight the role that liberty of expression played in the controversy between two existentialist philosophers, Albert Camus and Jean-Paul Sartre. Both were committed socialists who sought to liberate workers whom they saw as shackled to their labour and shorn of their humanity. To do this, both held the view that new political systems were needed.

In 1951, Camus published his essay *L’homme révolté* (“The Rebel”).¹⁹ In his “philosophy of revolt”, every human should be free, but freedom is relative; it must embrace limits and moderation. Absolutes are anti-human. Utopianism leads to the loss of freedom. The true rebel is not the person who conforms to the orthodoxy of some revolutionary ideology but a person who says “no” to injustice. The true rebel pursues the politics of reform, such as that of modern trade-union socialism, and not the totalitarian politics of Leninism.

The systematic violence associated with such ideologies — “les crimes de logique” that were committed in its name — were to Camus wholly unjustifiable. (One should recall that in 1951 Stalin still ruled the U.S.S.R.) Though the ultimate aim of such ideologies was to diminish human suffering, Camus was adamant that the good ends that were sought could not justify the use of evil and cruel means.

Camus wrote, “Absolute freedom is the right of the strongest to dominate . . . Absolute justice is achieved by the suppression of all contradiction: therefore it destroys freedom.” Camus concluded that the conflict between justice and freedom requires constant re-balancing, moderation, an acceptance and celebration of what matters most: our humanity.

¹⁶ John Stuart Mill, *On Liberty* (London: J.W. Parker and Son, 1859).

¹⁷ Antoine de Saint-Exupéry, *Pilote de guerre* (Paris: Gallimard, 1942).

¹⁸ John Stuart Mill, *On Liberty* (London: J.W. Parker and Son, 1859).

¹⁹ Albert Camus, *L’homme révolté* (Paris: Gallimard, 1951).

Sartre was having none of this. He saw no contradiction between perfect freedom and perfect justice. Both would be achieved under Marxist-Leninism. Camus' denunciation of oppression was unyielding. His acceptance speech for the 1957 Nobel Prize in Literature is an impassioned, eloquent call for humanity and liberty.²⁰

6. Sir Isaiah Berlin

From the same era, here are two quotes from Sir Isaiah Berlin's *Four Essays on Liberty*:

The essence of liberty has always lain in the ability to choose as you wish to choose, because you wish to choose, uncoerced, not swallowed up in some vast system; and in the right to resist, to be unpopular, to stand up for your convictions merely because they are your convictions. That is true freedom, and without it there is neither freedom of any kind, nor even the illusion of it.²¹

In this passage, I hear the voice of John Stuart Mill.

[T]he ends of men are many, and not all of them are in principle compatible with each other. [Therefore] the possibility of conflict — and of tragedy — can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition. This gives its value to freedom ... as an end in itself, and not as a temporary need, arising out of our confused notions and irrational and disordered lives, a predicament which a [political or ideological] panacea could one day put right.²²

In this passage, I hear the voice of Milton.

7. Sir Salman Rushdie and President Emmanuel Macron

I will conclude by reference to two contemporary figures, Sir Salman Rushdie and President Emmanuel Macron. Rushdie is a resolute advocate of what he calls “the provisionality of all truths, the mutability of all characters, the uncertainties of all times and places”.²³ In this I hear echoes of Isaiah Berlin. Rushdie has referred to liberty of expression as “the right without which all the other rights disappear”.²⁴ In this I hear echoes of John Milton and John Stuart Mill.

President Macron recently stated:

²⁰ Albert Camus, “Banquet Speech” (December 10, 1957), online: *Nobel Prize* <https://www.nobelprize.org/prizes/literature/1957/camus/speech/>.

²¹ Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1990).

²² Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1990).

²³ “Salman Rushdie is a Champion of Imagination, Ambiguity and Liberty” (August 15, 2022), online: *The Economist* <<https://www.economist.com/culture/2022/08/15/salman-rushdie-is-a-champion-of-imagination-ambiguity-and-liberty>>.

²⁴ “Salman Rushdie is a Champion of Imagination, Ambiguity and Liberty” (August 15, 2022), online: *The Economist* <<https://www.economist.com/culture/2022/08/15/salman-rushdie-is-a-champion-of-imagination-ambiguity-and-liberty>>.

Liberté d'expression et liberté de la presse, je n'ai jamais cessé de défendre ces principes et tous ceux qui l'incarnent. Y compris face à ceux qui, depuis l'étranger, ont pour projet de les faire reculer. Je n'accepterai jamais que ces libertés puissent être reniées.

...

Les valeurs de la République ne sont pas négociables. Notre responsabilité collective est de les défendre et de les promouvoir.²⁵

In this, I hear the aspirations of Voltaire.

8. Why the Death of Socrates Matters

In the West, no secular figure is honoured more highly than is Socrates. As described by Plato, Socrates is heroic in his selfless pursuit of understanding, his personal integrity and his great courage. But the lessons that we should draw from the death of Socrates extend beyond the value of living a life well considered. We should understand the conflict that will always exist between ideas of absolute justice and social harmony as opposed to individual choice and liberty of expression. For me, this is the lesson to be drawn from the death of Socrates.

November 19/22

²⁵ Emmanuel Macron, "Liberté d'expression et liberté de la presse. Je n'ai jamais cessé de défendre ces principes et tous ceux qui l'incarnent. Y compris face à ceux qui, depuis l'étranger, ont pour projet de les faire reculer. Je n'accepterai jamais que ces libertés puissent être reniées . . . Les valeurs de la République ne sont pas négociables. Notre responsabilité collective est de les défendre et de les promouvoir." (November 27, 2020), online: <<https://twitter.com/EmmanuelMacron/status/1332404206091849728>>.