
One of my conclusions about this book is that it defies reviewing. It is an ambitious, condensed and extremely hierarchical study. It is not the kind of book one will consult on a particular question, since it is impossible to grasp the meaning of positions on particular questions without understanding the background, the terminology and the writer's presuppositions. The breadth of these background conditions is such that no one can do justice to the book without digesting it in its entirety. As a book, it is a "take it whole or leave it" proposition. In these days of an explosion of writing, this is a risky way to write. I think Detmold has succeeded in building an integrated and challenging analysis of law (together with an analysis of morals, rules, authority and the functions of these in life). Parts of the picture are very attractive to me. Others seem to me wrong and misleading. But in the seamless web of Detmold's analysis it is difficult to find a suitable and manageable point of departure.

I shall thus try to give the general contours of Detmold's thought, and deal in particular with his alleged refutation of positivism. I repeat that such a sketch cannot do justice to the work. In addition, it fails to capture the special structure and style of Detmold's argument. Two unique features are worth mentioning. First, the book is structured in chapters and sections. It opens with a synopsis, containing a one-sentence abstract of each section. Not surprisingly, the synopsis cannot always even suggest the main argument, but this structure (popular in the last century) has obvious advantages. Secondly, the breadth of Detmold's field is amazing. All philosophers of law write about rules, judges, legislatures. Many of them write about morals and practical reasoning as well. Detmold is the first contemporary theorist I have read who feels that the analysis of law cannot be complete without talking of life, death, beauty, tragedy, love and the mystery of existence. Reference to these themes is inserted in most crucial points of the analysis.

1. General Background

Legal decisions are, for Detmold, a sub-class of practical decisions. Moral positions are, ultimately, passionate responses of individuals to the conflicting reasons for action present in each case. Only facts can be reasons for action, so that there is nothing inherently normative about moral norms.

Ideally, the 'correct' way of making any practical decision is by making it as a single-case decision, balancing all the first-order unconditional reasons for
and against the alternative choices. Detmold thinks that there are no inherent difficulties in this procedure, since the world in which we act is one, and there is commensurability of all reasons of action. The moral priority of this procedure rests on the fact that it gives full weight to the particularity of events and people. This particularity, according to Detmold, is what makes life unique and important.

Nonetheless, Detmold concedes that in most practical cases we must decide by rules — i.e., decide the case by applying a norm, covering a class of cases, which we assume to be binding. Moreover, Detmold accepts and even justifies the fact that people usually are motivated not only by unconditional reasons for action, but by reasons which are contingent on their own projects or commitments. He further accepts that there may be good strategic reasons for adopting rules, for appropriating the infinite mystery of the world into a manageable structure.

Yet Detmold refuses, in morals as well as in law, to let any agent give up his freedom (or duty) to look at the particular reasons of action in 'hard cases', defined as non-rule cases. Even if there is a persuasive set of reasons for adopting an absolute rule requiring, e.g., promise-keeping, an agent may still argue that he should not apply this rule in a given particular case. At times, Detmold insists, this is the only position which is morally permissible.

In more conventional moral terminology, Detmold seems to hold that rule-utilitarianism may justify binding rules for most cases, but that there is a residue of cases in which it must be still open to make act-utilitarian judgments. Detmold does not say much to help us identify hard cases, but it seems that such cases are those in which the application of the rule will yield seriously unacceptable consequences, which cannot be justified by a first-order balancing of moral reasons.

These tools and theses enable Detmold to present his analysis of law, of discretion, of the obligation of judges and of the principle of binding precedent. Law is a game-like normative context in which judges mainly apply norms to rule-type cases. The centrality of norms to the law is acknowledged by Detmold. Nonetheless, the judges are moral agents, and they must be able to justify their decisions by moral, not legal, criteria. In hard cases, the mere invocation of a legal norm is not enough to justify the decision. In this sense, every legal decision must be justifiable by moral standards, hence the refutation of positivism.

2. The Defence of Positivism

Many of Detmold's theses about morality and the nature of practical reasoning are controversial. I do not have to deal with those, however, since I
think his attack on legal positivism fails even if you accept all his other theses. In fact, Detmold's background description gives credence to a sophisticated form of legal positivism.

It is no accident that Detmold never defines positivism. What he challenges is the idea that it is conceivable that the decision required by law may be immoral. The example Detmold relies on is that of the judge who sentences a defendant to death, arguing that this is what the law requires, but admitting that the decision may not be morally justified. Detmold analyses a few possible attempts to resolve the contradiction between these two normative statements and concludes that they all fail. Hence, he argues, a judge can only justify his decision by invoking a moral norm. No legal decision may be justified unless it is morally justifiable. It follows, Detmold argues, that legal positivism is refuted.

I am willing to agree with Detmold that judges are agents, and that they are morally responsible for their decisions. I agree with him further that a judge who sentences a criminal to death without being convinced that this particular result is morally justified is acting wrongly. But these concessions do not affect positivism as a theory about the law. They affect one's analysis of the duties imposed on agents acting within the law.

I agree with Detmold that the law is a partial normative order, which can be evaluated in moral terms. But Detmold himself recognizes that we need partial normative orders of various sorts, and that for most practical purposes we are entitled to treat them as determining the issue. The essence of all partial normative orders claiming autonomy is precisely the fact that they enable us to make practical judgments without opening, in each case, the long and uncertain process of balancing of first-order moral reasons for action. Moreover, single-case decisions may have many moral virtues, but they have formidable moral risks, in addition to the fact that such practical reasoning is highly impractical.

Detmold even recognizes that it is important to have law and to be willing to make most decisions within it. He concedes that there are systemic reasons for following rules in some cases in which first-order balancing might suggest that not following the rule might be better in the instant case. This is all that is and seeks to justify it by invoking the legal norms is failing in his moral duty. If I believe that there are acceptable legal ways to arrive at the 'correct' decision, I may argue that he has failed in his duty to the law as well. But the very ability to make these judgments presupposes, for me, a positivistic theory of law.

In this continuing debate it has been said that in addition to the fact that positivism (a theory about the nature of law, not a theory about what people should do) cannot dictate anyone's actions, positivism may have the
needed to accept positivism not merely as a description of law but also as a possible basis for justifying it as a social practice.

Detmold's refutation of positivism is not based on claims that it is an inadequate description of the phenomenon of law. The refutation is based on the logical impossibility of arguing that the legal system dictates a solution, which the judge will in fact reach, which cannot be justified in moral terms.

Empirically, Detmold must concede that such claim is not only possible, but that many judges have in fact made it. In the dramatic cases of life sentences and clearly unjust laws, most legal theorists will condemn the judges who have acted in this way. In less dramatic cases, many judges explicitly prefer systemic reasons for following rules to justice in the instant case. The practice of the law thus belies Detmold's descriptive claims. Moreover, this practice is not merely the way things are. It reflects deep and basic needs and desiderata of any public normative system seeking to guide behaviour for large and heterogenous populations.

This would suffice to support the conclusion that Detmold's reasoning does not refute legal positivism. But clearly Detmold is motivated not mainly by theoretical concerns. He wants to argue that positivism distorts the picture of the moral responsibility of judges to their particular decisions. Positivism does that by suggesting that there are two kinds of justifications – legal and moral, and that the obligations of the judge is exhausted, according to positivists, by justifying his decision under legal norms.

But positivism is committed to no such position, as is amply demonstrated by the many positivists who hold that there is no general obligation to obey the law. Positivists do claim (and I think Detmold does too) that there are indeed two distinct kinds of justification, legal and moral. The difference between them stems from the fact that the legal system is a partial normative order, claiming autonomy for most practical purposes. The judge, as an officer of the system, usually accepts this claim as binding. This habit is clearly one of the identifying features of any stable legal system. It explains the willingness of judges to prefer, in most cases, the dictates of the norms to their own attempt at balancing the merits of the case. This willingness may be justified when the moral implications of the decision required by the law are not clearly unacceptable. Good judges have many ways of interpreting the law to avoid blatantly immoral consequences. When a judge feels he cannot find a respectable way of doing so, he must make a moral decision whether to enforce the law, distort the law, or resign. Whatever he decides to do, positivism as a theory about the law tells the judge nothing. He will have to turn to his moral theory and consult it on the question whether the situation justifies or requires an action within the law or an action against it.

I agree with Detmold that a judge who arrives at a clearly immoral decision
additional virtue of sensitizing judges to the fact that there is no built-in
guarantee that legal norms will yield morally justifiable decisions. A denial of
this fact, or a thesis that there is a unity between the two, may encourage
judges to believe that whatever the law requires is in fact moral.

If we are concerned, as Detmold clearly is, with minimizing the risk that
judges will sacrifice innocent victims to immoral norms, our main job should
be to see to it that judges will have moral integrity and will accept their moral
responsibility to their decisions. The contribution of legal theories to this
quest is direct and questionable. No one, Detmold included, has succeeded in
refuting positivism on this ground. In a world of never-ending attempts to
reach the ‘truth’ of the matter I dare to predict that no one ever will. Detmold
has not even tried to show that accepting a positivistic theory of law (or
rejecting any of his theses of morals) is conducive to a tendency in judges to
see their responsibility as exhausted by legal standards. If he had tried, I
think his case would not be strong.

It might even be said that a book so heavily loaded with questionable
meta-ethical propositions is less likely to make a contribution to this
important practical goal than a more straightforward analysis, less depen-
dent on Detmold’s background. In this sense, the fact that Detmold’s
practical conclusions may be reached via more conventional routes, includ-
ing contemporary versions of positivism, is a strong argument against his
approach.

But the fight between positivism and anti-positivism in law is one of those it
is essential to understand, although it is unlikely to be won. It is a question we
must deal with anew all the time. Detmold offers a stimulating and original
opportunity for a reconsideration of the question. Some of his arguments are
sharp and profound. He is not afraid to be radical, with interesting results. I
would not recommend it as a beginner’s book. It is challenging reading for
those already initiated.

Ruth Gavison*

* Haim Cohn Professor of Human Rights, Faculty of Law, The Hebrew University of
Jerusalem.