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Book Reviews

Announcements
Adjudication, Validity, and Theories of Law
John Bogart

Introduction

Although Positivism and Natural Law theories seem to be mutually exclusive theories regarding the law, one might be able to salvage the attractive features of both theories by confirming each theory to a different area of judicial life. The most promising line of demarcation is to confine Positivism to theories of validity, and to confine Natural Law to theories of adjudication.¹ This strategy has been very ably outlined in a paper by David Brink,² which I shall use as the springboard for this essay.

The reconciliation strategy relies on a separation of the spheres of application for Positivism and Natural Law. Positivism is to provide the theory of legal validity, and Natural Law is to provide the theory of legal adjudication. So confined, the theories will not clash, yet the apparent important truths of each are preserved. This possibility of reconciliation, thus, depends in part on the cogency of the distinction between theory of validity and theory of adjudication within law.

Although the strategy is attractive, it is far from clear that it can prevail. I shall advance two lines of argument against it. One line attacks both the particular formulation offered by Brink, as well as the general soundness of the strategy. The other line of argument urges that accepting the distinction between theories of validity and of adjudication actually demonstrates the strength of the Positivist approach to law.

Theories of Validity

The reconciliation of Positivism and Natural Law cannot be pursued unless there is a way of providing each a separate domain of application. The most persuasive way of demarcating these spheres is by distinguishing legal validity from legal adjudication. This is a natural distinction to make, and one of some importance.

Theories of legal validity concern the existence conditions for valid law, for legal systems, and consequently for the criteria of applicability of legal systems. A theory of legal validity explains what the law is. It indicates the conditions which determine when there exists a valid legal norm. It distinguishes legal norms from other norms, in particular marking out the conditions which make orders, pronouncements, directives, etc., into legitimate claims of legal authority. A theory of validity does more than explain what makes a directive into a law. It must also explain the existence and bounds of legal systems. Individual laws do not, after all, exist in isolation. A theory of validity will certainly have to explain the relations among laws and so indicate the nature and scope of various legal systems. It will provide the criteria for determining which, if any, legal system applies to a concrete situation, dispute, etc., and set the limits of legal authority within the system.

¹ I owe thanks to Carola Monroe and Richard Bronaugh for the helpful comments on earlier versions of this work.
² 1. The strategy offers itself as a plausible reconstruction of some significant parts of Ronald Dworkin's work. It is also a strategy I have encountered several times among graduate students.
² David Brink, "Legal Positivism and Natural Law Reconsidered" (1985), 6 Monist 364.
It is a part of this complex effort that leads to the requirement that theories of validity also explain the criteria for applicability of a legal system, or the set of laws within a legal system. This requirement on the adequacy of a theory of validity may be misunderstood and supposed stronger than in fact it is. To require a theory of validity to determine the applicability of a legal system is not to require that it provide the means for settling, for a given dispute, the question of which, if any, particular legal norms are to be relied upon to decide the case. What validity theories are required to solve, for a given dispute, is the question of the applicable legal system, or perhaps more stringently, the general set of laws within a legal system that apply to the case. Theories of validity need not solve conflicts of law (as jurisdictional questions are often termed), nor need they determine exactly which laws properly decide a given dispute.

It is important to emphasize two things. First, theories of validity need not entail that there is a unique legal system that applies to a given dispute. There may well be several independent legal systems with legitimate, even valid, claims over a given case. This is perhaps unusual, but nonetheless perfectly acceptable. Second, it is a matter of convenience to speak here, and elsewhere in this essay, of disputes and cases. Law is not only about disputes or cases before courts.

A theory of validity, then, defines or delimits the content (though not the substantive results) of a legal system. A legal system will often be a fairly complex system of norms. Schematically, we may think of the system as composed of various sorts of norms. Some issue from authoritative sources. These have been characterized as primary rules and first-order standards. In addition, there will usually be rules of hierarchy and a rule determining the sources which may issue first-order standards. These norms are referred to as secondary rules or rules of recognition. Finally, we may think of a third sort of norm, authoritative rules of application or standards of interpretation. These are three schematic categories, and we must be careful not to lay too great a weight on the distinctions or their characterization. Legal systems are obviously complex, and the functions and nature of constituent elements are multiplex, and the system may fulfill different roles at different moments. Indeed, identification of even the rule of recognition is much harder than the schematic presentation here would indicate.

Theories of Adjudication

The theory of adjudication has a scope different from that of the theory of validity. A theory of legal adjudication — here, judicial adjudication — is a theory regarding duties involved in the resolution of cases before court. It is not a general theory of legal reasoning, which involves a great deal more than what judges do in deciding cases. But, a theory of judicial adjudication involves more than what is in dispute in this paper. The present focus is on the existence and nature of a particular duty, namely, the duty of judges to apply the law. The theory of adjudication, as the locus of the reconciliation strategy for Legal Positivism and Natural Law, should either affirm such a duty (in which case Legal Positivism may do without Natural Law and no reconciliation is effected) or deny it (in which case Natural Law is assured an important place in the general theory of law and reconciliation is effected).  

3. Again, this is a matter, I think, of the theory of validity determining the scope of a legal system and some subset of laws within the system. The scope of an individual law is a problem left to the theory of legal reasoning, which is properly part of the theory of adjudication.
Theories of Law

I would include under the theory of adjudication such quasi-judicial norms or standards as provide explanatory justifications of the legal norms and standards delineated through the theory of validity. Thus, these justifications offered for decisions (where they are not already legal norms under the theory of validity) are not part of valid law, although they nevertheless may properly govern judicial reasoning. That a man not profit from his crime is not law in the United States, although it may weigh heavily in some instances of judicial reasoning.\(^4\) It is, rather, a tool of interpretation. The problems of legal interpretation are not problems of legal validity, for they persist whatever the theory of validity. And problems of interpretation are at the heart of controversial judicial decision-making. However this may work out in the end, what we are concerned with here is judicial decision-making, with judicial adjudication. As we shall see, that is something worth emphasizing.

Brink’s Theory

I have presented the difference between theories of validity and theories of adjudication in a way somewhat different from the way this distinction was drawn by Brink. There are two crucial differences which need to be discussed. The first concerns the relative scopes of the theory of validity and the theory of adjudication. Brink described the theory of validity in an expansive fashion, by including within the theory of validity what he termed “quasi-justifications” of legal standards. Quasi-justifications are “second-order legal standards which underlie or provide the rationale for the legal system’s first-order legal standards.”\(^5\) These include, for example, the principles that there is no liability without fault, and that a man may not profit from his crime. The second important difference lies in the treatment of the criteria for determining the result of particular cases.\(^6\)

“A theory of legal validity should also provide criteria for determining what the law requires for any justiciable controversy.”\(^7\) What is left for the theory of adjudication is the explanation of “how judges should decide cases.”\(^8\)\(^9\)\(^10\)

These are both matters which I have placed within the purview of the theory of adjudication. The differences are important because of how they frame the possible nature of adjudicatory duty. If we take quasi-justification as part of the law, to be identified by

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5. More precisely, it is a part of the law in only some jurisdictions. It is, e.g., a part of the California Civil Code. If it is uncontroversially part of the law of New York, then the criminal forfeiture statutes would have been obsolete. I cannot see that they were. The same may be said of federal law. Principles of interpretation need not, but may, be part of the law. The California Civil Code, for example, contains a number of principles of interpretation. (E.g., §382: “For every wrong there is a remedy.”) The point is that not all that judges write or say, nor all that they rely on in making decisions, is part of the law.

6. Brink supra n. 2 at 367.
7. Brink id. at 368.
8. Brink id. at 369.
9. Brink id. at 369.
10. Brink’s discussion plainly relies on a clear account of “justiciable controversy”. This seems to mean that the theory of validity, by which Brink determines justiciable controversies, provides the criteria for determining the outcome of the case. The theory of validity then determines everything there is for a theory of law to determine about the law. I discuss this below. Additionally, the idea that it is in any way easy to determine what a justiciable case is, is surprising. There is a large set of very difficult and important problems buried in the phrase “justiciable case”. To name just one, rules of standing are hardly mechanical.
the theory of validity, then policy considerations which underlie particular legislative acts are part of the law, as well as are the various pronouncements of judges. Indeed, as described by Brink, these standards include not only the reasons for introduction of legislation, but also social and political functions. There are several reasons to resist his inclusion of such matters within the domain of the theory of validity. It would make hopeless the project of developing criteria for determining what the law is. Reasons for legislation are often not only multiplex, but, as a set, incoherent and inconsistent. This is further aggravated by the fact that the justification for retaining existing legislation changes over time even where there is no change in the legislative text. The justifications for judicial holdings suffer from related problems. The import of particular cases changes, and so too the understanding of what justifies the holdings — a topic of some importance in common law jurisdictions. Further, the sense in which a social or political function is part of (an element of) the law (is the law) is at best obscure.

Turning from functions back to rationales, there are more problems — what rationales? Whatever we may say about intentions or motives relative to law, I do not see that the underlying theories of legislators (or judges) come to be law because they are connected to some statute. Consider some cases. Jim Crow laws surely disadvantaged blacks, and reflected the view (had as their rationale) that blacks were, e.g., intellectually inferior to whites. But was it the law that blacks were intellectually inferior? If the rationale for the U.S. Constitution was belief in a Lockean contractarianism, does it follow that such contractarianism is the law of the land? That idea seems to be plainly incorrect. Notice as well that by Brink’s characterization, theories of science and logic become law by being used in justification of statutes. In short, the inclusion of second-order legal standards as characterized by Brink renders the law a mire.

The criteria for determining what the law requires in any justiciable case are, I believe, properly part of the theory of adjudication. Indeed, they are at the heart of such a theory. Assume that the theory of validity, provides criteria which determine what the law requires for any justiciable case. By providing those criteria, the theory of validity effectively provides the means for determining what the law requires in the concrete case. The theory of validity, by assumption, establishes the extent of legal duty in any justiciable case. Thus, in the dispute before the court, application of the theory of validity yields the full extent of legal requirements for the case. Under the present assumption, then, the theory of adjudication consists solely of the solution to the question of whether or not to apply the law. The theory of adjudication is thus reduced to the theoretical problem of the obligation to obey the law. Theory of adjudication is therefore a theory of authority.

Authority and obedience to law are no doubt extremely important topics in the philosophy of law and in political and moral philosophy. But is adjudication theory properly understood as theory of authority or obligation to obey the law? If so, it is at least very misleading nomenclature. But more important, it is wrong as to the nature of adjudication, or the theory of adjudication. Adjudication is concerned with resolution of conflict. A theory of judicial adjudication is a theory about how disputes before courts are properly resolved. Brink assumes an incredible degree of transparency for legal standards. Even adopting, as we ought not, his account of the theory of validity, he has given us no explanation of how cases are to be decided. Many ordinary cases, after all, require genuine adjudication. There is a dispute over what the law requires in the case. That fact is not addressed by Brink’s theory of validity or his theory of adjudication. There are insufficient
tools in Brink’s theory for an adequate theory of adjudication. There is only a standard of moral obligation for application of the law. That is hardly sufficient to yield decisions in cases requiring adjudication.

I have dwelled on these differences because, as I said above, they affect the nature of the judicial adjudicatory duty, and that duty is crucial to the strategy of reconciling Positivism and Natural Law. Under the scheme I have presented, there remains a theoretical controversy over the nature of any judicial duties of adjudication. We may ask whether or not there is a legal duty to apply the law on the part of judges acting within their institutional roles. We may ask a second, different, question, whether the judicial duty is conclusive, that is, does it override all other normative claims for the judge? These are plainly distinct and independent questions. Both are questions relevant to the philosophy of law.

The first question is properly addressed under a theory of adjudication. The duty, if it exists, determines (in part) what it is a judge must do acting as a judge; that is, it determines (in part) what is required for a judge acting as such to resolve a controversy before the court. The second question addresses a more general question. It is directed at whether the duties of law preclude (or pre-empt) consideration of all extra-legal normative claims, whatever their source.

In contrast, under Brink’s characterization of the respective domains of theory of validity and theory of adjudication, the theory of adjudication addresses only the second question. Brink’s theory of adjudication is a general theory applied to a case which happens as a matter of fact to come under the law; it is not a theory of judicial adjudication. The theory of validity, under Brink’s scheme, provides a determination of both the content of a legal system and what the law requires in a given case. All that is left for the theory of adjudication is the question of whether to apply the law (the second question). That question is a general one for moral and political philosophy as applied to particular cases at law. Brink’s theory, therefore, is a theory of moral adjudication, and not a theory of legal adjudication.

The Reconciliation Project

We are now in a position to evaluate the reconciliation strategy advanced by Brink, a strategy, I would emphasize, that seems quite promising. Assume, as we have, that the theory of validity is a positivist theory. The decisive question for the reconciliation project is the nature, if any, of judicial duty. The issue at the heart of the reconciliation project is whether there is a legal duty on the part of judges to decide cases (only) by applying valid law.11 If the answer here is that there is no overriding or general duty of this kind, then there is freedom or room for a Natural Law theory of adjudication, joined with a Positivist theory of validity. On the other hand, if there is such a duty, then, given the Positivist Theory of validity, it is impossible that a Natural Law theory of adjudication could be joined with the theory of validity.

If the theory of validity is positivist, then whatever legal duties exist are completely defined under that theory. Insofar as the judicial office is itself defined by the legal system, the scope of the office, its duties, rights, et al., are legal duties, etc. However, it does not follow that the valid legal duties exhaust the duties of judges. That would be so only if the legal

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11 Valid law is determined by the theory of validity.
norms were such as to pre-empt and exclude all other norms, a position there is little reason to accept.12 Although legal norms may or may not allow for the claims of other norms, that does not determine the existence or force of those other norms. In other words, legal or judicial duties do not preclude moral duties of a different, and even inconsistent, kind.

A Natural Law theory of adjudication will not successfully be joined with a Positivist theory of validity unless there is a significant judicial duty to ignore the law, based on the moral content of the relevant law independently of validity. That is a way of saying that the Natural Law theory of adjudication requires a duty of significant moral satisfaction about the content of judicial decisions and not merely with the validity of the law.13 The duty here is not, however, a general duty; it is a judicial duty. The duty is derived from, and is an integral part of, the legal system governing the decision in question. There may well be a more general moral duty to seek to mold the law (and other social institutions) to the contours of satisfactory moral or political theory. That is a duty whose scope is much wider than law, applying to all within the society. That would be a duty, if it is a duty, that applies just as much to prosecutors, police, and other institutional authorities as it would to judges. There is little about the nature of such a general moral duty that is peculiar to the philosophy of law. The conflict of law and morality is an honored topic in the philosophy of law. But that conflict is not at the heart of judicial adjudication, although it certainly has an effect on judicial adjudication. We must distinguish, then, judicial duties with respect to decision-making from other separate duties with respect to decision-making. The former is an issue special to the philosophy of law.

The Natural Law theory of adjudication requires that there be a judicial duty to assure that every decision meets a test of moral satisfaction or adequacy. By assumption, the theory of validity is Positivist, so the extent of law is defined by Positivist theory of validity. Judicial duties are part of the law, and hence determined by the theory of validity. Insofar as there is a judicial duty to decide cases, then, the duty is a legal duty. The moral test required by Natural Law must then be found by application of the Positivist theory of validity. But that makes the suggestion of a Natural Law judicial duty of moral adequacy in decisions otiose.

This may be seen in the following way. Assume a Positivist theory of validity as applied to the United States Constitution. It is clear that Constitutional Law cannot avoid reliance on substantive moral concepts (this follows from the language of the Constitution).14 A Positivist theory then validates moral standards without self-contradiction when the moral concepts are built into the law, directly or indirectly. This possibility, which depends on the actual content of the law as determined by the theory of validity, makes the Natural Law theory of adjudication otiose. The moral content is applicable only contingently and as determined by the Positivist theory of validity.

Brink, to the contrary, argues that there is a judicial duty to decide cases in such a way that they meet significant moral standards. Brink’s conclusion relies, however,

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12. The view rejected involves a general claim of normative pre-emption. It should not be confused with the claim that within the law non-legal norms yield to legal norms. The narrower claim is a plausible implication of legal authority.

13. Brink agrees. See Brink supra n. 2 at 364, 365.

14. The prohibition of ‘cruel and unusual punishment’ (Eighth Amendment) on its face involves moral concepts. Cruelty is a moral concept in just the way kindness is. The complexity or ‘thickness’ as it is sometimes termed, of a concept is not reason to doubt its status as a moral concept. Along a somewhat different dimension, the Due Process Clause of the Fourteenth Amendment also directs interpreters to moral and political analyses. The point is not that these are ‘purely’ moral concepts, concepts whose explication proceeds with no reference to extra-moral theory. Rather, whatever other factors are necessary to their explication (e.g., history), moral theory is both necessary and central to the explications.
on an examination of a more general question. The theory of adjudication concerns the proper decision to be rendered in a given case. It concerns the substance of judicial duty with respect to decision, and crucially, concerns whether there is a judicial duty to apply the law in deciding legal cases. This is the way I have framed the problem, and Brink does the same, at least initially. Yet when the argument comes, it is directed at a distinctly different issue, namely, whether "judges have an all-things-considered obligation" to apply the law in deciding cases. Generally speaking, Brink discusses arguments regarding general obligations to obey the law. It should be quite clear, however, that the existence of an all-things-considered duty is not sufficient to reconcile Natural Law and Positivism. Such a duty is, after all, a general moral duty, one that is not tied in any special fashion to judicial offices. It should be equally plain that there may always be moral grounds to seek, through available means, to alter or circumvent the law. Judges have more than the general obligation of everyone to obey the law. There are special institutional duties, and these must be attended to. If there is a special institutional duty, it would seem to show, directly and fully, that the Positivist theory of adjudication follows from the Positivist theory of validity. The difficulty for the strategy of reconciling Natural Law and Positivism is not one of placing philosophy of law within a sphere that also includes moral and political theory. It is not a matter of determining general normative pre-eminence. It is much narrower. The difficulty is, given a Positivist theory of validity, how it might be possible to free judicial duties from control by the moral content of law. That problem is not solved by consideration of general theories of adjudication, or of all-things-considered moral duties.

The mistake in Brink's development of the strategy lies in his characterization of the respective scopes of the theories of validity and of adjudication. He has provided an overly expansive scope for the theory of validity such that there is nothing left for a peculiar judicial theory of adjudication. The strategy seems to succeed because it presents, in new dress, a point which is not at all controversial, namely, that law is not always all that matters (even to a judge).

The dispute between Positivist and Natural Law theories of legal adjudication must be a dispute about judicial reasoning (at least in part). The strategy of reconciliation developed by Brink fails because, like many others, Brink does not notice that Positivism allows us to invoke — but validated within the framework of a Positivist theory — substantive moral standards for use in a legal system. The Positivist theory then has space within it to accommodate the moral concerns motivating the Natural Lawyer, at least in a significant part. But it does so in a way which should not be comforting to Natural Law adherents. The apparent Natural Law elements are brought to bear wholly at the direction of a Positivist theory. But a reconciliation must not defang Natural Law. What occurs here is not reconciliation; it is subordination. Natural Law theories become unnecessary.

There are several lessons to be drawn from these considerations. One is about the power of Legal Positivism. A second is about remaining strategies. If there is hope for reconciliation of Positivist and Natural Law theories, it lies in the theory of legal reasoning, and in the relation between that theory and the theory of validity. (Positivism, of course, is not in

15. Brink supra n. 2 at 364, 369.
16. Brink id. at 377.
17. Brink id. at 377-381.
conflict with morality as such, for once we accept gaps in the law there is no difficulty in supposing that judges ought to decide there as morality requires. But that would be a moral, and not a legal duty.) There is hope in legal reasoning, and danger; it is far from clear that theories of legal reasoning are divisible into Positivist and Natural Law camps. A third lesson that may be drawn is that we would do well to be critical of, or more hesitant to accept, the assumption of unity among normative systems applicable to social life. Conflict is pervasive and more enduring than some would think.