

# According to law

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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? Some philosophers of law take ‘obligation’, ‘right’ etc. in legal claims to mean ‘moral obligation’, ‘moral right’ etc. (for example, [Shapiro 2011](#): 191, [Gardner 2012](#): 133, [Hershovitz 2015](#): 1188). They disagree sharply, however, about the meaning of ‘legal’.

One possibility 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 *adjectivalism* the view, first, that in legal claims ‘obligation’ etc. means ‘moral obligation’ etc., and second, that in legal claims ‘legal’ indicates the ground of the moral incident ([Shapiro 2011](#): 185).<sup>1</sup> Consider:

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

Legal claims are relativized, in some sense, to the law of a certain system. This claim, for example, might concern what is true in English law. I will leave the relativizations implicit in what follows. If adjectivalism is correct, 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 moral incidents grounded in legal practice are (obviously) moral incidents, there would be a legal obligation, right etc. only if there is a corresponding moral obligation, right etc. This is unacceptable to legal positivists, who emphasize the possibility of divergence of legal from moral incidents ([Wodak 2018](#): 802).

Positivists need an alternative to adjectivalism. One alternative is that in legal claims ‘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

1 The label ‘adjectivalism’ is from Shapiro but he does not endorse adjectivalism.

natural complement to positivism. John Gardner, for example, says that ‘a legal obligation or right is none other than an obligation or right that exists according to law. ... [W]hen, according to law, there are obligations and rights and so on, law’s claim is that these are *moral* obligations and rights and so on, not merely legal ones’ (2012: 133). Many other leading positivists are also perspectivalists (for example, Raz 1990: 175–77, Coleman 2007: 596–97, Coleman 2011: 78, Shapiro 2011: 185, 279).

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. 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 premisses are, I shall assume, true. The issue is whether the argument remains valid and its premisses 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. (I have benefited here from an analogous objection to some types of fictionalism in Vision 1993.)

The invalidity is obvious when we compare an argument with the same structure:

- (6a) According to my neighbour all and only those who are lizards disguised as humans are morally permitted to lie.
- (6b) According to my neighbour I am morally permitted to lie.
- (6c) So, I am a lizard disguised as a human.

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 adjectivalism. That possibility would not exist were the legal perspective infallible.

The prefix in (5a) takes scope over the whole conditional. That is, the premiss is: according to law (a person has a right to vote if and only if that person is over 18). The premiss 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, in a system relative to which (5a) is true (e.g. Canada's), it is not just the consequent that is part of the law. Rather, the whole conditional is part of the law. The law is not that persons have a right to vote; it is that certain persons have a right to vote, namely, those over 18. What is true from the legal perspective is 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: 280). So, what is true from the legal perspective is the whole conditional.<sup>2</sup>

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. To be clear, I do not claim that all good legal arguments are deductive arguments. Nor do I claim that perspectivalism fails to preserve the validity of every good legal argument, deductive or otherwise. My claim is that there are some deductively valid legal arguments (a point

2 I thank an anonymous referee for pushing me to clarify this point.

accepted by at least some perspectivalists; see, e.g., [Gardner 2012](#): 186), some of which perspectivalism renders invalid.

3. To avoid this objection, perspectivalists would need to find a way to accommodate the use of legal claims in logically complex arguments. Here is one possibility. When uttered in legal contexts, perhaps sentences like ‘*A* is over 18’ should not be taken at face value. Instead, they should be understood as implicitly prefixed with ‘According to law (...)’. (For a similar suggestion in respect of non-legal premisses in mixed arguments, see [Marmor 2018](#): 480.)

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 a competent adult.
- (10b) If *A* is a competent adult, then *A* has a moral obligation to keep her promises.
- (10c) According to law *A* has a moral obligation to keep her promises.

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* has a legal obligation to keep her promises.

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 relativized to English law. In English law, as it happens, there is no obligation to keep one’s promises. So, legal perspectivalists are committed to claiming, relative to English law:

- (12) According to law it is not the case that *A* has a moral obligation to keep her promises.

The perspective of English law is now logically inconsistent. According to English law, *A* has a moral obligation to keep her promises. And according to English law, it is not the case that *A* has a moral obligation to keep her promises. 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 realistic 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 relativized to morality. They are both committed to what Daniel Wodak calls the ‘moralized’ view of legal obligation (Wodak 2018: 797, 801). But that view 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 ‘obligation’ and ‘right’ have very different meanings in legal and moral discourse (Hart 1982: 127–28). There may be other possibilities. So, while we should *not* be perspectivalists, what we *should* be is an open question.<sup>3</sup>

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3 I thank Hasan Dindjer, James Edwards and three anonymous reviewers for their comments.

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