RJPN2323351 VOL 0, ISS 0

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JURISPRUDENCE
https://doi.org/10.1080/20403313.2024.2323351

The nature of human practices and the importance of practical reason: why law cannot be a moral practice only

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Scott Hershovitz's *Law is a Moral Practice* is a thought-provoking, engaging and clearly written monograph on the relationship between law and morality. The core thesis is that *because* law rearranges our moral relationships, it is a moral practice. The book is a clear statement of a legal anti-positivist account regarding the nature of law, to which I am fully sympathetic. However, the details and complexity of the relationship between law and morality are not developed and, therefore, the thesis in its full richness is not exploited. I will concentrate on scrutinising Chapter 1 and only tangentially will comment on Chapter 4 of the book. I will advance two criticisms and one comment on Hershovitz's first chapter. The first criticism is that the idea that law is a moral practice because it rearranges our moral relationships tends to be circular, unless a conception of practical reason connected to morality and human practices is advanced. Second, I will problematise the predominance of a backward-looking legal reasoning that focuses on rights and wrongs only. Finally, I explore Bernard Williams diagnosis regarding 'the problem of the morality system' and how his reflections might have implications for Hershovitz's key premises.

1. The threat of circularity or why we cannot discard the ancient philosophical platitude that reason mediates between law and morality

Hershovitz asserts that because certain activities aim to rearrange moral relationships, then there are moral practices.[1] This does not mean, he correctly warns us, that law is good because it is law, or that all laws are moral.[2] Rather, he aims to defend the view that *legal practices are tools for adjusting our moral relationships, and they are typically employed for the purpose of doing so.*[3]

He illustrates his point with the example of parenthood. Parents have authority over their children and this legitimate (moral) authority enables them to discharge their responsibilities, but at the same time, they rearrange the moral relationships of the household, i.e., they establish rights and wrongs. Similarly, the law is a tool that rearranges our moral relationships and in this way, it establish the boundaries, so to speak, of rights and wrongs. Two statements are crucial in this proposal:

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[1]Hershovitz, *Law as a Moral Practice* (Harvard University Press 2023) 16–17.
[2]ibid 18.
[3]ibid.

S1: Activities are practices.
S2: Activities that rearrange moral relationships are moral practices.

Thus, we might say, intuitively, that there are activities like playing chess that are *mere* practices (S1), not moral practices. Hershovitz advances the view that there are other activities that rearrange our moral relationships in terms of rights and wrongs and, precisely because of this, they are moral practices. If someone were to ask, 'what makes "a moral practice" substantially different from simply simple practices (S1)?' one could reply that 'a moral practice is an activity that rearranges a moral relationship'. But from S2 we have learned that activities that rearrange moral relationships are moral practices. We need, therefore, a non-circular definition of 'moral practice'. The question that now arises is 'What is morality?' Hershovitz would need to provide a sound and plausible answer to this question to avoid an air of circularity or emptiness. His answer is as follows, *morality is the part of practical reason that concerns what we owe to each other, that it's the part that deals with rights and wrongs*.[4] This definition seems to be crucial to establish the key demarcation between mere practices (S1) and moral practices, and the missing piece that will explain the distinction between law as a mere tool with no moral aim, and law as having moral aims, i.e., the rearrangement of moral relationships.

Interestingly, Hershovitz does not engage with the idea of practical reason in the book. We all agree that both morality and law are practices, human practices. Arguably, however, what makes them *human* practices is the engagement of our practical reason. They are *human* practices because they are rational practices. Hershovitz states that practices should be understood in a modest way, i.e., a repeated action that 'hangs together', but he also adds that these activities have an aim or goal, e.g., the practice of medicine.[5] There are, however, numerous repeated actions that 'hang together' and also have a goal, e.g., playing a musical instrument, a factory producing a product, a group of people weaving together, drafting a constitution, voting, a political protest. Are they all 'practices' at the same level? Furthermore, so many activities exercised by non-human animals 'hang together' and have a goal or aim, e.g., bees creating their hives, beavers creating their dams, packs of wolves chasing prey and so on. Without a clear explanation of what 'hanging together' towards a goal or end means, we lack clarity on a key concept of Hershovitz's theoretical framework. A regular or repeated action directed towards a goal does not differentiate human practices from the practices of non-human animals.

The assertion that we are beings in the world and that our doings and activities, and the institutions that result from these doings are substantively and qualitatively different from the movements and actions of non-human beings is a philosophical platitude. Thus, constitutions, states, laws, family, universities, corporations and all the doings and activities performed in the context of these institutions differ from hives of bees, beavers' dams, and the 'doings' of packs of wolves, herds of sheep and so on. The differences between the 'doings' of non-human and human beings are multiple, but the starkest difference lies in the fact that we are the kind of creature that needs to 'make sense' of our doings, activities and institutions, and it is through describing and re-describing what we are doing that

[4] ibid 21.
[5] ibid 26.

our own doings, activities and institutions become intelligible to us. At the same time we use the 'making sense' of our doings to move forward, so to speak, and to transform ourselves and our institutions. So far many philosophers and social theorists would agree with this basic view. This is also a key insight of the legal anti-positivist tradition, e.g., John Finnis and Ronald Dworkin. The disagreement starts when we address the following questions: how should we understand this 'making sense' and its effects on our doings and institutions? How minimal or maximal is it or should it be, i.e., do we need a top-down approach because reasons and knowledge play a key role in the 'making sense' of doings? Or, rather, should we start from our social practices and self-understanding within our social practices because values are determined by our social practices, including our language, and we need 'values' to 'make sense' of our doings? Finnis makes practical reason the core of law and Dworkin argues that constructive interpretation as integrity enables us to answer the question 'What is the law?'. They draw on the ancient philosophical platitude that we cannot seek and reach the common good, or what is right or wrong, or what is intelligible or not within a political community *directly*. We need to engage our reasoning capacities, via constructive interpretation, or via reasons for action, or via core basic values to answer the question of what the law is. More importantly, their position is that we cannot answer the question of what the law is except from the first-person deliberative stance. This means that to answer the question 'What is the law?', we first need to answer the question 'What shall I do?'.

Hershovitz's arguments ignore the richness and complexity of these insights at a cost and to the detriment of establishing clear boundaries between moral practices and other morally-neutral human practices, i.e., playing chess, playing board games and so on. Furthermore they are at the cost of demarcating between human and non-human practices.

Here is, however, the real challenge. On one side of the spectrum concerning the relationship between morality and law we could argue that *all human practices are moral practices*. This is hinted at by Onora O'Neill in her *Constructions of Reasons*.[6] Thus, it is that when we act intentionally, we can act either ignoring moral demands, i.e., ignoring the categorical imperative, or we could act morally, i.e., following the categorical imperative. It is proposed that we can integrate our intentional activity, i.e., when we pursue aims and goals, and involve in pursing personal projects, and morality via an argument that shows that the categorical imperative and the universalisation requirement underpin our intentional action. Thus, the maxims operate as the grounding of the relevant practical judgement and are present and manifested in the execution of the intentional action. Let me illustrate this point using the following example:

> GAUGUIN, BORROWING MONEY FROM A FRIEND: Gauguin has been asked by his wife (family) and children to leave the family home. The family feels that he does not share their values anymore. He has decided to become a full-time painter after failing to establish a career as a salesman in Denmark and provide for his family. He needs money to buy canvasses, brushes and paints, and to travel to Tahiti where he can develop his creativity. He knows that he cannot repay the money but despite this he promises his friend that he will pay the money back next month. He borrows the money and never pays it back.

[6] O'Neill, *Constructions of Reasons* (Cambridge University Press 2012). See a development of this argument in my paper 'Dworkin's Dignity Under the Lens of the Magician of Königsberg' in *Dignity in Dworkin's Legal and Moral Philosophy* (Oxford University Press, 2018).

Gauguin intends to become a painter by profession, to buy a boat ticket to travel to Tahiti, and to buy canvasses, brushes, and paints. The limiting condition of the categorical imperative underlies his intentional action. He cannot lie to his friend about being able to repay the loan because 'lying to a friend' is not a maxim that he would be willing to endorse universally. If he lies to his friend he takes away his friend's freedom to choose. Thus, he does not intend the universal moral law but when he acts according to his intentional action and brings about the intended state of affairs, for example travelling to Tahiti and achieving a career as a painter, he performs his actions in respect of the moral law.

The structure of morality, therefore, is present in all intentional actions, and embedded with the world and values. If we follow this way of thinking we could say that even when we play chess, we should act morally, though sometimes we act immorally. True, 'playing chess' is defined by following the rules of chess, but we also see it as a human activity and we can choose, while playing chess, to cheat or not to cheat, to bully or not to bully our opponent and so on. On this, every human activity involves the engagement of our practical reason and the decision of whether or not to respond in a moral manner.

Is morality an option? At some points Hershovitz might seem to assert this as shown by the following sentence: *But there is another prominent reason for participating in legal practices: sometimes, we want to rearrange our moral relationships.*[7] Probably the emphasis of this sentence is not adequate. We would say that morality or the normative stance is inexorable, and we need to engage with practical reason in order to rearrange our moral relationships because of the kind of creatures we are, i.e., rational beings immersed in human practices. A moral or normative stance is not an option. It is not the case that we are faced with a number of reasons and we are free to participate or not in legal actions. The action of defying the law will have consequences -punishment or sanctions will follow if we defy the law-, and we need to engage our practical reasoning to make these actions intelligible, even actions of defiance. If, as judges, legal participants or citizens, we decide not to engage in practical reason and not to think about what we shall do in the context of the law, then we are also 'doing' and our 'doing' can be either irrational or rational and lead to the wrongness and/or wickedness of our activities.

On the other side of the spectrum regarding the relationship between morality and law we could say that there is a clear distinction between morally-laden and morally-neutral activities. For legal positivists law is a morally-neutral activity. But if practical reason is involved in all our activities, and if Onora O'Neill is right in her suggestion that in all our activities there is the underpinning structure of morality and rationality, then how is it the case that law can be morally or value-neutral? Legal anti-positivists of all trends have sufficiently demonstrated that this position is unintelligible.

Hershovitz, like most legal anti-positivists, aims to show that there is a continuity between morality and law. However, because he does not engage with an explanation of the kind of practical reason that is suitable for his account of practice, the analysis lacks the richness and complexity of other legal anti-positivist accounts.

The crucial role that a sound account of practical reason would play is palpable in his discussion regarding the correctness of law within a diachronic dimension. Arguably,

[7] Hershovitz (n 1) 16.

following Hershovitz's core argumentation, there cannot be immoral legal rights because there are not, properly speaking, legal rights. All rights will be somehow moral rights. Therefore, a slave owner in the eighteenth century never truly had any rights over his slaves. Within the respective legal system and at that particular time, however, slave owners *did* have rights *because* specific actions followed from these rights. For example, they could legitimately trade their slaves and their children inherited their slaves. Additionally, everyone acknowledged that they were the legitimate owners of their slaves. Furthermore, until 2003 payments were made to compensate English slave owners for the loss of their slaves. What should we say about these compensations? According to Hershovitz we would say that they are a mistake in 'law as a moral practice'. The interesting question, however, is '*why*' *and* '*how*' we, human creatures like us, could make this mistake whilst immersed in practices? The question of practical reason is central to answer these questions but Hershovitz's theoretical framework cannot answer these important questions.

2. Problematising 'rights and wrongs' and the prevalence of backward-looking legal reasoning

Hershovitz emphasises the importance of law as rearranging moral relationships and more specifically defining rights and wrongs. However, courts *do not only* establish rights and wrongs, but also want to guide the citizen. Arguably, for a citizen, the forward-looking standpoint of her action and potential avoidance of harm or injury, for example, in the context of the English law of negligence, is not presented as an abstract right, duty, principle or rule. However, this does not mean that it cannot be formulated as such, only that the answer to the question 'What shall I do?' must first be settled. This means that there is an internal logic in negligence law but it is not reductive. The judge from the standpoint of the backward-looking perspective will consider values that can only be learned and grasped through the forward-looking perspective. This new grasp of values will enrich the doctrinal concepts and be applied in the backward-looking perspective. To illustrate this let us analyse a landmark case of negligence law.[8]

In the case *Donoghue* v *Stevenson*[9] Mrs. May Donoghue went to a café where her friend ordered an ice-cream and a bottle of ginger beer. They were supplied by the shopkeeper who poured the ginger beer over the ice-cream. Mrs. Donoghue ate part of the ice-cream and as she finished pouring the rest of the ginger beer, a decomposed snail floated out. As a result of consuming part of the liquid Mrs Donoghue contracted a serious illness. The bottle was dark glass so its content could not have been determined by inspection. Mrs. Donoghue initiated an action for negligence against the manufacturer, David Stevenson, who had produced a drink for general consumption by the public. The presence of the snail rendered the product dangerous and harmful, and the plaintiff alleged that it was the duty of the manufacturer to avoid producing harmful and dangerous products.

The facts and circumstances of the case provide a concrete particularity to the value of physical integrity. The aim of the judges' reasoning is to determine the specific content of

[8]For a full development of this view, see my paper 'Revising the Puzzle of Negligence: Transforming the Citizen Towards Civic Maturity' [2023] American Journal of Jurisprudence 105–18.
[9][1932] UKHL 100.

the plaintiff's rights, but she also has a forward-looking perspective. If her decision is to guide citizens it needs to advance values manifested in particularities, and needs to provide appealing descriptions of values for the guidance of citizens' actions.

Lord Atkin in *Donoghue* v *Stevenson* stated:

> But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In these passages Lord Atkin states that there is a duty to avoid acts or omissions which would likely harm others, to the extent that 'I ought reasonably to have them in contemplation'. Lord Atkin establishes a general principle that 'you must not injure your neighbour'. This doctrinal duty is empty and abstract. However, it acquires special content in the particular circumstances and facts of the case and due to the descriptions and re-descriptions of the judge. The judge applies her knowledge and grasp of values *as if she* were an agent. This means as if she is engaged in the question 'What shall I do?' in order to provide guidance to the citizen. But, simultaneously, the judge needs to look at the relational dimension of the case in order to determine whether the plaintiff's right has been violated and whether the defendant had a duty which has been breached. These attributions are sound and possible only if the judge understands the values that are at stake and can grasp the complexity of such values *as acting* from the forward-looking perspective.

Lord Atkin re-describes the facts of the case and the values at stake. It is an example that illustrates how the realisability of specific values is presented as a description of values by the judge as if she were taking the forward-looking perspective, which is the perspective of the citizen who has not caused any harm yet. The citizen who engages in the activity of manufacturing a drink is asked to consider the value of being attentive and *careful when producing an article of food*. This is put as follows:

> A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House.

The issue is now not only between Mr. Stevenson, the manufacturer, and Mrs. Donoghue, but between *any* manufacturer and any consumer. The manufacturer is asked to consider the fact that the consumer is not able to inspect the bottle prior to purchasing it. The right of the consumer and the duty of the manufacturer are the grounding of the attribution, but the engagement, realisability and determination of these abstract rights

and duties are in terms of values and therefore demand sound deliberation and exercise of the judges' and citizens' practical reasoning.

This analysis shows that an account of practical reason is key to understanding the interaction between the backward-looking perspective, in terms of rights and wrongs, and the forward-looking perspective, in terms of descriptions of values and the guidance that the law offers to the citizen. Hershovitz, however, focuses on only rights and wrongs to the detriment of a richer account of ethically-laden legal reasoning.

3. Bernard Williams on the morality system and Hershovitz's conception of morality in law

Finally, let us consider what Bernard Williams diagnosed as 'the problem of the morality system' and how his reflections might have implications for the key premises put forward by Hershovitz in his book. According to Williams moral judgments require the 'view from nowhere', but this strong metaphysical presupposition is in clear contradiction with the way we engage with rights, wrongs, values and desires. When we ask ourselves the Socratic question 'how should we (everyone) live?' We are supposed to take a stance separated from our moral experiences and moral phenomenology. If this question is put in the Kantian framework, it demands that we abstract ourselves from our desires, character, dispositions, personal projects, visions of the world and daily actions. By contrast, from the first-person deliberative stance, desires provide the basic feature for actions, including ethical actions. We cannot engage in 'doing' unless we desire. But desires engage with values, which are inevitably contaminated by particularity and contingency. Only from this 'attached' perspective or the view from *'here and now'*,[10] are we able to understand their complexity and particular dimension. Hershovitz argues that morality, and rights and wrongs, are embedded in practices *construed as repetition towards a goal. Practices 'hang together'*. But how should morality as embedded in legal practices be conceived if morality is not 'the morality system' but is simply a practice that 'hangs together'. Hershovitz could perhaps place himself closer to Bernard Williams' approach, in which character and desire embedded in practices play a key role in our deliberations. However, again, we need a more precise account of practical reason embedded in practices to understand his conception of law as a moral practice.

4. Conclusion

I have tried to demonstrate that any explanation of law as moral practice needs to explain the role of our engagement with the law as the kind of creatures we are, i.e., rational creatures. This means that any account of the relationship between law and morality that does not explain the character of practical reason and how it engages with the law is deficient and unsatisfactory. Hershovitz has advanced a view that aims to show that law is a moral practice because it changes our moral relationships, but his account cannot explain how the judge and legislator through the law can make this possible. Therefore, there is no mediation or bridge between law and morality except a repetition of acts that 'hang

[10] B Williams, *Ethics and the Limits of Philosophy and Williams* (Routledge 2006, originally published in 1985); B Williams, *Making Sense of Humanity* (Cambridge University Press 1995).

together' towards a goal or end. However, arguably, many non-human practices also engage in repetitive activities that 'hang together' towards a goal or end. Hershovitz discards the ancient philosophical platitude and a key lesson learned from legal anti-positivists, namely that we cannot understand and engage with right and wrong, good or bad but through the mediation of reason.

Disclosure statement

Q3 No potential conflict of interest was reported by the author(s).