Legal Reasoning, the Rule of Law, and Legal Theory: Comments on Gerald Postema, “Positivism and the Separation of the Realists from their Skepticism”

Introduction

In his incisive paper, “Positivism and the Separation of Realists from Their Skepticism” (Postema 2008), Gerald Postema uses ideas about American legal realism, statutory interpretation, and the rule of law to construct (and justify) a common-law view of the nature of law.

Postema reflects on the debate between H. L. A. Hart and Lon Fuller that appeared in the Harvard Law Review in 1958 (Hart 1958, Fuller 1958), focusing on the response H. L. A. Hart gave to the American legal realists. In Hart’s response to the realists, he tried both to respond to the realists’ skepticism, and to ground his own legal theory, a theory which Postema labels “settled meaning legal positivism.” Hart’s strategy, as Postema points out, was to insist that legal (judicial) interpretation must be different when dealing with the core of legal texts, where meaning is certain, compared to interpretations in the penumbra, where the application is uncertain. Postema shows that Hart’s analysis here does not hold up, either on its own terms, or as an attractive view of law’s role (given Hart’s own view of the law’s function in society).

Starting from Hart’s view of law’s role as normative guidance, Postema constructs an intricate and nuanced overview of the various functions of legal rules and the role of reasoned argument and justification within the legal system. The result, Postema argues, is a vision of the law modeled roughly on the operation of common law legal systems, some distance from the view of law embedded in the settled-meaning legal positivism Hart himself advocated.
As will be seen, while Postema’s critique of Hart on legal reasoning is persuasive, questions can be raised about whether or to what extent that critique can then ground a theory of the nature of law, as Postema proposes. In Part I, I review Postema’s analysis and critique of Hart’s response to the realists. In Part II, I evaluate Postema’s efforts to ground a theory of law on an idea, or ideal, of the rule of law.

I. Postema’s Analysis

Postema argues that Hart’s response to the American legal realists was built on certain assumptions about law’s role, and why we ask law to take up this role, and that taking those assumptions seriously would lead to a different view of the nature of law than the one Hart advocates. In particular, Postema claims that focusing on assumptions underlying the ideal of the rule of law and law’s essential normative guidance technique leads to a view of law as “a disciplined practice of public practical reasoning” (Postema 2008, man. at 16) that is closer to the common law view of law\(^1\) than to Hart’s legal positivism.

Postema offers a number of criticisms of Hart’s response to the American legal realists. In Hart’s distinction between the core and the penumbra, he had asserted that a legal norm’s core was where there was a single and settled right answer, while in its penumbra application would be responsive to contextual reasoning, and reference to extralegal standards. (Hart 1958, 607-615) Hart conceded that the penumbra was not devoid of reasoning of a legal sort, as judges

\(^1\) One might wonder if in celebrating the common law conception of (the rule of) law, Postema’s view implies that civil law systems may be lesser forms of legal systems (if they are legal systems at all).
tried to make their decisions in the penumbra more coherent with other legal standards and with the objective of justice. (Hart 1958, 612-14; 1994, 127-28)

Postema offered a series of criticisms of Hart’s analysis of the difference between reasoning in the core and in the penumbra. First, for Hart, core reasoning is clear, and penumbral reasoning comes down to “choice.” (Hart 1994, 127) As Postema points out, “choice” in Hart’s sense (that the text does not state how it is to be applied) is a minimalist, Kantian sense of judgment that applies in the core as well. (Postema 2008, man. at 6-7)

Second, while Hart noted that reasoning in the penumbra is not limitless, but is usually guided by some sense of justice or coherence with other legal standards, he did not sufficiently take into account the implication that penumbral reasoning is thus not mere (arbitrary) choice, but rather reasoned argument, subject to tests of adequacy. (Postema 2008, man. at 7-8)

Hart wanted to separate the way reasoning is done in the core, and the way it is done in the penumbra (urging judges dealing with core matters to avoid the contextual reasoning needed for the penumbra), and appeared to argue that “law” or “legal reasoning” should be confined to reasoning in the core. While Hart defends these assertions on the grounds of clarity and the separation thesis, Postema points out such arguments mostly beg the question. (Postema 2008, man. at 9-10)

Postema offers an alternative justification for Hart’s position, based on Hart’s view that law’s basic task is guiding human behavior through rules. A focus on law’s role in guiding behavior would show the value of rules – at least the core of rules – where meaning is clear and
application predictable. However, as Postema reports, it is insufficient to show that law encompasses only clear meaning. (Postema 2008, man. at 10)

Postema points out that law fulfills its functions – guidance through rules, while protecting against arbitrary exercise of power -- best when it has certain characteristics. For example, its norms must be manifest and publicly accessible, and officials’ claims that their actions are warranted must be subject to challenge by public argument in a public forum. (Postema 2008, man. at 15-16) For Postema, the rule of law means that government is accountable to citizens, in a way that requires public, reasoned justification for its actions, and not just when the rule is settled. This all points, Postema argues, to a common-law conception of law, in contrast with Hart’s settled-meaning legal positivism.

II. Legal Reasoning, the Rule of Law, and Theories of Law

One way of understanding Postema’s paper is as an effort to derive a theory of law from an analysis of legal reasoning. Certainly, much of the paper is given over to a careful critique of Hart’s response to the American legal realists regarding how judges should reason, and how we should characterize judicial reasoning, and Postema’s own views about law build from these discussions of how judges should decide cases.

This might lead one to wonder: What is the relationship of a theory of legal reasoning and a theory of law? Can one ascertain how to interpret legal texts from one’s theory about the nature of law, or at least exclude certain approaches one might otherwise consider? And could it work in the other direction (as, at times it seems to do, in Postema’s paper), such that one might be able to work towards a theory of the nature of law from a theory of legal interpretation? This inquiry, in turn, raises a different question: is a theory of legal reasoning a theory of the best
approach to legal reasoning, or the determination of some form of reasoning that is universal, distinctive, or essential for, or among, legal systems? Elsewhere in the literature, one can find what appear to be general theories of legal interpretation: e.g., Larry Alexander’s intentionalist theory of legal interpretation (e.g., Alexander & Prakash 2004), or the general theory of (all) interpretation one finds in the work of Ronald Dworkin (1986, 49-68), and in the recent work of Stanley Fish (2008). A claim that some approach to legal reasoning was “necessary” might easily be connected to assertions about the “necessary” features of law, though this would be a hard claim to make out.²

Hart devoted only a small portion of his jurisprudential writing to discussing the proper interpretation of statutes and other legal texts. He clearly did not see legal interpretation as central to his theory of (the nature of) law. The topic appears to come up in his exchange with Fuller, only because Hart perceives a challenge in the American legal realists’ discussion of legal interpretation, a possible basis for arguing against a separation of “law as it is” from “law as it ought to be.” (Hart 1958, 606, 612-13) Those who have followed Hart (e.g., Joseph Raz³ and Jules Coleman (e.g., 2001)), elaborating Hart’s form of legal positivism in different ways, have, if anything, had even less to say about statutory interpretation. Within legal positivism generally, one might say, the unstated assumption is that a (legal positivist) theory of law has few if any implications for legal interpretation, and that there is little reason to consult one’s theory of legal interpretation before constructing a theory of law.

² One more complication: the exchange between Hart and Fuller on which Postema focused deals primarily with statutory interpretation – how to apply legal rules like “no vehicles in the park.” Hart does assert both that the problem of core and penumbra is like the direction from example one finds in precedential reasoning (Hart 1994, 124-26), and that the “penumbra of uncertainty must surround all legal rules” (Hart 1958, 607). Still, one should not too quickly move from the particular to the general: it is not hard to imagine that the issues of common law reasoning and constitutional interpretation might differ in significant ways from those applying simple statutes.

³ While Raz has written on the topic of legal interpretation, see Raz 1996b; 1998, he has not argued that his views on legal interpretation are entailed by or closely tied to his theory about the nature of law.
There is one (non-legal positivist) theorist who takes a different view. Ronald Dworkin famously argues that there is no sharp line between one’s theory of law and a theory of how to decide particular legal disputes. (e.g., Dworkin 1986, 90) However, in this assertion he is taking a position that seems counter-intuitive to many theorists (and not just legal positivists), who would urge a sharper separation between one’s general (or conceptual) theory of (all) law, and a theory regarding the best operation of or within a particular legal system.

In any event, the question about connecting theories of legal reasoning and theories of law may, in the end, not be apt for evaluating Postema’s argument. It might be more accurate (as well as more charitable) to read Postema’s article not as grounding his view of the nature of law (merely) on a theory of legal interpretation. Rather, one should see the discussion of interpretation as being used only as a path to a discussion of (an ideal of) the rule of law: that law should function as a constraint on arbitrary official power, requiring reasoned justification by government officials, and emphasizing reciprocity in the relationship of government and citizens. (As a proper honor to the Hart-Fuller debate, Postema throughout the article echoes many themes raised by Fuller, themes found both in the debate with Hart (Fuller 1958) and from Fuller’s later work. (e.g., Fuller 1969))

Postema is by no means alone in building a legal theory on the ideal to which law does or should strive; he mentions the parallels between his work and Fuller’s, and one could also list more recent work by Simmonds (2007), Alexy (2002), and perhaps also MacCormick (2007). These approaches have their own problems (e.g., Kramer 1998; Raz 2007); additionally, in these other cases (Fuller prominently excepted), the ideal in question is the moral-political ideal of justice or moral correctness. Postema’s ideal sounds more of the sort of dialogical ideal of
Jürgen Habermas (e.g., 1996). Postema focuses on the rule of law, maximally understood, with the implicit hope, perhaps, that sufficient procedural safeguards, publicity, transparency, and the need for justification, will lead to fair rules and just outcomes.

At other times, Postema’s argument for his approach to legal theory is not couched in terms of ideals. For example, he argues against both Hart and some who have followed Hart (most prominently, Raz (e.g., 1979; 1994)) that if we focus on law’s guidance function, it makes no sense to call “law” what judges do deciding cases within the core, and “not law” or “extra-legal” judges’ decisions in the penumbra. For citizens seeking guidance will focus on judicial decisions, and will not make (even if they were competent to make) distinctions between decisions in the core and those in the penumbra. (Postema 2008, man. at 11-12)

Further, Postema insists at one point that his argument is not based on any sort of ideal view of law, but rather showing only what is required for even “minimally effective normative guidance.” (Postema 2008, man. at 19) However, earlier, when Postema distinguishes “rule of law” with “rule with law” (Postema 2008, man. at 13-14) -- the latter being cases of tyrants using legal rules (and their veneer of legitimacy) solely to express their power, rather than to constrain it -- the implication is that such “rule with law” is still a kind of law, and still able to guide behavior, even if the guidance is neither moral nor the most efficacious.

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4 In the history of the concept of “the rule of law,” there have been quite minimal/procedural conceptions and, in competition, more substantial and substantive versions. (Tamanaha 2004) Friedrich Hayek’s writings exemplify the latter. Postema’s conception of the rule of law is clearly substantial, if not especially substantive.

5 This critique is reminiscent of the exchange between Raz and Dworkin, where Raz wanted to distinguish legal standards judges have an obligation to apply in deciding disputes and extra-legal standards that judges might nonetheless be obligated to apply, while Dworkin saw no reason not to equate “law” with whatever norms judges were obligated to apply. (Raz 1984; Dworkin 1984, 261-62)
Even if Postema’s theory of law were best characterized as being based on an ideal of (the rule of) law, is there anything wrong with building one’s theory of law around an ideal? Teleological theories – theories equating essence with that to which an entity aspires – go back at least to Aristotle. And, in the alternative, if Postema’s theory were best understood as being based on some view of the function of law, functional theories are no stranger to philosophy generally, or to jurisprudence in particular. (e.g., Moore 1992)

There is certainly no a priori reason for rejecting such approaches, but theorists need to have some justification for choosing one methodological alternative over others. (Though it is likely unfair to blame Postema for not considering all the methodological issues, when space is limited, and his article was properly focused on Hart’s critique of the American legal realists.) To consider the merits of Postema’s conclusions regarding theories of law, one must consider, at least briefly, foundational methodological questions, regarding what theories about the nature of law are, and what they are meant to do.

Hart’s great work is called The Concept of Law (Hart 1994), and those who have later explored the methodological aspects of legal positivism have affirmed that what is theories of law purport to be are analyses of “the concept of law” – or “our concept of law” (e.g., Raz 1996a; 2005; Coleman 2001, 173-74). Under this approach, theories of the nature of law are explorations of the necessary and sufficient conditions for the application of the concept “law” (and the related concept, “legal”). This approach raised its own set of concerns (see Bix 2007), but it fits fairly comfortably with what philosophy and philosophical theories normally do.

Certainly, there is room for other approaches to theories about the nature of law: whether search for the Platonic essence of “law” or interpretation of our current practices (e.g., Dworkin 1986) or the placement of the social practice within a more general moral/political/theological
investigation on how we should live our lives (e.g., Finnis 1980). The point is only that the methodological foundation, the methodological justification, must be established before the theory is launched. One need not entirely exclude the possibility of a theory of law based on law’s ideal or law’s functions, in stating that there might be an initial suspicion, or risk, with such approaches that a theory of best practices is being conflated with a theory of the nature of law.

Conclusion

Postema has shown, through characteristically clear and sharp analysis, that legal interpretation is not as Hart portrayed it during the Harvard Law Review debate with Fuller: it is not a sharp division between unreflective application (in the core) and arbitrary choice (in the penumbra). As Postema’s analysis displays, this is neither a good description of what actually occurs, nor an attractive prescription for what should occur.

Postema offers a richer and more attractive picture of both interpretation and law generally: one in which there is reciprocity between the government and the governed, where arbitrary government action is curtailed through the requirement of reasoned justification and the availability of judicial (and political) review, and where legal norms and social norms interact in intricate and mutually supportive ways. Postema characterizes all of this as aspects of the rule of

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6 In Stephen Perry’s work (1995, 1996), law’s function(s) play an indirect role. Perry argues that in constructing a theory of law a theorist must make a moral choice between alternative possible functions for law. On this basis, Perry argues, against the legal positivists, there cannot be a morally neutral theory of law. Postema, by contrast, is not so much making claims about law’s function(s), or the need to choose among alternative functions, as accepting Hart’s statement about law’s function, and elaborating an argument from there.

7 There being echoes here of Raz’s complaint against Dworkin, that Dworkin “developed a theory of adjudication and regards it … without further argument as a theory of law.” (Raz 1994, 186-87)
law, and argues that they point to a common-law theory of law, far distant from Hart’s sander
settled-meaning legal positivism.

A harder question regards the appropriateness of moving from a prescription for legal
systems to a theory of law. While there is some precedent for building a theory of law on an
ideal to which law aspires or on assertions about the law’s function(s), these are controversial
methodological approaches that require justification, more justification than Postema was able to
offer in the limited space available after finishing his primary task of evaluating the views of
legal reasoning in the Hart-Fuller debate.

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