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PHILOSOPHICAL ASSUMPTIONS IN LEGAL PHILOSOPHY

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Abstract

In this article, I argue that the debate between contemporary legal positivism and contemporary natural law philosophy must be understood in terms of underlying assumptions about the nature of philosophy. Despite differing conclusions about the nature of law and legal theory, contemporary legal theorists generally approach the study of law in a similar way. Generally speaking, contemporary legal theorists attempt to provide general accounts of law which are theoretically valuable. They believe that a general and theoretically valuable account of law can be achieved by bracketing-off metaphysical questions and focusing on the analysis of concepts. However, it is ultimately because contemporary legal theorists share assumptions about the nature of philosophy that they share similar problems. Because of these share assumptions, contemporary philosophers of law must choose between two alternatives which have limited theoretical value, namely, an overly formal account of law or a relativistic account of law. Thus, this article is not only a critique of specific contemporary legal theories (those of Dworkin, Hart, Raz and Finnis), but also a more general critique of contemporary legal philosophy as a whole. Only by challenging the basic assumptions which underlie contemporary legal philosophy can we hope to provide accounts of law which are both general and theoretically valuable.

INTRODUCTION

The traditional debate between natural law and legal positivism is relatively easy to understand. It is easy to understand because the contrast between the two sides was sharp. Traditional natural law philosophers were Thomists in the full sense of the word. They accepted not only Aquinas' position on natural law, but also the metaphysics and epistemology which, they thought, were presupposed in his account of law. Traditional legal positivists were followers of Bentham, and they accepted not just his proposal for the separation of law and morality, but also his reasons for this separation. Traditional legal positivists shared Bentham's distaste for metaphysics and for the pretentions of an ethics grounded in metaphysics and religion. So, the traditional debate between natural law philosophers and legal positivists was a more fundamental debate about the nature of morality and the place of metaphysics in philosophy of law.

I will show in this article that the nature of the debate changed with the publication of *Hart's The Concept of Law* in 1961. The debate changed because Hart's influence was felt not just among legal positivists, but also among contemporary natural law philosophers like Finnis and Dwork in. Those who influenced Hart (like Austin, Ryle and the later Wittgenstein) became at least indirect influences on both contemporary legal positivists and natural law philosophers. As a result, both sides of the contemporary debate share many assumptions about how philosophy should be done. They both agree that the work of philosophers involves, primarily, the analysis of concepts. Questions of metaphysics and even morality are, at least at the start, bracketed-off or put aside. Instead philosophers of law focus their attention on deciding what concepts are central to an understanding of law, analyzing those key concepts, and showing what follows from this analysis. Because of these shared assumptions about the nature of philosophy of law, the line between natural law and legal positivism becomes unclear. Just what the point or points at issue are between them becomes a significant question in contemporary philosophy of law.

In this introduction, I will show that there is a problem deciding what is the point at issue between contemporary philosophers of law (and whether, indeed, there is a significant point of dispute between them) by considering some common ways of understanding the contemporary debate between natural law and legal positivism. I will show why it even becomes a problem deciding who is a natural law philosopher and who is a legal positivist. By the end of this introduction, I will do more than show that there are problems in contemporary philosophy of law; I will also indicate what direction should be taken in order to resolve these problems.

1-The meaning and significance of the credo that an unjust law is not a law

There are three ways in which the debate between contemporary natural law theorists and contemporary legal positivists has been commonly understood. First, the debate is typically characterized in terms of the natural law credo or an unjust law is not a law[1]. While Legal positivists maintain a distinction between the existence of a law (or the fact of law) and its moral evaluation, it is thought that natural law theorists collapse this distinction by denying the legality of immoral laws. In other words, by denying the legality of unjust laws, natural law philosophers (un like legal positivists are said to) seem to equate moral and legal criteria for the existence and character of law. This has led legal positivists such as Kelsen and Raz to claim that natural law theorists have no specific notion of legal validity apart from moral validity[2]. This has also led legal positivists like Hart to make the following criticism of natural law theories: "the assertion that 'an unjust law is not a law" has the same ring of exaggeration and paradox, if not falsity, as 'statutes are not laws' or 'constitutional law is not law[3].

Certainly, on the surface, it seems contradictory to call something an unjust law and yet to deny that it is a law. This statement can only avoid an obvious contradiction if two senses of the word 'law' are to be understood. And, very briefly, I will argue that even traditional

[1] For a brief discussion of the sources of this credo (as well as an interpretation of its meaning) see Norman Kretzmann's article "Lex Iniusta non est Lex: Law on Trial in Aquinas' Court of Conscience" originally published in American Journal of Jurisprudence 33 (1988), 99-122.

[2] Joseph Raz, "Kelsen's Theory of the Basic Norm." American Journal of Jurisprudence (Vo l. 19, 1975), 100

[3] H.L.A. Hart, The Concept of Law. (Oxford: Clarendon Press, 1961), 8. Henceforth known as CL 1961

natural law theorists like Aquinas, as well as contemporary natural law theorists like Finnis, have two senses of the word 'law' in mind when they make this statement. Let me first consider a passage in which Aquinas writes about unjust laws. In the *Summa Theological* -, Aquinas considers the second objection, which states that not all law can be derived from eternal law since some laws are unjust. He responds by stating that although human law has the nature of law to the extent that it partakes of right reason (and thus unjust laws do not have the nature of law but have the nature of violence), "nevertheless, even an unjust law, in so far as it retains some appearance of law, through being framed by one who is in power, is derived from the eternal law[4]. I think that it is clear from this quotation that Aquinas has two senses of the word 'law' in mind when he discusses unjust laws: first, 'laws' in the full sense of the word are those which are in accordance with right reason (i.e. just laws); and, second, 'laws' in a more limited sense of the word (i.e. unjust laws) which have only the appearance of 'law' in the full sense of the word. Unjust laws are s till laws in a limited sense since they have some characteristics of law (for example, they were framed by those in power), yet lack other important characteristics of law (namely, they are not in accordance with right reason or they lack justice). Thus, the credo that an unjust law is not a law means that an unjust law (which has some characteristics of law in the full sense) is not a law in the full sense of the word (which must also include justice)

Finnis provides another way of understanding the credo *lex iniusta non est lex* which appeals to the different stances a speaker can take in using the word 'law'[5]. A speaker can make a statement regarding the law as one who is critical of the law (in Finnis' terms, one can assert what is justified or required by practical reasonableness *simpliciter*), or a speaker can make a statement regarding the law from an expository or sociological/historical viewpoint (i.e. as one who neither endorses nor criticizes the practice of law). Thus, when someone says that an unjust law is not a law, the speaker is asserting that an unjust law (where law is understood from an expository or sociological/historical viewpoint) is not a law (where law is understood from the standpoint of practical reasonableness).

If Finnis is correct, then natural law theorists need not deny such a thing as a limited, legal validity as distinct from moral validity; they need not deny the presence of formal or procedural criteria for the existence of law which can be and are to be distinguished from the justice of law so identified. Thus, an interpretation of the natural law credo which would deny that there are two senses of the word 'law' not only mischaracterizes traditional and contemporary natural law, but also fails to get to the heart of the traditional or contemporary dispute between natural law theorists and legal positivists. Neither side really denies the existence or legal validity (although a limited form of existence and validity for natural law theorists) of unjust laws. It seems more important to consider whether or not morality is needed in a full account of law.

2-Understanding the debate in terms of the connection between law and morality

Thus, a second common way to construe the contemporary debate between natural law and legal positivism is in terms of the connection between law and morality. Natural law

[4] St. Thomas Aquinas, Introduction to Saint Thomas Aquinas. Edited by Anton C. Pegis (New York: Random House, 1948), 632*633

[5] John Finnis, Natural Law and Natural Rights. (Oxford: Clarendon Press, 1980), 36S. Henceforth known as N L.

theorists, according to this account, argue that there is a necessary connection between law and morality, while legal positivists assert that there is only a contingent connection (if any) between law and morality[6]. This way of characterizing the debate has the benefit of accounting for different versions of both natural law theory and legal positivism. First, it accounts for both traditional forms of natural law theory like Aquinas' account and for the less traditional forms of natural law theory found in contemporary debates. The latter typically do not hold that moral laws or principles are universal or immutable (for example, Ronald Dworkin 's account in Law 's Empire), and are not based on or accompanied by Aquinas' teleological assumptions about nature (for example, Dworkin's, Lon Fuller's and even John Finnis' respective versions of natural law). Second, it accounts for different forms of legal positivism, including versions given by both inclusive or soft legal positivists like Hart and Waluchow, and versions given by 'exclusive' or 'hard' legal positivists like Joseph Raz. In his book *Inclusive Legal Positivism*. Waluchow describes clearly the distinction between these two kinds of legal positivist theories. He states:

> "a distinguishing feature of inclusive positivism is its claim that standards of political morality, that is, the morality we use to evaluate, justify, and criticize social institutions and their activities and products, e.g. laws, can and do in various ways figure in attempts to determine the existence, content and meaning of valid laws"[7]

In other words, inclusive legal positivists like Hart and Waluchow hold that law and morality are contingently connected. An exclusive legal positivist, on the other hand "excludes morality from the logically or conceptually possible grounds for determining the existence and content of valid law[8]. So, for an exclusive legal positivist like Raz, there is not even a contingent connection between the existence and content of law and morality. Both versions of legal positivism share the denial that there is a necessary connection between law and morality. Thus, this way of characterizing the difference between natural law and legal positivism seems to capture a belief widely shared by natural law theorists (that there is a necessary connection between law and morality) which contrasts sharply with a belief widely shared by legal positivists (that there is no necessary connection between law and morality). Such an account of the debate seems to indicate a definite point of dispute between natural law philosophers and legal positivists about the very concept of law.

3-Are contemporary natural law philosophers and contemporary legal positivists actually arguing at cross-purposes?

Despite the apparent contradiction in the statements made by natural law theorists and legal positivists about the connection between law and morality, some philosophers have argued that there is no real contradiction or conflict between them. For instance, in the introduction to his book Definition and Rule in Legal Theory. Robert Moles describes and criticizes H.L.A. Hart's account of the natural law and legal positivist debate[9]. According to Moles,

[6] W J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994),

[7] Ibid

[8] W.J. Waluchow, *Inclusive Legal Positivism*.

[9] Robert Moles, Definition and Rule in Legal Theory: A Reassessment o f H.L, A, Hart and the Positivist Tradition. (Oxford: Basil Blackwell, 1967)

Hart describes the debate in terms of the connection between law and morality. But Moles states, "of course, what Hart fails to appreciate is the further point made by Collingwood - that statements cannot be contradictory unless they are answers to the same question"[10]. He adds, "because Hart fails to appreciate the relationship between propositions and the questions they answer, he does not find it necessary to reconstruct, or make explicit, the questions which Austin and Aquinas were dealing with."[11] Moles is suggesting that if legal positivists and natural law theorists are dealing with different questions, then the statements they make need not be contradictory. Other legal theorists such as Brink argue that legal positivism and natural law theory are not only compatible but also complementary theories which state important truths[12].

Thus, a final way to characterize the debate between natural law theorists and legal positivists is to argue that the debate has been nothing but a quibble over words since there is no substantial point of dispute. Neither natural law theorists nor legal positivists deny that there is law as it is and law as it ought to be, yet each is concerned with a different problem or task. While the legal positivist is concerned with providing an adequate description of law and/or legal practice, the natural law theorist is concerned with evaluating law and legal practice. Thus, it should not be a surprise that a natural law theorist states that there is a necessary connection between law and morality when that theorist is primarily concerned with law as it ought to be. And, further, the legal positivist's claim that morality is not necessarily connected with law does not contradict the
natural law theorist's claim since the positivist is simply describing law as it is in fact independently of the evaluation of law. This view seems to be supported by the way in which a natural law theorist would provide a consistent interpretation of the credo that an unjust law is not a law. By appealing to two senses of the word law the natural law theorists seem to acknowledge the distinction between law as it is and law as it ought to be; and this seems to open the door for a separation of tasks in to a descriptive task and an evaluative one.

The fact that contemporary legal positivism and contemporary natural law philosophers are arguing at cross purposes could be also based on the fact that they are focusing on different areas of law. For example, Brink argues that legal positivism is concerned with providing a theory of legal validity while natural law theory should be understood as providing a theory of adjudication[13]. Perry argues that legal positivism is grounded in one area of law (criminal law), while natural law philosophy is grounded in another area of law (civil law)[14]. In any case, the basic idea is that contemporary legal positivism and contemporary natural law philosophy, despite appearances, may not be opposing theories of law, but rather complementary theories.

[10] Ibid.4,
[11] Ibid.4,
[12] David O. Brink. "Legal Positivism and Natural Law Reconsidered." The Monist (Vo l. 68, No. 3, July 1965), 134
[13] Ibid
[14] Stephen Perry, "Judicial Obligation, Precedent and the Common Law" in the Oxford Journal of Legal Studies (Vol. 7, No. 2, Summer 1987).

I think that Moles is right in saying that we should not assume that Aquinas and Hart are dealing with the same questions. In fact, given the very different historical and philosophical contexts in which their works are situated, we have good reasons for thinking that Aquinas and Hart are dealing with different questions. But it is a much harder case to show that contemporary legal positivists and contemporary natural law philosophers, despite what they say they are doing, are actually dealing with different questions. There does appear to be a difference of op in ion about the connection between law and morality, and contemporary philosophers of law say they disagree with other philosophers on this point. In order to see whether there really is a significant point of dispute between contemporary legal philosophers, we need to consider more closely what it means to say that there is a necessary connection between law and morality and what it means to deny this necessary connection.

4- Ambiguities in statements about the connection between law and morality

As I said earlier, understanding the debate in terms of the connection between law and morality seems to provide a clear way of differentiating natural law philosophers and legal positivists. But, I show, a closer examination reveals more ambiguity than one might initially expect. In fact, on closer examination, it becomes unclear just who is a natural law philosopher and who is a legal positivist. I presented that these ambiguities reveal the need to consider some more fundamental questions about the nature of philosophy and even the nature of morality.

Consider what it means to say law is connected to morality. In so doing does one make a claim about actual laws and legal systems or about the definition of law itself?[15] In the first case, an "object-level" contention about the moral qualities of particular laws or legal systems would be made. Questions about the neutrality of legal practitioners may be at issue. For example, do or must judges appeal to moral principles in their interpretations or applications of law? Questions about the criteria that legal practitioners use for identifying, interpreting and applying the law may be relevant here. Questions about whether there is or is not an "internal morality" necessarily found in every legal system may also be at issue. In the second case, a "meta-level" issue about the nature, concept or definition of law is involved. In this case, questions about the neutrality of legal philosophers, and not legal practitioners, may be at issue. For example, the question m might be whether philosophers appeal or should appeal to morality in providing an analysis of the nature of law. In both cases, there is a second ambiguity in the meaning of the phrase "appeal to". Is the appeal made by a committed participant (one who accepts or endorses the principles appealed to and is appealing to the principles in order to justify his or her interpretation) or is the appeal made by an outside observer of the practice (who simply describes the principles without accepting or endorsing them)?[16]

[15] In The Concept of Law. Hart explicitly acknowledges that that there are ambiguities in the statement that there is a necessary connection between law and morality.

[16] Klaus Fuber makes this important distinction between "object-level" contentions and "meta-level" issues. See "Farewell to Legal Positivism: The Separation Thesis Unravelling." in The Autonomy of law: essay on Legal Positivism. Edited by Robert P.George. (Oxford: Clarendon Press, 1996), 119-162.

What is at stake in many of these issues is a question that is often neglected in contemporary philosophy of law; namely, what should we as philosophers of law be doing? Is it our job simply to represent how actual laws and legal practice work, and see whether particular laws 'connect' with morality or not? There are two problems with viewing the contemporary debate about the connection between law and morality as an object-level debate. First, if philosophy of law is primarily concerned with particular laws in existing legal systems, then philosophy of law is more narrowly descriptive than it purports to be. Although philosophers such as Hart argue that their account is descriptive and, to some extent, sociological, they also argue that their account is in some sense general and conceptually necessary. But if they are primarily concerned with making
'object-level' statements about actual laws, then it seems that their conclusions about the connection between law and morality would have the character of an inductive generalization instead of being conceptually necessary. But there is a second problem with viewing the contemporary debate about the connection between law and morality as an object-level debate. If I was right in suggesting that natural law philosophers do not deny the existence and legal validity of un just laws, then it would seem that both contemporary legal positivists and natural law philosophers would have to conclude that there is, at most, only a contingent connection between particular laws and morality. So when a contemporary natural law philosopher is claiming that there is a necessary connection between law and morality, he or she must be making a meta-level contention about law. Thus, if there is an actual point of dispute between natural law philosophers and legal positivists then it must be a dispute involving meta-level contentions about the law.

Conclusion

In this article, I accomplished four things. First, I characterized contemporary philosophy of law in terms of some shared, underlying assumptions about the nature of philosophy and legal theory. It will be shown that contemporary philosophers of law assume that a philosophical account of law should be general (and thus they aim to produce general accounts of law). It will also be shown that they assume (and in some cases argue) that a theory of law must take adequate account of the normativity of law. They also generally assume that their own philosophical activities are governed by norms, although they may disagree about what norms do or should govern legal philosophy. Finally, contemporary legal theorists assume that a philosophical understanding of law can best be achieved by attempting to bracket-off metaphysical issues and focusing instead on the analysis of concepts.

Second, I shown that because of these shared assumptions about the nature of philosophy, the accounts of law given by contemporary legal philosophers can be assessed in a similar way. As will be exposed, contemporary accounts of law can be assessed internally (by showing whether their conclusions do, in fact, follow from their analyses of concepts) and externally (by showing whether their accounts of law are valuable in furthering theoretical inquiry and moral deliberation).

Third, I illustrated these two points by examining and assessing accounts of law given by some contemporary legal philosophers. What emerges from this examination and assessment of particular contemporary legal philosophers is a more elaborate account of the assumptions which underlie contemporary legal philosophy (in particular, two additional assumptions about the nature of conceptual analysis emerge) and, with this, a

more general critique of contemporary philosophy of law in general. It would be shown that because of some shared assumptions about the nature of conceptual analysis (and thus some shared ideas about how accounts of law should be assessed), contemporary philosophers of law cannot achieve what they aim to do; that is, they cannot produce general accounts of law which are theoretically valuable.

Fourth, and finally, I shown that there are alternatives to the way in which philosophy of law is currently done. In the conclusion, I examined two alternatives which are based on challenges to some of the main assumptions which underlie contemporary philosophy of law. I demonstrated that only one of these alternatives holds promise for providing a general account of law which is theoretically valuable.

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