

## According to law

*Adam Perry*

### 1

Legal discourse consists largely of legal claims. These are claims that there is a legal obligation, legal right, legal permission, or other legal incident. What is the meaning of *legal obligation*, *legal right*, etc in legal claims? Philosophers of law typically take *obligation*, *right*, etc to have the same meanings they do in moral discourse. They disagree sharply, however, about the meaning of *legal*.

One view is that *legal* is an adjective indicating the ground of a moral incident. That ground is an element of legal practice, such as a statute, judicial opinion, or custom (Greenberg 2014; Hershovitz 2015). Call this view *adjectivalism* (Shapiro 2011: 185). Consider:

- (1) There is a legal obligation not to park on double yellow lines.

Legal claims are relativised to the law of some system. This claim, for example, might be made relative to English law. I will leave the relativisations implicit in what follows. If adjectivalism is true, then (1) would mean the same as:

- (2) There is a moral obligation not to park on double yellow lines grounded in legal practice.

Adjectivalism has an important implication. Since grounding operators are factive, there would be a legal obligation, right, etc. only if there is a corresponding moral obligation, right, etc. This implication is unacceptable to legal positivists, who emphasise the possibility of divergence of legal from moral standards (Wodak 2018: 802).

Positivists need an alternative to adjectivalism. One alternative is that *legal* indicates that the rest of the sentence in which it is embedded is put forward as a claim about what is true according to law or from the law's perspective. Call this view *perspectivalism* (Shapiro 2011: 185). (1) would be the same as:

- (3) According to law there is a moral obligation not to park on double yellow lines.

A perspectival operator is *not* factive, so (3) can be true without there being a moral obligation not to park on double yellow lines. Perspectivalism is a natural complement to positivism. And indeed, contemporary positivists are typically perspectivalists (Raz 1990: 175-77; Coleman 2011: 78; Shapiro 2011: 185-91; Gardner 2012: 131). This makes perspectivalism the dominant understanding of legal claims.

Here I set out a new objection to perspectivalism. The objection is that perspectivalism is unable to account for the use of legal claims in logically complex arguments.

## 2

An argument is *mixed* if it includes legal and non-legal claims (cf Vision 1993). For example:

- (4a) All and only persons over 18 have a legal right to vote.  
(4b) A has a legal right to vote.  
(4c) So, A is over 18.

Some steps are legal claims, some steps are not, so this is a mixed argument. The argument is valid. Its premises are, I shall assume, true. The issue is whether the argument remains valid and its premises true on the perspectivalist interpretation.

When we rewrite the argument as the perspectivalist suggests:

- (5a) According to law all and only persons over 18 have a moral right to vote.

(5b) According to law *A* has a moral right to vote.

(5c) So, *A* is over 18.

the argument fails. That some proposition is entailed by what is true according to so-and-so or such-and-such does not guarantee its truth.

This is obvious when we compare an argument with the same structure.

(6a) According to my neighbour all and only those persons who are not visited by angels are visited by demons.

(6b) According to my neighbour I am not visited by angels.

(6c) So, I am visited by demons.

One might say that the neighbour's perspective could be wrong, whereas the legal perspective is necessarily correct. But that is not a reply open to perspectivalists. After all, it is the possibility of legal obligations absent corresponding moral obligations that is supposed to motivate perspectivalism and embarrass adjectivalists. That possibility would not exist were the legal perspective infallible.

The prefix in (5a) takes scope over the whole conditional. That is, the premise is: According to law {a person has a right to vote if and only if that person is over 18}. The premise is *not*: If and only if a person is over 18, then according to law {that person has a right to vote}. This might seem to beg the question against the perspectivalist. If the prefix took scope over only the consequent, then the argument would be valid. However, the legal perspective must include at least the content of general legal norms, that is, the law. As Raz writes, the 'legal point of view (of system *S*) ... consists of the norms of *S*', as well as certain other reasons (Raz 1990: 171; see also Shapiro 2011: 186). It could be a law of some system that all and only persons over 18 have a right to vote. With respect to that system, a claim like (5a) would take scope over the whole conditional.

To be clear, the problem is not limited to arguments that rely, like (5), on *modus tollens*. Nor is it limited to arguments in which the relevant entailment relation is itself the content of a legal norm. Consider:

(7a) All and only persons over 18 have a legal right to vote.

- (7b) All and only persons over 18 have a legal right to marry.
- (7c) Either *A* has a legal right to vote, or *A* has a legal right to marry.
- (7d) So, *A* is over 18.

This argument relies on disjunction elimination. The entailment relation is not explicit and need not be true according to law. Perspectivalists say that this argument can be interpreted as follows:

- (8a) According to law all and only persons over 18 have a moral right to vote.
- (8b) According to law all and only persons over 18 have a moral right to marry.
- (8c) Either according to law *A* has a moral right to vote or according to law *A* has a moral right to marry.
- (8d) So, *A* is over 18.

But plainly this argument is invalid.

In summary: legal claims can figure in mixed arguments. A good account of the meaning of those claims will preserve the validity of those arguments. Perspectivalism fails to do this.

### 3

To avoid this objection, perspectivalists would need to find a way to accommodate the use of legal claims in logically complex arguments. Here's one possibility. When uttered in legal contexts, perhaps sentences like '*A* is over 18' shouldn't be taken at face value. Instead, they should be understood as implicitly prefixed with 'According to law {...}'.

Making the prefix explicit in (5) gives us:

- (5a) According to law all and only persons over 18 have a moral right to vote.

(5b) According to law *A* has a moral right to vote.

(5c\*) So, according to law *A* is over 18.

This argument is reasonable only if the legal perspective is deductively closed. That is, the argument relies on an inference rule like:

*Legal Closure*

If *p* is entailed by *q, r, s, ...*, and according to law each of *q, r, s, ...*, then according to law *p*.

Given Legal Closure, (5c\*) follows from (5a) and (5b).

However, Legal Closure leads to absurd results when it is combined with perspectivalism. Consider:

(10a) According to law *A* is over 18.

(10b) If *A* is over 18, then *A* is morally obligated not to lie.

(10c) According to law *A* is morally obligated not to lie.

Here (10a) tells us that according to law some proposition is true. (10b) tells us that this proposition entails a further proposition, which (10c) tells us is also true according to law. So this inference is licensed by Legal Closure. But this conclusion is, for perspectivalists, the same as:

(11) *A* is legally obligated not to lie.

But (11) could easily be false even if (10a) and (10b) are true. Moreover, deriving a legal obligation based solely on the truth of a moral obligation is incompatible with positivism, and hence with the motivation for perspectivalism.

Things get worse. Suppose that (11) is relativised to English law. In English law, as it happens, lying is permitted. A permission to lie is the absence of an obligation not to lie. So, legal perspectivalists are committed to claiming, relative to English law:

(12) According to law *A* is not morally obligated not to lie.

The perspective of English law is now logically inconsistent. According to English law, A is morally obligated not to lie. And, according to English law, A is not morally obligated not to lie. Given Legal Closure, and the principle of explosion, everything is true according to English law. That includes every moral truth. Again, this is not an implication that positivists can accept.

So, to account for the use of legal claims in mixed arguments, perspectivalists would need to endorse Legal Closure or something like it. But Legal Closure leads to far too many things being true according to law. I see no way to overcome this further problem, so I am inclined to reject perspectivalism, and with it the main way of understanding the core of legal discourse.

#### 4

Adjectivalism, unlike perspectivalism, does not struggle to account for the use of legal claims in logically complex arguments. For example, this is the adjectivalist rendering of (4):

- (13a) All and only persons over 18 have a moral right to vote that is grounded in legal practice.
- (13b) A has a legal right to vote that is grounded in legal practice.
- (13c) So, A is over 18.

This argument is perfectly reasonable.

Should we all be adjectivalists, then? Perspectivalists and adjectivalists alike think that within legal discourse deontic terms like *obligation* and *right* are relativised to morality. But that may be wrong. And if it is wrong, then there will be alternatives to perspectivalism and adjectivalism. For example, *right* and *obligation* could have a single meaning in legal and moral discourse, and *legal* and *moral* modify these terms by indicating the relevant source of normativity (Wodak 2018: 791, 802). Or perhaps *right* and *obligation* have very different meanings in legal and moral discourse (Hart 1982: 127-8). There may be other possibilities. So, while we should *not* be perspectivalists, what we *should* be is an open question.

## **Acknowledgments**

I thank Hasan Dindjer and James Edwards for comments. This is still a draft and some things are still missing, including some citations.

## **Bibliography**

- Coleman, J. 2011. Architecture of Jurisprudence. *Yale Law Journal* 121: 2-80.
- Gardner, J. 2012. *Law as a Leap of Faith*. Oxford: Oxford University Press.
- Green, L. 2002.
- Hart, HLA. 1982. *Essays on Bentham*. Oxford: Oxford University Press.
- Raz, J. 1990. *Practical Reason and Norms*. Princeton: Princeton University Press.
- Shapiro, S. 2011. *Legality*. Cambridge: Harvard University Press.
- Vision, G. 1993. 'Fiction and Fictionalist Reductions'. *Pacific Philosophical Quarterly* 74: 150-174.
- Wodak, D. 2018. What Does 'Legal Obligation' Mean? *Pacific Philosophical Quarterly* 99: 790-816.