

# REFINING OUR UNDERSTANDING OF LAW AND POLICY THROUGH PHILOSOPHICAL METHOD, PHILOSOPHICAL-POLICY AND LEGAL DESIGN

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Collingwood's philosophical method is meant to be a set of assumptions or premises that establish a method completely counter to positivist/naturalist assumptions that humanity, as part of the natural world, can be best understood according to its empirical-analytic parameters. From this point of view, assessing humanity in terms of scientific method commits a category mistake. Collingwood's is not just one among many philosophical methods, but it is meant to describe the true assumptive structure that is required to understand the distinct context and requirements of the human sphere as opposed to the order of the natural world. Collingwood suggests that these categories are how we think and act as persons and, therefore, that they are also required as a foundation for any practical and accurate illumination of social, political and legal affairs. Even if one would rather avoid discussion of the 'truth' of social relations, one merely needs to assume that humans, while from nature are capable of transcending it, to take seriously the contention that distinct categories and assumptions are a reasonable point of departure to study the human condition.

In addition to the concession that humanity is more than the sum of its organic parts, there is also the severe limitations of current theory. Contemporary theorists start with two axioms that prejudice all the logic that follows. First, that scientific method is adequate to understand humanity, and second, that proper theorizing requires one to start with the empirical facts of the matter and induct from these specifics to a general theoretical model. For Collingwood, this technique, both narrows and prejudices the act of theorizing but, can be remedied by supplementing scientific method with a prior philosophical method that better takes human practical reason into account.

My idea is to begin with the assumptions of Collingwood's Philosophical Method and, by applying them to restructure pre-existing systematic philosophical arguments about humanity in society, create a variety of distinct sets of deductive premises that, while not being created within the context of any particular legal or policy issue, can be tested against empirical practice. From this perspective, each philosophical argument assessed through philosophical method would provide its own metaphysical 'truth' about human agency that could then be comparatively tested against other arguments, for accuracy against practice. Specifically, by utilizing a variety of more comprehensive arguments about the human condition prior to, and independently of, approaching any particular policy-legal question, one can then synthesize a policy argument based on fundamental human categories and concepts that can then, and only then, be tested for utility against the existing and historical patterns of practice. The point is not just to know 'what' but 'why' and 'how' and move from a bias for the status-quo to a full consideration of alternative for change.

By beginning with an understanding of humanity at a more essential level, through cross-section of pre-existing philosophical arguments with distinct sets of premises about the human condition,

theorists can be armed with a better picture of essence, source, scope and, therefore, the proper configuration of a legal or policy matter. In this way, we may have access to a clearer picture of the various arguments for the human predispositions behind specific matters of legal and policy choice, enhancing modern decision making with comprehensive arguments about human nature and its evolution.

The overall purpose is to supplement the traditional and empirical logic of investigation for a policy or legal question with an underlying philosophical logic of concepts, that provides an explanation of why what is exists, how it came to be and when and where it creates both advantages and disadvantages in terms of change.

To allow comparative philosophical analysis to be used to specifically illuminate the evolution of law and policy, I have enhanced Collingwood's distinctions with my own theoretical work on the transitional use of Enlightenment philosophical systems to provide a background and foundation for the understanding of specific practice in public policy and law. The combination of my work and Collingwood's seeks to create a more specific technique: *Philosophical Policy & Legal Design*.

To apply Collingwood's philosophical method is to promote:

1. Comprehensive Philosophy Over Compartmentalized Theory;
2. Dialectic Argument Over Eristic;
3. An Essential Metaphysics Of Absolute And Relative Presuppositions;
4. Overlap And Refinement Of Concepts On A Scale Of Forms

### **1. Comprehensive Philosophy Over Compartmentalized Theory:**

For 150 years the social sciences have struggled to understand humanity from the vantage point of observing and experimenting with our superficial behaviour and preferences to produce narrow theories of specific social phenomena (e.g. trade, war) from inductive reasoning alone. This phase of social science strove to understand the human status-quo and worked from the obvious human character traits, basing its studies on such assumptions as self-interest, power and conflict. This mapping of the superficial human landscape facilitates a basic knowledge of what one can observe about how we think and act in specific areas of social interaction, and the probable motivations and consequences of our actions, but it cannot adequately address more essential and wider philosophical concerns about what constitutes human nature, how individual agency creates the social life we experience and what real constraints or incentives shape human life. While this level of complexity may not be necessary to understand the status-quo of what 'is', it is critical to making effective arguments about change, or what 'ought' to be. To facilitate change we need to have a further depth of knowledge that allows us not only to decipher, but to effectively redesign, the human context given the requirements of human agency. This necessitates an understanding of the essence, or full complexity, of the human being as a basis for deliberation and choice in policy and law. It also requires a move from theory to philosophy.

Specifically, social science has reached a level of maturity where it needs to complement its positivist methods and epistemology with a consideration of not only what happens but what essential traits, principles and dialectics are involved in making it happen and how these might

be adjusted to initiate change and a more just or beneficial outcome. A new, philosophical, level of social investigation is required, one that focuses on the substructure of the physical superstructure that has been the preoccupation of social science to date. We need to utilize philosophical systems and philosophical argument to lay out a fuller conceptual framework for empirical investigations.

But uncovering the complexity of this conceptual substructure is a daunting task. Fortunately, philosophers have been working to provide logical maps of human nature and practical agency for thousands of years. Our task, if we wish to empower effective change in human law and policy, is to begin with these alternative arguments, or sets of premises, for human complexity and harness them as alternative paradigms that allow us to translate essential understandings of the human being into transformative policy and legal designs for the future. My approach, *Philosophical-Policy & Legal Design*, does this in three steps:

- First, to compliment scientific method and its study of the natural world, I employ Collinwood's unique *Philosophical Method* as a basis of thought and action about humanity. This method sets parameters for the assumptions and standards of investigation that speak specifically to what is essential about the human context.
- Second, I use philosophical method to reexamine preexisting whole systematic philosophical arguments about humanity, translating them into policy paradigms and searching through these to both decipher the assumptions and principles at the core of status-quo policy while also selecting alternative philosophical arguments that better address what is essentially at stake in the legal or policy issue under scrutiny.
- Third, I then apply these paradigms to policy and law to more fully understand the gap between what "is" and what "ought" to be, supplying essential information on what alterations in the law are required for any desired policy change, and what the most effective arguments are to operationalize this transformative change.

## **2. Dialectic Argument Over Eristic:**

The point of assuming a dialectic structure is that for policy the prime directive is to sort out the balance between the morality of *process* that makes a stable order of social cooperation the end-in-itself and the role of morality as *critical principle* that represents the role of right and individual status that may disrupt social cooperation but which is required to protect humanity-in-the-person as the end-in-itself for policy and law. Beginning with this core dialectic of *process*  $\leftrightarrow$  *principle* we then need to specifically define those dialectics that are of particular interest to policy and law. This introduces my paradigm framework that allows one to extract from the philosophical argument, taken as a whole, those assumptions and principles necessary to address legal and policy questions from its perspective. This paradigm framework begins with the fundamental assumptions of the philosophical system in terms of its definition of the individual, the collective action problem and the role of the state.

The Individual: The *Process*  $\leftrightarrow$  *Principle* dialectic is applied to the concept of the person through the philosophical system's balance between *Passion*  $\leftrightarrow$  *Reason*. Specifically, one should ask how the philosophical argument balances the power and role of human desire against the ability to transcend such desires and reason independent of context. Where is the balance? How does that

balance define the generic person the policy-maker is assuming as the subject and participant in the policy and legal question under scrutiny?

The Collective Action Problem: The next fundamental assumption needing to be defined for an understanding of how a particular philosophical system may be applied to law and policy practice involves specification of the collective action problem. What is the specific pitfall in individual interaction (given the balance of *Passion* ↔ *Reason* from the first fundamental assumption) that may cause sub-optimal social outcomes? Here, the specific dialectic of *Utility* ↔ *Right* should be considered the basis upon which the requirements of policy or legal intervention should be judged. One asks how the transition from individual choice to collective outcomes balances the influence of the collective utility of social stability (*Process*) against individual right (*Critical Principle*) to establish and maintain public coordination. It may be that a recognized strategic game (e.g. Prisoner's Dilemma, Lewis Coordination Game, Chicken) can be utilized to add clarity to the collective action space in which these problems are defined and overcome.

The Role of the State: The last fundamental assumption addresses how the philosophical system guides the state in balancing matters of private arbitrary choice and matters of public policy requiring either negative intervention in protection of the citizen, or positive intervention in providing services to capacitate individual choice, or neither. Given the previous dialectic between *utility* ↔ *right* the role of the ethical in terms of either supporting moral choice aimed at the stability of the society or moral choice more focused on the entitlements of the person is made more operational by placing the persistence of collective action as a responsibility of the state, through this dialectic pair. Overall, the dialectic between Private Choice ↔ Public Policy dictates a predominantly active or passive role for the state. How does the philosophical system delineate between the ethical and the political/judicial? Should the state merely support and provide protection for the arbitrary choices of individuals or should it actively seek to protect and empower their capacity as agent-causes in the world by making a larger number of issues the subject of unilateral will. Fundamentally, one assess the role of the state by asking what the balance is between those practical matters where the philosophical argument under consideration recommends its classification as an matter of personal choice and those that it classifies as matters requiring an state action.

### **3. Metaphysical Structure:**

Taking both the dialectic structure of the fundamental assumptions into account, the next step in applying Collingwood's Philosophical Method is to decipher the metaphysical structure of the philosophical argument under consideration. Here, Collingwood posits that this structure contains an Absolute Presupposition and a series of Relative Presuppositions. To locate the absolute presupposition one should single-out that norm or concept that drives, or provides the ultimate imperative for, the philosophical system as a whole. The relative presuppositions are those concepts, or precepts, that are instrumental, either positively in terms of producing the absolute presupposition or negative in presenting obstacles to its realization that must be overcome. In this way, they stand as necessary and sufficient means to the ends of the absolute presupposition.

**4. Overlap & Refinement On A Scale Of Forms:** The last two rows of the policy-paradigm framework concern the transformation of the fundamental assumptions and metaphysics of the philosophical system into an evolutionary model with specific practical policy imperatives and goods that build a bridge between the theoretical structure of the philosophical system and its practical application. Consequently, we look first for those material goods that provide policy imperatives for the decision-maker given the fundamental assumptions and metaphysics of the philosophical system under scrutiny. What specific dimensions of the socio-political world (e.g. property, education, granting of rights) does the philosophical argument emphasize as practical means to its operationalization?

Next, Collingwood argues that one of the fundamental differences between the natural and the human world is that, whereas in the former, definitive classification of concepts is required, in the latter this is impossible. For the study of humanity, concepts like Justice, Freedom, Fairness and Equality overlap one-another and cannot be definitively classified or defined without the mutual consideration of that overlap. This is the core of the idea that human logic and the world of concepts in which we think and act are inherently dialectic.

In addition, Collingwood posits that this overlap is not static but dynamic. Specifically the purpose of philosophy is not the discovery of new concepts and ideas, but the refinement of a well established set of concepts over time. This introduces the idea of the evolutionary ‘scale of forms’ through which philosophical concepts seek their essence. In the last row of the paradigm framework, we decipher the practical attributes of the scale of forms represented in the philosophical system under study.

This proscribes the components of the process by which the dialectic operates. That is, it places and systematically relates the specific conceptual characterization of the process<sup>↗</sup>principle dialectic and its constituent dialectics, given by the philosophy system, into a dynamic logical string defining the evolution and balance of the dialectic over time and context. This process of progression toward essence sets a pattern of synthesis moments that can be used to both understand the historical particularities of any policy or legal matter while also deciphering the overall pattern of change or refinement that has, and may in the future, occur.

The final step before the application of the Policy Paradigm to legal or policy practice is to take these practical attributes of the philosophical systems scale of forms and create a context model that is a map of the system’s logical evolution. The *context model* for the scale of forms represents how the concepts, or pairs of concepts, representing process<sup>↗</sup>principle for this philosophical system, internally overlap and influence one-another in their definition of the subject under study.

With this context model in hand, one now considers empirical practice, and whether the dialectical balances and metaphysics recommended by the philosophical system ring true to the facts of the policy or legal matter and the pattern of its practice.

#### **CHANGES TO HUME’S PHILOSOPHICAL-POLICY:**

For Hume the absolute presupposition of his philosophical system is the *Passion for A Stable Social Order* this is complemented by the circumstances of justice which act as the Relative Presuppositions of the philosophical argument, that is, the assumptions that make social convention and its layers of sanctions necessary.

When one moves from the philosophical system in general to the context model of Hume's Legal System, then the Relative Presuppositions

Is the scale of forms the transition point from paradigm to context model and policy design?