John Gardner on the Scope of Legal Positivism

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Abstract

In *Legal Positivism: 5½ Myths*, John Gardner argued that legal positivism should be understood *only* as a thesis about the validity of individual norms. This influential view has had the effect of discounting and marginalizing two other important questions about the separation or non-separation of law and morality: regarding the legal status of significantly immoral legal systems, and regarding the role of moral evaluation in the construction of theories about the nature of law. More importantly, there is far less attention now paid than there should be to the interesting theoretical question of the extent to which a position in favor of separation (or non-separation) on one topic entails, or at least strongly supports, a similar view on the other topics.

Keywords: John Gardner. Hart-Fuller Debate. Legal Positivism. Legal Validity. Theory Construction.

Introduction

John Gardner's work has been influential across a wide range of topics, including tort law, anti-discrimination law, theories of justice, and the debates on the nature of law[1]. Already, there are memorial volumes present or forthcoming considering the many facets of Gardner's career[2]. In the context of this workshop honoring Gardner's many contributions, I have the time only to discuss one small but interesting corner, relating to his writings on the nature of law.

One of Gardner's most influential pieces, *Legal Positivism: 5½ Myths*[3], offered

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1 See, *e.g.,* Gardner 2012, 2018, 2019.

2 See, *e.g.*, Dempsey and Tanguay-Renaud 2023.

3 Gardner 2001. (The article was also reprinted in Gardner 2012: 19-53. Citations in the present work will be to the original article.)

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a series of warnings about what he says that legal positivism does *not* advocate. The article is constructed around a distinctive view of the scope of legal positivism, a view that, I will argue, is unhelpfully narrow. This may seem a minor point, but I will argue that its acceptance or rejection is connected with important questions about the relationship between law and morality.

In what follows, Part 1 discusses Gardner's views, Parts 2 and 3 discuss the other aspects of legal positivism that Gardner's perspective ignores or marginalizes, before offering some general observations in Part 4, and concluding.

1. Gardner's View

In *Legal Positivism: 5½ Myths*, Gardner argued that there is «one and only one proposition [that is] the distinctive proposition of "legal positivism"»[4]. That proposition, as modified in the course of the article, states: «In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits […]»[5]. That is, according to Gardner, what makes a theory "legal positivist": that it rejects a moral test (or any sorts of "merits" test) for legal validity. (Though, as Scott Shapiro would later argue, a non-merits-, source-based test for identifying law leaves open the possibility that legal rules, identified this way, will have moral implications[6]).

Under Gardner's suggested test, no merits criteria will be allowed, either as a sufficient or a necessary condition for legal validity. This would thus exclude certain understandings of the Radbruch Formula (that individual norms that are sufficiently unjust lose their legal validity)[7]. It would also exclude certain (generally conventional) understandings of constitutional judicial review of legislation, understandings that in such cases courts are holding legislation contrary to the constitutional requirements to have been "void ab initio"[8]. Finally, it may also conflict with certain understandings of common law decision-making (in common law countries), in which there is a sense in which what is morally best is already the law, just being "discovered" by common law judges.

Gardner's legal positivism is thus a form of "exclusive legal positivism" (where

4 Gardner 2001: 199.

5 Gardner 2001: 201. The words left out by the ellipses are «(where its merits in the relevant senses, include the merits of its sources)».

6 See Shapiro 2011: 8-12 (distinguishing identity questions from implication questions).

7 See Radbruch 2006.

8 It is important to clarify that those who hold these ("exclusive") legal positivist positions are not arguing that courts do not invalidate legislation contrary to the constitution, or that they should not. The question is only how to characterize such decisions. Exclusive legal positivists argue that such decisions are best understood as powers delegated to judges to invalidate legislation.

moral evaluation can play no role in determining the legal validity of rules) rather than a form of "inclusive legal positivism" (where moral evaluation *is* allowed to play a role, but only if so authorized by social/conventional sources), though I do not want the focus of the present work to be yet another overview or evaluation of that debate[9]. More importantly, from the present perspective, Gardner's view of legal positivism ignores or discounts two other important aspects of the separation of law and morality, ones that have roots in the works of H. L. A. Hart and many other paradigmatic legal positivist authors.

(Beyond the two topics that will be discussed, there is yet another position that is sometimes included as part of, or at least related to, legal positivism: "ethical" or "normative" legal positivism[10]. This approach argues that the exclusion of moral considerations from determining legal validity is not required by the nature of law, as argued for by conventional legal positivist theories, but is rather a contingent matter, but one worth choosing for policy reasons. I will not be discussing that interesting approach in the present work).

2. The Legal Status of Systems

One of the central parts of the well-known Hart-Fuller debate, published in the 1958 *Harvard Law Review*[11], was the disagreement about the legal status – or *non*-legal status– of the rule system present in Nazi Germany.

Lon Fuller offers his own distinctive twist on natural law in his response to Hart. Fuller's objection to the purported *legal* status of what the Nazis had went less to its substantive evil (not that Fuller in any way denied the deep substantive immorality of the Nazi rules), and more to its procedural irregularities (secret laws, highly vague laws, judicial interpretations and applications that deviated sharply from the promulgated texts, etc.).

H. L. A. Hart, in his *Harvard Law Review* piece and, later, in *The Concept of Law*[12], presents the legal positivist position in contrast to the natural law view (as Hart understood it), in asserting that even evil laws, and unjust *systems* of rules, were still "law", and that to claim otherwise was simply to invite confusion[13]. He urges us to view the separation of law and morality at both levels. In his *Harvard Law Review* piece, he examines «not [only] whether every particular rule of law must satisfy a moral minimum in order to be a law, but whether a system of rules

9 I have written about that debate elsewhere. See*, e.g.*, Bix 1999, Bix 2024.
10 See*, e.g.*, Campbell 2016, Schauer 2021.
11 Hart 1958, Fuller 1958.
12 Hart 2012.
13 See*, e.g.*, Hart 2012: 200-203.

which altogether failed to do this could be a legal system»[14].

Of course, Hart famously went on to complicate the inquiry by making a point more sociological than conceptual. His discussion of «the minimum content of natural law» points out that any society which failed (whether in its social norms or its institutional norms) to give minimal protection to life, health and property for at least a chosen elite, would be doomed to failure[15].

Without wanting to re-enter the particulars of the debate about whether the Nazis (or Stalinist Soviet Union or Apartheid South Africa) had law, the question of whether a rule or dispute-resolution system could be too immoral to warrant the label "law" and "legal" remains an important question, about which reasonable citizens and theorists can and do disagree, and which even has been the focus of a much-discussed experimental jurisprudence study[16].

David Plunkett, in his review of Scott Shapiro's book, *Legality*[17], similarly distinguishes between two kinds, or two aspects, of legal positivism: arguing that social facts (alone) ground *the content of law* (e.g., the content of legal norms), and arguing that social facts (alone) ground *the institutions* of law[18].

And there are questions to be asked about the moral prescriptions for officials and for citizens who live in a society which is so immoral or so procedurally wrong as, under some theories, not to warrant the title "law." As others have noted, there may be moral reasons to abide by simple contractual duties even in a world of great injustice. But such inquiries would take us far from our present topic.

3. Value-Free Methodology in Theory Construction

Another question about the separation – or connection– of law and morality that is regularly mentioned, but rarely focused upon, is that relating to methodology. H. L. A. Hart argued that it is not for the theorists to evaluate (morally) the legal systems about which they are theorizing. And even when they (properly) take into account that citizens sometimes accept the legal system as giving them reasons for action, it is not the theorists' role to ascertain whether they are justified in doing so[19].

In response to Hart, John Finnis argues[20] that the theorists of the nature of law need to make moral evaluations: to posit a practically reasonable hypothetical

14 Hart 1958: 601.

15 See Hart 2012: 193-200.

16 See Flanagan and Hannikainen 2022, critiqued by Himma in Himma 2023: 359-363.

17 Shapiro 2011.

18 Plunkett 2013: 570-572, 584.

19 Hart also famously notes that citizens might have non-moral reasons for accepting the law. Hart 2012: 203.

20 Finnis 2011: 3-22.

citizen, and to ask whether such citizens, viewing their own legal system, would conclude that the law in fact gives them (moral) reasons for action. In rejecting what he characterized in Hans Kelsen's work as a «lowest common denominator» view[21], and the general «internal point of view» espoused by both H. L. A. Hart and Joseph Raz[22], Finnis concludes:

> If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation …, a viewpoint in which the establishment and maintenance of legal … order is regarded as a moral ideal …, then such a viewpoint will constitute the central case of the legal viewpoint. For only in such a viewpoint is it a matter of overriding importance that law as distinct from other forms of social order should come into being, and thus become an object of the theorist's description[23].

Stephen Perry raised a different challenge[24]. He pointed out that theories about the nature of law asserted or assumed a primary objective for law, but that theorists did not agree on that objective: for Hart, law was about guiding behavior, while for Dworkin it was about justifying or constraining state coercion. The choice between these alternatives requires moral evaluation.

By contrast, both Julie Dickson[25] and Jules Coleman[26] have written at length about the way in which the construction of legal theory must be selective and evaluative, but that this evaluation can and should be morally neutral, based on principles of theory construction or just based on "importance". Coleman observed that a theory of the concept of law, like all other theories of concepts «are normative both in their construction and ambition. They are responsive to the norms governing theory construction, and aim not merely to report on linguistic behavior, but to discipline use and to structure thought»[27]. Theory-construction in jurisprudence, Coleman argues, needs to take into account «epistemic norms in identifying those features of law the concept must answer to,» and «theoretical norms, such as consilience and unification»[28].

Dickson speaks of «indirectly evaluative» legal theory (as contrasted with the "direct" moral evaluation advocated by John Finnis and others). As Dickson states, indirectly evaluative propositions «state that a given X has evaluative properties but do not entail directly evaluative propositions stating that this same X is good (or bad)»[29]. In particular, a statement that a particular feature is "important" is

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21 Finnis 2011: 5-6, citing Kelsen 1945.
22 Finnis cites to Hart 1958, Hart 2012, and Raz 1990.
23 Finnis 2011: 14-15 (footnotes omitted).
24 Perry 1995, 1998.
25 Dickson 2001, 2022.
26 Coleman 2001.
27 Coleman 2001: 179-180.
28 Coleman 2001: 199.
29 Dickson 2001: 53.

indirectly evaluative, and assumes or asserts no conclusion regarding whether that feature is (morally) good or bad[30]. In a more recent work, Dickson restates that «the task of identifying and analysing those significant and important features of law which make it into what it is» is a process needed prior to «engaging with law's moral evaluation and/or justification»[31].

Jeff Pojanowski, following arguments earlier developed by Stephen Perry, questions whether any theory grounded in a hermeneutic approach – as Dickson's approach is in Hart's hermeneutic approach, with its emphasis on legal subjects' «internal point of view»[32]– can in fact be morally neutral[33]. He writes, in an overview of a larger argument: «If the concept of law is an enduring moral ideal that judges and makes sense of varying, contingent social practices, such a concept picks out and highlights essential properties amid the flux of human affairs»[34].

Also, when we look back at Lon Fuller's challenge to legal positivism, both in his 1958 *Harvard Law Review* exchange with Hart[35], and in his later Yale University Press book[36], Fuller's principles of legality, his «inner [or internal] morality of law» operate at the level of legal systems as a whole, not at the level of individual legal rules.

Fuller argues variously that systems have to satisfy the principles of legality to a certain level to qualify as "legal" (and that the system in Nazi Germany did not so qualify – due to, among other things, secret laws and courts interpreting laws in ways that diverged sharply from how they were written), or that systems could be said to be "legal" to different degrees, according to their level of compliance with the principles.

In his *Legal Positivism: 5½ Myths*, Gardner argues for equating legal positivism with a proposition separating legal validity from (legal) merits by asserting that it is one of the few propositions about law that the main figures associated with legal positivism (he names Thomas Hobbes, Jeremy Bentham, John Austin, Hans Kelsen, and Hart[37]) converge upon. However, as can be seen, claims about what can and cannot be included in the process of theorizing about (the nature of) law similarly bring together, on the one hand, major figures associated with legal positivism, and, on the other hand, significant figures associated with natural law theory or general anti-positivism.

30 Dickson 2001: 53-54.
31 Dickson 2022: 176.
32 Hart 2012: 82-91; see also Dickson 2001: 33-37 (discussing Perry's critique of Hart).
33 Pojanowski 2021: 1476-1486.
34 Pojanowski 2021: 1487.
35 Fuller 1958, Hart 1958.
36 Fuller 1969.
37 Gardner 2001: 200.

4. Why Does It Matter?

Why does this matter? Why should we be concerned with John Gardner's allegedly-too-narrow understanding of legal positivism? Many theorists have expressed their impatience with too great a concern about labels. For example, Joseph Raz wrote: «I believe that the classification of legal theories as legal positivist or non-legal positivist […] is unhelpful and liable to mislead»[38]. And John Finnis repeatedly affirmed his «belief that reflections on law and legal theory are best carried forward without reference to unstable and parasitic academic categories, or labels, such as "positivism"»[39]. A critic might assert that my present paper is just the wrong sort of example: one tied up both with what counts as "legal positivism" and what sorts of inquiries are relevant to that (meta-)question.

I am sympathetic to those concerns. Of course, nothing crucial turns on labels alone. I do not think that it is important whether one calls the particular theories of (say) John Gardner, Scott Shapiro or Hans Kelsen "legal positivism" or not[40], nor is the precise boundaries between (e.g.) "legal positivism," "natural law theory," and what is sometimes offered as a third, or overlapping, category "anti-positivism," of any great significance.

If I am troubled by the narrow boundaries for legal positivism Gardner espoused, it is not because of any fixation regarding which theories get which names. My concerns, rather, are: (1) that Gardner's position implicitly denigrates, marginalizes, or ignores the importance of the other two sets of law/morality (dis)connection, the one at the level of whole legal systems and the other relating to theory construction; and (2) that Gardner's position implicitly discounts the connections among the three categories, and turns our attention away from them.

I am especially intrigued by the sense in which a «legal positivist position» on one of these inquiries *does or does not* entail, or at least strongly support, a legal positivist position on the others. It is parallel to the inquiry in philosophy, regarding whether realism (or anti-realism) about one area of discourse or class of statements entails realism (or anti-realism) about other areas of discourse or classes of statements[41]. Much closer to the present topic, David Plunkett and Daniel Wodak have recently argued that «positivism [might be] true of one part of legal reality (legal institutions), but not another (legal

[38] Raz 2009: 317.

[39] Finnis 2000: 1597.

[40] With Shapiro, one might raise questions of the legal positivist status of his theory based on his argument that law necessarily has a moral aim. See, *e.g.*, Plunkett 2013. For Kelsen, the challenge to his legal positivist credentials tend to come from the role of efficacy and validity in his theory. See*, e.g.*, Bulygin 2015: 235 («Carlos Santiago Nino […] maintain[s] […] that Kelsen employs a normative concept of validity akin to that found in authors of the natural law tradition» (footnote omitted)).

[41] See*, e.g.*, Dummett 1982.

norms)»[42]. The point of their work is that a legal positivist position about one aspect of (what they call) "legal reality" need not entail a similar position regarding other aspects, and that we would be wise to be open to such divergences and disaggregations.

There are actually here two different sets of questions: first, whether one should take a similar position across the three queries: separation[43] of law and morality/merits/evaluation for all three or non-separation for all three. And second, what the logical/philosophical connection is, if any, among the positions one takes: are the ultimate positions consistent because one follows from the others as a matter of persuasive argument, or are consistent positions mostly just a coincidence?

Conclusion

John Gardner's influence was broad, as his writings brought much-needed clarity and insight to a wide range of topics across legal, moral, and political philosophy, as well as a number of policy debates. The article on which this piece focuses, *Legal Positivism: 5½ Myths*, offered helpful warnings about a number ("five and a half") of common misunderstandings regarding legal positivism, while also providing a useful restatement of the legal positivist position regarding the connection (or lack thereof) between legal validity of individual norms and their merits.

However, as discussed, the intended or unintended effects of Gardner's narrow but influential view of legal positivism has been to discount and marginalize two other important questions about the separation or non-separation of law and morality. These other questions, about the legal status of significantly immoral legal *systems*, and the role of moral evaluation *in the construction of theories* about the nature of law, had also once been prominent in debates between legal positivists and their critics. More importantly, there is far less attention now paid to the interesting theoretical question of the extent to which a position in favor of separation (or non-separation) on one topic entails, or at least strongly supports, a similar view on the other topics.

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[42] Plunkett & Wodak 2022: 235.

[43] I am using "separation" here as a shorthand. I realize that on more precise analyses, even for positivists there remain a number of points of connection between law and morality. See*, e.g.*, Green 2008.

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