



Lawrence Alexander – Interview

Hello, professor Alexander. How are you? Are you enjoying Buenos Aires?

Well, thank you. I'm good. Buenos Aires is as good as usual.

Do you mind if we record the interview?

Ok, it's fine. I'll have to be careful with what I say.

(Laughter)

We would like to start with some more personal questions, if you do not mind. To begin with, what brought you into legal philosophy?

Just my tendency to ask more questions about things, nothing special. I was a philosophy major as an undergraduate. So, as you know, law is a postgraduate education in the US so I was a philosophy major in college and then I went to law school but the philosophy background showed up in my thinking about legal issues. So I just... I think legal philosophy is just doing law by asking a few more questions than you otherwise do. So I don't think of it as really a separate field. You know, I just view it as an approach to thinking about legal questions.

Then everything works together. It's just about being curious...

It's a certain curiosity. I suppose that's true.

Now, starting with constitutional law. We know you have a special type of originalist interpretation of law. Can you describe it for us?

Yes. So my view of interpretation of constitutional law is the same as my view of interpretation of your question which is: I try to find out what you meant when you asked me that. And, so, when the question is 'What do the words mean?', I don't think the words themselves which are just sounds and marks mean anything. It's what you meant by them. You can put marks on a page, you can

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make sounds in the air, you can make smoke signals, you can raise flags, anything to communicate what it's in your mind to get it into my mind.

We know that Judge Scalia is an originalist. So, we would like to ask you what role he plays in American law and also how would you differentiate your originalist theory from Scalia's.

Well, I think mine is better. (Laughter) No, I think... I don't think Justice Scalia is a theorist. So, I don't think that... I'm not sure what his brand of originalism is. He claims to be sticking just with the meaning of the text as if the texts have a meaning independent of the meanings of the people who made the text. I don't think there is such a thing. I don't think texts have meanings by themselves. So, to the extent that Justice Scalia thinks that, I disagree with him. And I'm not sure he thinks that and I'm not sure that if I present it to him that way he would disagree with me. He doesn't get paid to be clear about these things, whereas I do so ...

(Laughter)

Ok. Regarding the paper you wrote for our journal, “Legal Positivism and Originalist Interpretation”, you talk about the problem of “Infelicitous results”, unhappy results. Suppose the next scenario: You are the judge and an originalist interpretation of the norm leads to an unhappy result. And you know what the author of the norm wants. Suppose that this unhappy result is really unhappy, and leads you to decide contrary to the case *Brown vs. Board of Education*. And suppose, also, that another type of interpretation, such as living constitutionalism, would lead to a happy result.

I don't say I would disagree with the premise, I don't think that there is another kind of interpretation. There are other kinds of manipulations, but they are not interpretations. So, I distinguish in paper various kinds, of ways, in which interpreting the intended meaning would appear to lead to an unhappy result. Sometimes, all you can say is that people with the authority who wrote the norm wrote a bad norm, but that's the norm they wrote. So, if I'm interpreting the norm, it leads to the unhappy result, that's what the norm is. Sometimes, norms are broad rules and every broad rules, as we know, can be under and over inclusive. Someone who writes a broad rule knows that there will be a certain number of cases that will be inconsistent with the purpose behind the rule. But, nonetheless, we rather have a rule than no rule. So, those unhappy results have been contemplated, they are not a mistake. The first kind of unhappy results were mistakes by the wrong norm. Sometimes you write the right norm and it, nonetheless, leads to some unhappy results. Not to many, I hope. So, a third kind of unhappy results, one that is really unhappy, leads you to question whether that was the intended meaning.

Here is an example from American law. This actually happened. Normally, when legislatures pass laws they will frequently put in a standard statement that we call a boiler-plate statement that says 'all laws previously enacted that are inconsistent with this are hereby repelled'.

So, in one state, passed the statute, and they mangled the boiler-plate. They put in ‘all laws previously enacted are hereby repelled’.

A second case comes along and the plaintiff is relying on a law that had been previously enacted before this other law and the defendant said ‘no, that law has been repelled, like every law before that, including the murder law, the burgling, all laws. The court looked at this and they said ‘well, of course they didn't really mean what appears there, they just left out the boiler plate, the inconsistent with this one, that part of the statement, they realize that was a mistake, they didn't really mean what they said.

Here is another example. It comes from a legal philosopher, from the US. You are working for a company, and you go into the boss and the boss says ‘A very big client is coming over today and he hates smoking. So, I want you to remove all the ashtrays’. You go around, picking up the ashtrays and, then, you notice that some ashtrays are built into the wall. Your boss said to remove all the ashtrays so you rip out the ashtrays from the walls, leaving a hole on the wall. Well, the boss is likely to say to you, when he sees what you've done, he says ‘You, idiot, of course I didn't mean that when I say remove all the ashtrays’. So, there is a case where the infelicitous result leads you to rethink whether you interpreted the norm correctly.

We have found out that there is a disagreement between your theory and Ronald Dworkin's theory and we would like to know how would you defend originalism from the objections that Ronald Dworkin posed against it.

Well, I have an article coming out that is entitled ‘Was Dworkin an originalist?’ and the answer is, surprisingly, yes. In Dworkin's essay, in the book by Scalia called ‘A Matter of Interpretation’, Dworkin says quite correctly that any marks or words that you see have to be interpreted according to the semantic intentions of the authors, which is originalism. That is what originalism is. He says that.

He says he is not an originalist because he misdescribes of what he thinks of his originalism. So he actually has a view that originalism means interpreting something according to how the people who wrote it, what results they thought it would bring about. That is not my view and it's not any originalist view that I'd know. Dworkin called that originalism, and that's why he said that he wasn't an originalist. The truth about originalist position is that you interpret things according to the intended meaning of the authors, and he agrees with that. If you look at his essay in the Scalia book or his essay in the Forum of Law Review about the same time around the year 2000, he says that, of course, marks and sounds only mean what the authors intended them to mean. He calls something different originalism, but it's not anything an originalist believes. He thinks what the authors thought would be accomplished is an evidence of what they meant but it's not the same thing of what they meant. So, if I say ‘don't give me any poison’ and I think aspirin is a poison, so I'm thinking ‘I sure don't want you bringing me aspirin’ because I think it's toxic. But if I make a

mistake, you know, you are free to bring me aspirin, because even though I didn't expect it... Because, what I meant was poison, and the fact that I thought aspirin was a poison is not... If I thought, if I had a whole bunch of ideas about what poisons were that seemed odd you might think I meant something odd by poison, that I didn't mean what I normally mean by poison. But just a few examples of things where I had a different expectation about what I'm saying would accomplish. That is not the same thing as originalism. Originalism is 'what did I mean', not 'what did I expect would happen'.

This question is from professor Gargarella. What do you think about popular constitutionalism?

Here is what I think about popular constitutionalism: I do not know what it is. I understand the word popular, I understand the word constitutionalism. So I read Larry Kramer's book and I still don't understand what it is. I do understand that he is opposed to strong judicial review, the type of judicial review of the Supreme Court. But I don't know what popular constitutionalism is. So, at times it seems to suggest that maybe it is having the public to interpret the Constitution. Well, I mean, anybody can interpret the Constitution. The question is: are they giving the correct interpretation of the Constitution? That's a different question. Kramer at times seems to be indifferent to it. You know, it is clear is popular something but it is not clear that it is constitutional.

I think that here we can talk about Pearl Harbor attack and what happened afterwards; that all the Japanese descendants, despite being American citizens, well, they were moved to concentration camps, supported by the Supreme Court and a popular interpretation of the Bill of Rights, I mean, the people's support... a clear infelicitous interpretation.

Anybody's interpretation can be wrong. So the question, in an institutional sense, is whose interpretation of the Constitution is final? Not who is right or wrong. So when you ask whether the Supreme Court interpretation of the Constitution is final for purposes of the legal system, you don't have to agree with it and it could be wrong. But any legal system actually has to have a principle of finality. So, in some point, the system makes a determination. Could it be a determination of what the law is? Could it be a determination about the facts? Did you rob the bank? And so forth. The decision is final whether is correct or not is correct. Correctness and finality are two different things. Whether the Supreme Court was correct in the Japanese case, as a matter of interpreting the Constitution, that is one thing. It may have been correct, it may have been incorrect. But for purposes of the time it was final.

Let's turn to criminal law now. The next question is from Horacio Spector. Which are the most influential currents in the theory of criminal responsibility in the U.S.A?

I am not sure what the referent is in theories of criminal responsibility. I think that criminal law in general is premised on the notion that most normal, adult human beings, are responsible, can be

morally and thus legally responsible for their choices. There are interesting questions about the effects of mental illness, about psychopaths, whether psychopaths can be morally responsible in a way in which they would be criminally responsible. But, in general, whatever the results among philosophers questions are (free will, determinism), criminal law assumes that people, normal people (between a wide range), are morally responsible for their choices. I have a theory of culpability, which is just my theory, which is that a culpable choice is a choice to impose risks of harm on other without been aware of any justifying reason for imposing that risk. My own theory is that when you impose the risk, when you think you are imposing the risk, you are culpable without making any difference if the risk eventuates on harm or doesn't. So, if you attempt to kill someone you are as culpable whether you succeed or not succeed. That's a controversial theory. Even more controversially, I don't believe that negligence (in sense of inadvertence to risk) is culpable. I think that if you don't see the risk of harm you are not culpable for imposing it. It doesn't make any difference how many other people would have seen the risk if you don't see it.

The next question is a philosophical question. What is your opinion about the incorporation of moral concepts into the Constitution?

Well I think it is an unwise thing, in general, to do that. In the first place, it forces courts (as a matter of constitutional interpretation) to do moral philosophy, which they are not equipped to do. There may not be any sort of one to one relation between the particular morally charged word you put in and moral reality. So, if you are a utilitarian, there is no joint in utilitarianism in freedom of speech or freedom of religion I think. You are just utilitarian about everything. So, to some extent, when you try to put in moral terms you are implicitly adopting a moral theory and you may not know it. You may not even realize it. It may be nothing in morality that corresponds with a particular word that you may use. I think it is a dangerous proposition.

Well, that is the end of the interview. Thank you very much for the interview.

Yes, I am happy to help you.