# Moral Argument in Legal Disputes: Why So Many Are Mistaken

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David Plunkett and Tim Sundell, Antipositivist Arguments from Legal Thought and Talk: the Metalinguistic Response, *in* **Pragmatism, Law, and Language**, 56 (edited by Graham Hubbs and Douglas Lind, 2014).

In “hard” appellate cases, legal disputants sometimes offer moral considerations. Legal experts seem to back up claims about what the law is on a particular point with moral argumentation (whether or not explicitly posited legal material, such as a statute or a written constitutional provision, mentions moral considerations, one might add). One antipositivist argument credits the disputants with choosing epistemic arguments that reflect metaphysical truths, and concludes that the law depends at least in part on moral facts.

A familiar legal positivist response is that appearances are deceiving. The disputants are supporting a claim about what the law *should be* by moral argumentation, because the law at this point is indeterminate. Yet that’s not what many disputants would say, as their use the language of discovery suggests. To borrow an idea from Leiter, the positivist either concludes that the disputants are disingenuous (perhaps because the conventions of legal argumentation require them to appear to argue only about antecedent law) or that legal practitioners, legal scholars, and legal officials misunderstand what they are doing when they rely on moral argumentation. But how can so many experts be so mistaken? That’s what Plunkett and Sundell explain, and they do so plausibly, without denigrating the knowledge, honesty, or intelligence of the expert practitioners.

The authors do not challenge the appropriateness of moral language in a legal dispute. They challenge the assumption that the moral language is used to make a claim about a moral fact, and the assumption that the dispute is about what the law (antecedently) is. Both assumptions are incorrect, say Plunkett and Sundell; and thus, one cannot conclude that moral *facts* establish the law from the mere fact that moral language is used in legal disputes in hard cases.

Instead, moral language is used to make a proposal about what a moral term should mean in the context, where its meaning in this context *and for these (legal) purposes* is underdetermined. That is, a moral word or phrase is used metalinguistically. The proposal is communicated, not by the literal content of the language used, but by the pragmatic content. (For more on what the authors call “metalinguistic negotiations,” see the December 10, 2014 Jot by Connie Rosati.) The authors offer no examples of legal cases fitting this description, though they give examples of legal issues turning on determining what a (nonmoral) term means. Perhaps “fundamental fairness” (involved in Gideon v. Wainwright) would do.

Why do the disputants think otherwise? First, disputants in a metalinguistic negotiation generally do not recognize when they are communicating pragmatically, since they don’t usually have intuitions subtle enough to distinguish between literal and pragmatic ways of communicating. When the legal question seems to hinge on the way an expression (“use as a weapon,” “fundamental fairness”) is applied to the facts of a case, the disputants will think they are arguing over some first-level matter—e.g., whether the defendant’s action with the weapon was a use, whether fundamental fairness is violated by the absence

of counsel for a defendant in a criminal action.

Disputants are instead arguing in the second case about whether the absence of counsel *should be* held to violate fundamental fairness (and so, due process, and so, the U.S. Constitution). Ordinarily, the reasons pertinent to that dispute are pertinent to the issue of what the expression "fundamental fairness" should mean in this context. This is the second reason. At this point, the difference between the projects becomes uninteresting to the participants. They are correctly aware that they are arguing about a constitutional right to counsel, but the difference between applying a determinate "fundamental fairness" and precisifying an indeterminate "fundamental fairness" doesn't matter to them.

If a legal question turns on the application of some expression and that expression is indeterminate at a point, the legal positivist can claim the law is indeterminate. So the disputants' debate isn't, then, about what the law antecedently is, but what the law should be (on that point).

This account nicely explains why *sometimes* when the disputants are using moral language in a hard case, they erroneously think they are arguing about moral facts and what the law is. Unfortunately, the authors fail to address all the kinds of cases the antipositivist offers. The account nicely fits cases that the disputants agree turn on the application of a term (from statute, constitutional provision or something canonical in the common law) that is a moral term or whose application ordinarily requires moral reasoning ("unreasonable risk of harm"). But what shall the positivist say when this isn't true and there is moral argumentation in a judge's opinion—e.g., in Riggs v. Palmer? When only one of the disputants turns to moral language, the dispute doesn't seem to be about determining an indeterminate moral expression. Perhaps the authors would call this, as they did in their article mentioned above, a "bedrock legal dispute," and contend that the metalinguistic dispute is over the phrase "the law." I'm not persuaded by that move, since there aren't always explicit claims about "the law" in these conflicting judicial opinions.

To be fair, Plunkett and Sundell disavow the claim that *all* disputes in hard cases involve metalinguistic negotiations. Nonetheless, one can take from the authors' general approach the idea of negotiation pragmatically expressed and say that in hard cases in which only some disputants use moral language there are (frequently?) negotiations pragmatically expressed about the identity, extent, and importance of concepts to fit settled law, where the answer has been hitherto indeterminate. This claim could be generalized to other hard cases not invoking moral language. The merits of an expanded approach are well worth investigating by those working on the nature of law and legal disagreement.

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