The Ends of Jurisprudence: A Guide to the Perplexed

Author : Barbara Levenbook

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David Plunkett and Scott Shapiro, *Law, Morality, and Everything Else: General Jurisprudence as a Branch of Meta-Normative Inquiry*, 127 **Ethics** (forthcoming, 2017), available at SSRN.

This article is a guide to the perplexed about general jurisprudence. Many people assume that general jurisprudence is either entirely devoted to answering the question, "What is the nature of law?" or at least centered on that question. That is, they think that general jurisprudence is devoted to, or centered on, a metaphysical question. The most famous recent debate about this metaphysical question is the Hart-Dworkin debate, which many legal theorists find frustrating, sterile, or deeply confused (at least in its presuppositions). As a consequence, there is a tendency among some to abandon this debate, turning to matters they regard as outside of general jurisprudence. Plunkett and Shapiro provide a more capacious understanding of the enterprise, according to which general jurisprudence, which concerns law in general, is not limited to, and may not be centered on, metaphysics. From their elegant, precise, clear and compelling account, it follows that those who think they should abandon general jurisprudence may not have reason to do so, and those who think they are abandoning general jurisprudence might not be doing so. For example, theorists who (a) think it is a universal truth about law that it has legislation and (b) give an account of the meaning of statutes are actually engaged in general jurisprudence.

Plunkett and Shapiro's thesis is that general jurisprudence comprises investigation in a number of philosophical fields – metaphysics, of course, but also philosophy of mind, philosophy of language, and epistemology. These investigations are unified by a comprehensive explanatory project. That project is to show how, in the words of the authors, universal "legal thought, talk, and reality fit into [the wider] reality." A theorist may enter this project at any point, may do only some of this work, but it remains true that this theorist is engaged in general jurisprudence.

The field of ethics is conspicuously absent from their list, though the authors appreciate that inquiries in this field are relevant for certain positions adopted within general jurisprudence.

Initially, I underestimated the importance and implications of their thesis. The reader should not make the same mistake. Plunkett and Shapiro's picture of general jurisprudence has substantive implications for some familiar meta-jurisprudential positions. I will describe two of these implications: one for Hershovitz, one for Dworkin.

Hershovitz is one who thinks the Hart-Dworkin debate is sterile and deeply confused.[1] As Plunkett and Shapiro point out, Hershovitz is arguing against specific assumptions underlying this debate, rather than the enterprise of general jurisprudence itself. Indeed, he is engaging in this enterprise, proffering a theory of what certain legal talk is about, and a theory about how legal obligations fit into reality. What is worth noting is that Hershovitz's recommendation that general jurisprudence should orient itself to exploring the moral consequences of our legal practices *doesn't* exclude investigations into metaphysics, epistemology, and the rest. Indeed, they become relevant and perhaps pressing. His arguments presuppose that there is a domain of legal practices. One can ask interesting metaphysical questions about legal practices that become questions in general jurisprudence, given Hershovitz's suggestion that legal obligations are moral obligations generated by legal practices. One can also raise jurisprudential questions in philosophy of mind and epistemology about the content of legal practices and the conditions of our knowledge of them.

Dworkin famously denied that there is a sharp distinction between engaging in general jurisprudence and in substantive legal argument (or political argument).[2] This denial turns out to be a mistake on Plunkett and Shapiro's characterization of general jurisprudence. Since general jurisprudence has a different aim and different "success

conditions" than the other projects, it is a distinct inquiry (albeit one that, perhaps, might turn out to be a necessary prolegomena to the other projects).

Plunkett and Shapiro offer a corrective of other mistakes commonly made about general jurisprudence. For example, it is often assumed that the Hart-Dworkin debate, or more broadly, the positivism-antipositivism debate, is about the nature of law. Plunkett and Shapiro challenge this characterization; the debate at its core is about what *grounds* law, which is a different metaphysical question. (This grounding relation is alleged to be a constitutive relation between legal facts and more metaphysically basic facts, in virtue of which the legal facts obtain.)

There is much more. Plunkett and Shapiro situate some current philosophical accounts (Raz's, metalegal expressivism) in helpful ways and sketch some broad philosophical strategies, in the hope that this will facilitate progress in general jurisprudence. Anyone engaged in that enterprise will only benefit from the discussion and categorizations offered.

The lesson in all of this is that any reports of the death of general jurisprudence are, to paraphrase Mark Twain, greatly exaggerated.

1. Scott Hershovitz, *The End of Jurisprudence*, 124 **Yale L.J.** 1160 (2015). See the jot on this article by Michael Green, *The New Eliminativism*, JOTWELL (January 18, 2016), https://juris.jotwell.com/the-new-eliminativism. [?]
2. Ronald Dworkin, **Law's Empire** (1986). See also Ronald Dworkin, **Justice for Hedgehogs** (2011). [?]

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