Law and Life in Common

Timothy Macklem

Law and Life in Common

Timothy Macklem

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

First published 2015
First published in paperback 2017

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

ISBN 978–0–19–873581–6 (Hbk.)
ISBN 978–0–19–881241–8 (Pbk.)

Cover photo © Gail Thorson

For John Gardner
Fellow student and friend,
with whom I took my first steps in the philosophy of law
and a great many of those that followed

Preface

Any moderately ambitious, stage-setting preface (or introduction, or foreword) that hopes to ease access to a complicated argument has a pretty challenging task before it. It must sketch the contours of what is to follow and yet be alive to the fact that it will take a book to capture those contours adequately. It must offer a sense of the problem that the book seeks to resolve and what might possibly be interesting about it, together with an outline of what the suggested resolution looks like, each attractive to even the sceptical reader. It must be couched in terms that are at least a little more accessible than the balance of the book (otherwise why not move straight into the opening pages?), and yet do not make matters seem simpler than they are. It must offer a kind of guide to what follows, helping dedicated readers maintain a sense of direction that is stronger than the structure of the book can provide on its own, while at the same time enabling more opportunistic readers to focus on the passages that are likely to prove the most fruitful to them. It must be brief and to the point, and yet establish a sense of the style and approach of the work as a whole.

Inevitably, this preface will not do all of those things, or at least will not do all of them well, if for no other reason than that success in terms of some of them is at odds with success in terms of others. What it will do, I hope, is to set the scene: first by pointing to certain dissonances in recent writing on the philosophy of law that suggest, if not a need for, at least the potential disciplinary reward of an inquiry of this kind, to be looked for in moving beyond what have by now become all too familiar oppositions; second by drawing attention to certain recurring disappointments in the contemporary experience of

governors and the governed, of those who make the law and those who look to be guided by it, in terms of the life in common they seek to build in co-operation with one another and the better world they hope to realize, which seem to stem from misguided expectations of law and what it is capable of doing for us; and finally, by explaining the nature of the present inquiry and its possible value, both to those who habitually reflect upon law and to those whose engagement with law for the most part precludes such reflection (I will leave aside those who are simply uninterested in reflection).

i. Let me begin with a suggestion, prompted by reflection on the overly partisan character of much of contemporary jurisprudence. It is a notable and rather unhappy feature of the divisions that have marked, and indeed dominated, the philosophy of law in the past 30 years or so that they have been attended by a startling lack of sympathy, respect, or even common courtesy on the part of many of those involved. Rival views have been treated with incredulity, dismay, and something close to contempt, most notoriously in a relatively recent, dyspeptic pair of papers by Ronald Dworkin and Brian Leiter.[1] How such disputes have arisen, and how their tenor has become debased, is no part of my concern. Their genealogy is unlikely to be in any way edifying. What is worth noticing, however, is their cost. There is an all too human tendency, perhaps born of self-protection, perhaps born of lack of empathy, perhaps born of an insufficiently complex understanding of the moral universe—a tendency that is most prominently displayed in religious and political affairs but that occurs nearly everywhere—to treat one's intellectual opponents as either fools or villains, to put it only somewhat crudely. In the grip of that tendency one acts as if the views that one's opponents hold are not ones that any upright, rational, self-respecting person could possibly hold. The real shame about this attitude is not simply the intolerance that it gives rise to, for while intolerance matters very much, it matters derivatively. It is that such an attitude prevents one from grasping aspects of understanding that would enrich and assist both one's own point of view and the project of human understanding more generally. It is an attitude born of an adversarial approach to ideas, one that raises the

[1] Ronald Dworkin, 'Thirty Years On' 115 *Harvard LJ* 1655 (2002); Brian Leiter, 'The End of Empire: Dworkin and Jurisprudence in the 21st Century' 36 *Rutgers LJ* 165 (2005). To be fair to Leiter, it was Dworkin who threw the first punch, in print at least, as the publication dates show.

question of whether (or to what extent) a non-adversarial approach is available, and if so what it might look like.

ii. I do not wish to be in the position of denying the obvious here. As we all know to our cost, and sometimes and painfully to our embarrassment as well, there is folly and villainy aplenty in the world. On the whole, however, one's intellectual opponents tend to be on to something that one has neglected oneself, or, to put it another way, they are in a position to perceive something that one's own awareness of has been obscured, or suppressed, by one's entirely proper attention to, and consequent immersion in, the views that one has committed oneself to. What is true of oneself is as true of those with whom one is in broad agreement. Congenial as their company may be, one has little to learn from one's fellow travellers. They can help to deepen one's understanding but they are unlikely to extend it into unfamiliar and unexpected domains, let alone to challenge it fundamentally. One usually has a great deal to learn, however, from the holders of views that one disagrees with fundamentally, perhaps even despises. To grasp the truth that lies behind their errors, and to make it one's own, is to approach the beginnings of wisdom.

iii. The possibility that this line of thought suggests is that the fault lines in contemporary jurisprudence obscure the extent to which the insights that exist on either side of those lines are capable of contributing to the richness and depth of the ideas to which they are opposed. Philosophers on both sides of those lines are as exercised as they are because they believe, and very often rightly so, that the core of what they have committed themselves to, the fundamental insight into human social practices that animates them, ought not to be denied by any rational person who has given the matter serious consideration. True as that may be, it does not, however, support the conclusion that is too often reached—that the core of what such philosophers have rejected ought to be similarly rejected by any rational person who has given the matter in question serious consideration. On the contrary, there are a great many forms of rationally viable accommodation between ideas that are opposed to one another. Both ideas may be true, despite their opposition, for there is a difference between opposition and contradiction, bearing in mind that contradiction is only one of the reasons that certain ideas cannot be endorsed and pursued simultaneously. More frequently, the ideas in question may well be complex and multifaceted, so as to be unsound in some respects yet sound in others. Good ideas, like other

good things, are often inextricably embedded in bad ones. Rather more interestingly, perhaps, such ideas may depend on the unsoundness of certain of their aspects for access to the soundness that is to be discovered in their other aspects. Falsehood is very often the gatekeeper to certain features of genuine understanding. Bad ideas, once again like other bad things, are often the progenitors of good ideas, and more disturbingly, given all the bad things that by definition follow (good luck and bad judgement aside) from the pursuit of bad things and all the bad things that are likely to follow from looking to bad ideas for guidance, may even be the necessary progenitors of those good ideas. Sometimes, that is, one can reach good ideas only by going through bad ideas to get to them.

iv. In more specific terms, part of what this book seeks to explore is the extent to which, for example, Austin's understanding of the law remains attractive to many, despite its devastating (albeit graceful) criticism by Hart, not simply because straight-forward ideas continue to attract those with straight-forward minds, and not simply because Austin's picture (like that of the many others who think of law in terms of force) resonates with a familiar working understanding held profitably by many of the subjects of law, but because Austin's focus on the will, over-emphasized as it may be, captures what those who are concerned to explain the rationality of the law may neglect: namely that, in a moral universe in which there are very often good reasons to do other than the law requires, the will has an essential role to play, both in the construction of law and in compliance with the law. Similarly, it is possible that Ronald Dworkin's ideas remain attractive to many lawyers in training—whose professional idealism is at something close to its zenith—despite the somewhat baroque consequences of taking them fully seriously, just because they capture something that legal positivism often tends to diminish: namely that in a moral universe of the kind just described, in which the achievement of a life in common depends upon arational as well as rational forms of persuasion,[2] the role that imagination,

[2] I use the word arational, here and elsewhere, as a way of referring to those forms of persuasion, those calls upon our attention, that are wholly consistent with reason (and so not in any way irrational) but are not determined by reason. For example, where more than one course of action is rationally permissible, yet neither is rationally defeated by the other, it may be possible, through various devices of presentation to one's mind (by oneself or by another), to highlight the rational contours of one of those courses of action in such a way as to make that course appear to be, all things considered, rationally superior to its rival, although in fact it is not. To prefer the course of action that has been

individual and cultural, has to play in the construction of a life in common is as telling as the roles played by reason and by will. This, it need hardly be said, is not how either Austin or Dworkin would have understood what they had to say, yet it may well be the way in which their work is to be most fruitfully understood—the way in which modern legal positivists, for example, who otherwise reject those views may nevertheless be in a position to learn something important from them.

v. Set that thought to one side, so as to consider another that might offer a further, admittedly anecdotal, indication of the possibilities for a fuller grasp of law as a social practice to be discovered in the line of inquiry that informs this project. Just as notable and as unhappy as the divisions that have marked the philosophy of law in the past 30 years is the parallel decline in belief in the possibility of politics, and consequent disappointment in the democratic project (at least in Western societies, those most experienced in and so familiar with that project). This decline and disappointment has been chronicled most fully from the point of view of the governed, and that chronicle has made all too familiar the cynicism that the governed feel toward the practice of politics and the character of politicians. Yet partiality in the telling of the tale should not be allowed to obscure the fact that it has been no less the tale of a decline in faith in the possibilities of politics on the part of those who govern. The drive by governments over the past 30 years and more to privatize many public institutions and public services, for example, has been sparked as much by despair on the part of politicians as by any ideology of the market. Let someone else take the blame for what can only fail, or the responsibility for what cannot be happily managed or resolved, is all too often the politician's thought. Yet in a democracy the fact of the matter is that by and large all these people are us: we are both the governors and the governed. How then has it come to this? What has led us to fall prey to self-doubt, has led us to lose belief in our capacity to govern ourselves (given that scepticism about the possibility of good government now largely transcends party lines) and to be governed by ourselves, and so has led us to succumb to what

so highlighted, on the basis that it is rationally superior to its rival just because of the way it has been presented as such, is to take account of what I am calling an arational form of persuasion, because it is to commit oneself to an entirely rational but not rationally superior course of action on the basis of its rational superiority. For a fuller account see paras xxiv and xxvii of this preface, and para 116 and note 9 in the main text.

amounts to something close to self-loathing, in our several capacities as the authors and addressees of law?

vi. One possibility, and again it is offered as no more than a suggestion—one that some might recognize, but on the accuracy of which nothing that follows depends—is that in seeking to govern ourselves we have expected too much of our political selves, of the project of self-governance, and, uniting and informing those, of the possibilities that law has to offer; that we have told ourselves that with all power in our hands and all the resources of reason at our disposal we could do nearly anything, or, to be more modest about it, could do everything that was required to achieve justice. The soundness of such a belief depends on the idea that it is possible to achieve justice through perfect rationality and an uncorrupted will alone, the idea that if the force of law stems from the weight it gives to the reasons it embodies, a clear-thinking democracy that is fearful of nothing other than fear itself has everything to achieve in the articulation and regulation of its destiny. If we have relied upon any such idea we have been quite mistaken to do so.

vii. If it is the case, as the argument of this book seeks to show it is, that the project of securing a life in common through the enactment and operation of law, democratically or otherwise, depends for its success upon a collaboration between what one might loosely call rational and arational claims upon the addressees of law, any neglect of that partnership—or, more particularly, any failure to apprehend its true contours—is bound, in most settings at least, to render the ambitions of law ineffective, so engendering existential disappointment in governors and in all those who support, or are expected to support, their brand of government. Laws fail in part because we take their rational pull to be all the warrant they need for their effectiveness, and because we then further and consequently believe that failure of that rational pull is something that can be experienced only by those of us who are less than fully rational (the criminally minded being the usual example), and that is consequently capable of being fully addressed either by the attachment to the laws in question of an appropriate sanction, so as to buttress their entirely rational claims with claims of an allied yet different, prudential character, or by the packaging of those laws as something that they are not, so that medicine tastes more like candy.

viii. This overly rationalized view of human action leads governors to cynicism about, and hence a generally covert reliance upon, arational methods of securing co-operation and compliance with

what their laws seek to achieve, while leading the governed to a corresponding suspicion of and disdain for their governors, as and when they recognize and thus see through the manipulative strategies in which their governors seek to engage them. As citizens, we speak contemptuously and disdainfully of what we think of as spin and deceit on the part of governments, as if it were possible, even in principle, to govern successfully without such practices; as if it were possible, that is, to build the kinds of communities that we all aspire to without a significant degree of beguilement of the addressees of law, or at least of some of them, on the part of those who are its authors. Conversely, from the perspective of those who are engaged in government, recognition of certain aspects of the partnership between rationality and arationality at the expense of others—most notably, an attention to the significance of the will that follows from the recognition of arationality, together with an accompanying failure to have due and consequent regard for the proper role of reason as the will's partner, or an attention to the corresponding significance of imagination and beguilement, together with a failure to have due regard to the rational responsibility that must accompany the exercise of imagination and the practice of beguilement—leads governments into the very sorts of corruptions of which they currently stand accused by much of their citizenry, the corruptions of force and deceit.

ix. Part of what this book seeks to explore, then, is the scope of an appropriately modest set of expectations about law and what it is capable of achieving, both in general and in particular domains of legislative and judicial ambition. Modesty, it should be emphasized, is not in any way to be equated with lack of significance. Small things can matter greatly, as we know from our experience of the significance that small lives possess—not only to those whom they touch most immediately, on whom their imprint can be deep and indelible, but to the worlds in the functioning of which those lives are but cogs, yet in the absence of which lives the machinery of collective existence would not run in the way that it does, could not secure the values (and disvalues) that it secures. From a proper modesty about law might come a proper expectation of what law can achieve, and from such an expectation might come a (modest) recovery of political hope—hope in democracy in particular.

x. Let me turn now to the earnest (and rather more extended) part: the part that explains the kind of philosophy on offer here, and that describes the place that this philosophy seeks to occupy between

even more abstract forms of reflection, such as those that characterize much of contemporary jurisprudence, and ordinary forms of understanding, on which we rely in the bulk of our lives, including lives in the law. (Those with no more than a passing interest in method may skip to paragraph xxii.) Just what is distinctive about this way of looking at the world, and what value might it have to offer us? What kinds of questions does it raise, and why might the answers be interesting ones? The suggestion I want to put forward in outline form here, and develop over the course of the book, couples modesty and ambition. It is the at once entirely recognizable and yet neglected thought that certain basic understandings of the world we live in, in this case certain central aspects of our comprehension of the social practice of law (the kind of comprehension sought by those who are properly ambitious about the possibilities of jurisprudence), are discoverable only by thinking about law from a perspective that is relatively modest, local, and immediate, pursuing seams that have long been worked by practitioners, though not with the same tools in hand or goals in mind. This is not an imperialistic manoeuvre, an attempt to maintain, in something like the Dworkinian manner, that philosophy knows best about everything, including the everyday. On the contrary, it is a suggestion born of distance, sympathy, and a sense of mutual respect. Abstraction and engagement are different ways of approaching the world, but they range over the same terrain and often depend on one another for their distinctive richness and success. Close engagement has much to bring to philosophy, just as philosophy has to bring to close engagement, although in both cases something is also lost, something philosophical as well as something practical. The question that such a claim gives rise to is just what it means for philosophy to become closely engaged with law, and what might we learn therefrom.

xi. The point being pursued here can be seen as an inversion of, as well as a companion to, the familiar idea that describes the project of applied philosophy: namely, that a philosophical outlook has a valuable contribution to make to ordinary practical reasoning. Here the further thought, albeit to the opposite effect, is that the detailed institutions, forms, and practices of ordinary practical reasoning have much to teach philosophy, in that a sound understanding of those phenomena is capable of yielding philosophical insights that would otherwise be inaccessible. Put in terms of roles, it is the suggestion that there are insights in the philosophy of law that are more

readily available to lawyers, and more particularly to those lawyers who have not only academic training in law but also a sound grasp of legal practice, than to those who have training and an interest in the philosophy of law but who have little or no experience of legal practice. It is the thought that engagement and abstraction are as apt to be fruitful companions as to be rivals, that the fabric of law is a special source of philosophical insight, and that lawyers and philosophers can be one another's best collaborators in the quest for understanding. It is a point about what law has to teach philosophy, yet it will begin here with reflection on what philosophy has to teach law.

xii. Many lawyers, academic as well as practising, may well raise an eyebrow at this point. Law is among the most fundamental of organized social practices, and, what is more, self-consciously so. Its outlook is, for that reason, both characteristically and naturally practical to the core, so as to focus habitually on the details of its workings in practical domains such as lawyering, legislation, policing, adjudication, and others of that ilk. 'It's a bit like learning plumbing' is what my law school's tutor for admissions told me, when I asked him what learning the law might be like and just where it might lead me.[3] I was puzzled but thought perhaps I could see what he meant: just what sort of fittings connect what sort of pipes? Could be tricky; might be interesting. I was a machine operator at the time, and the sense of recognition felt reassuring. For many lawyers it seems somewhat odd, and perhaps inappropriate, to think of law in any other way. Deep reflections on law, on just what it is and what it might perhaps be good for, have not only to overcome self-understandings of that kind, and the various species of inhibition and distaste that those understandings give rise to, but also, and more broadly, to warrant their place and claim on ordinary attention in an increasingly practical world. 'What practical use are such reflections?', not only lawyers but others want to know. What is more, given that there has been a very great deal written in the philosophy of law since HLA Hart published *The Concept of Law* 50 years or more ago, and in doing so brought the field to life after decades of relative neglect and decline, has not nearly all of what might usefully be said on the subject already been said, as demonstrated by what

[3] Acidly embracing, although I was not in a position to recognize it then, the journeyman's approach to university legal education that had been disparaged by William Twining in 'Pericles and the Plumber', 83 *LQR* 396 (1967).

even certain legal philosophers regard as the somewhat tired state of jurisprudential enquiry today?

xiii. The question being pressed here is only partly sceptical. It is not simply the overly apologetic question of why one should do philosophy—a question that philosophers, on the whole, might be best off overlooking. It is also a question that is driven by a sense of uncertainty as to the particular *kind* of usefulness that deep reflection might give rise to, and so a question that is liable to be pressed by philosophers as well as by lawyers. If the usefulness of such reflection is both real and something more than self-referential, in just what domain does that usefulness lie? How is it to be properly pursued? Unless and until we know that, we are liable to seek usefulness in the wrong place, looking for it where it is not and failing to see it where it might be. Those who claim attention for what legal philosophy has to tell us need to be clear just whose attention they are claiming, if and to the extent that it goes beyond that of philosophers of law themselves.

xiv. Lawyers and others who raise such questions are sometimes blinkered, sometimes self-serving, sometimes parochial, yet they have a point—though it is one that is easy to misapprehend. *Pace* Dworkin, deep reflections on law are not useful in the ordinary, everyday understanding of practical usefulness that most lawyers have in mind, and such lawyers and their friends are accordingly quite right to be sceptical of the value of philosophy in that particular practical setting. It does not follow, however, that deep reflections on law are not in any way useful, so as to warrant a broader scepticism on the part of practical reasoners generally. On the contrary, everything that human beings are capable of registering is registered with usefulness in mind, but usefulness is an idea that is much richer than many (including utilitarians) take it to be. Usefulness is nothing other than the value (and disvalue), in all its variety and complexity, that engagement with the world (theoretical and practical, though it is practical engagement I will primarily have in mind here) is capable of giving rise to. The scope of the value (and disvalue) that law and reflections on law can give rise to, and the range of understanding that is required in order to perceive the elements of what that scope embraces, is infinitely greater than that which would make any analogy between legal rules and the elements of plumbing an apt one.

xv. Still, to say only this much and no more might reasonably be thought to be avoiding the question, a question that proceeded from doubt as to the usefulness, in any recognizably practical sense,

however extended, of deep reflections on law. Either such reflections are useful on the standard notion of usefulness, it might be said (as followers of Dworkin would contend they are, but which others are understandably doubtful about), or to describe them as useful is simply something akin to a magician's trick, a case of persuasive definition. Perhaps one can call them useful without betraying the meaning of that word, but they are not useful in the sense that people normally have in mind when they speak of usefulness. Or so the argument might run.

xvi. The more nuanced answer to the question, then, is that the idea of usefulness at work here runs deeper than the standard view recognizes as a matter of everyday usage, but not so deep as to betray what the standard view has in mind. One way to see this is to notice that the standard view of usefulness is itself rather more accommodating than is sometimes recognized—sufficiently accommodating, for example, to embrace the realm of aesthetics. Aesthetic value is not a domain that one reaches only by departing from the idea of usefulness in the ordinary sense: there is beauty to be found in well-executed pipework and in the fabric of the law, and part of that beauty stems from the niceties of practical execution, so that pipework and laws are the more beautiful the more that all their many and detailed elements tend to the success of their practical function. One does not need to venture into some different, let alone higher realm in order to participate in aesthetic value. To notice this much is to notice simply that the standard view of usefulness is not as narrow or as single-minded as some practical reasoners would have it. However there is also usefulness beyond the standard view of the term yet true to what it has in mind. Certain forms of usefulness, philosophical usefulness in particular, are instances of what I might call deep usefulness—the kind of usefulness that is analogous to what we are thinking of when, in speaking of human psychology, we say of a person that he or she is very grounded, has a very sure sense of himself or herself. Philosophical enquiry, and the understanding that it seeks, bears the same sort of relationship to understanding in general (or to the general understanding of a domain such as law, or of some particular domain within law) that such a person has to the grasp of his or her character and capacities, and its usefulness is of a similar order.

xvii. Plainly there is real value (and disvalue) to be found in the grounding that philosophy can provide, and the question, to which the analogy to human psychology suggests an intuitive answer, is

what sort of value that is and in what realms of human activity it is to be found. A conventional picture associates that value with the general and the abstract, seeks to gain access to it through a process of reflection and detachment, thinks of it as informing and sustaining, and contrasts it with the particular, the immediate, the engaged, and the dependent. There are two ways in which that picture might be disturbed without being denied. The first is to diminish the contrast, and so suggest that there is rather less distance between the domains of the philosopher and the everyday actor than is commonly assumed, thereby and to that extent miniaturizing the concerns of philosophy (and enlarging the import of ordinary action). The second is to suggest that the contrast in question is to be looked for not between domains in relation to which one picture or the other offers the superior explanation, but between modes of understanding and action, of explanation and operation, both of which are available in a wide range of domains. What is more, the value of each of these modes is not merely different from that of the other, but typically conflicting, giving reason to prefer one to the other in particular contexts, themselves not susceptible to broad categorization, including the contexts of particular actions in particular lives, as driven by particular values, disvalues, or some combination thereof, be they the actions and lives of individuals or of communities.

xviii. Put shortly, the approach that I have sought to pursue in the work that follows is based on the conviction that deep thinking, in this case deep thinking about law and what it is capable of, can be profitably pursued in relatively fine-grained settings—or, to use a different metaphor, in relation to thick understandings of law—but that the perspective that such thinking provides is neither exclusive nor superior, and indeed is often purchased at the price of no less valuable understandings of law, most obviously those understandings that are deeper than it on the one hand (and so thinner and more coarse-grained) and those that are less deep on the other (and so thicker and more fine-grained). Philosophical reflection is just one more way of apprehending the world, with its attendant benefits and burdens, and the interest to be had in pursuing it here is the interest in discovering what it has to offer when pursued in more concrete settings than it is conventionally pursued in, in thinking less about law as a whole and more about laws of different kinds:[4] in other

[4] The kinds that I have in mind here are distinguished from one another by the extent to which they characteristically rely for their success, in terms of their capacity to build

words, in exploring what is to be discovered by taking as one's starting point not a general, broadly abstracted picture of law but a suite (in the present case a triptych) of particular pictures of law, themselves subordinate, interdependent, mutually informing, and fundamentally deferential to one another and to their rational rivals.

xix. One might stop there, but there is something more that can be said, briefly and by way of illustration, so as to capture the relative simplicity of the distinction and the relative complexity of its potential articulation in thought and practice. Begin by establishing what deep thinking is not; in other words, what it can helpfully be contrasted to. In much, perhaps the bulk, of our everyday lives we learn by doing, not by thinking about what doing means and what that meaning might be good for. When we engage in an everyday practical task, like that of driving a nail; or when we seek to express our thoughts and feelings, whether in words, or music, or dance, or some other language; or when we enter into exchanges with others, and so build relationships, be they transient or long-lasting, we put practice to the fore, to the exclusion of other modes of understanding and engagement, and so become successful practitioners by a set of incremental, cumulative practical steps, without any need for the intervention of deep thought. There is a way of holding a nail, of starting to drive it, of picking up the swing of the hammer, of following through on the final blow so that the wood is not bruised; there are ways of becoming one with words, or music, or dance; there are ways of establishing rapport and exchange with humans and other animals, none of which bear much thought. Indeed, in a great many cases it is a damaging error to think very much at all. One can all too easily know less by understanding more. Some of these kinds of doing involve deliberation, some involve preparation, some involve education, but none of them are any the less cases of bare doing for all that. These aspects of our lives flow through us, as Leo Kottke once put it of music, from one generation of practitioners to the next, as we inherit, become versed in, and then bequeath the many arts of living, sometimes well and for the good, sometimes not.[5]

a life in common, on the strength of the reasons they refer and give rise to alone, or further on the strength they derive from various supporting strategies of will and of imagination—sometimes rational, but more commonly, and more interestingly perhaps, sometimes arational.

[5] Interviewed for an anthology of the first 15 years of his career, and asked to reflect on the shape of his achievement, from newcomer to mature artist, Kottke observed: