

Copyright and Moral Norms  
IP Scholars Conference 2011

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July 25, 2011

Introduction

One of the leading philosophies on the nature of law advances the idea that the law's existence and content is entirely dependent on social facts and that there is no necessary connection between laws and moral norms. This thesis advanced by legal positivists rejects all claims by natural lawyers that laws should reflect certain objective values or standards of rightful conduct. As H. L. A. Hart explains, legal positivism means "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality."<sup>1</sup> Analytical jurisprudence does have its strengths. Seeing the law as entirely dependent on certain social conditions without evaluating its merits or demerits<sup>2</sup>, certainly allows for clearer and less complicated analysis, eliminates biases by demanding value-neutral investigation, and offers a more concrete institutional framework for analysis of the conception of laws.<sup>3</sup> Evaluating laws from socially observable facts (such as whether there is a sovereign who will impose sanctions for non-compliance with a rule or whether individuals in a given society consider themselves bound to obey certain forms of regulation), however, may be problematic because it limits one's understanding of the conception of laws to the very social institution that built it without providing one with a bench-mark for evaluating the worthiness of the law that is the subject of one's inquiry. When a normative value-based analysis is rejected in our thinking about the nature of laws, we lose sight of universal values, which could serve as clear standards for rightful human conduct in a society marked by individualism and collectivism and affected by dissonances between private rights and public interest. In no other area of the law is the division between individualism/collectivism and private rights/public interest more pronounced than intellectual property, especially within the copyright system where the private individual's right to market profit often clashes with the public interest in creative works for education, research, and general socio-cultural development.

In that light, this article makes two claims. First, this article argues that the link between law and morality must be affirmed and that laws must not be incongruous from moral norms if a fully thriving society is to develop and prosper through a robust legal system. It claims that laws

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<sup>1</sup> H. L. A. HART, *THE CONCEPT OF LAW* 181 (OXFORD UNIVERSITY PRESS 1961)

<sup>2</sup> Legal positivists have proposed various social conditions that would allow one to determine whether a social rule may be considered "law". These determinative social conditions include orders backed by sanctions (JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Prometheus Books 2000)), unions of primary and secondary rule recognized by society as binding (H. L. A. HART, *THE CONCEPT OF LAW* 77 (Oxford University Press 1961)), or as systems of legal norms, which follow from a presumptively valid basic norm or *grundnorm* (HANS KELSEN, *THE PURE THEORY OF LAW* (The Lawbook Exchange, Ltd. 2002)).

<sup>3</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 41-44 (Oxford University Press 1979)

must not detract from a valuable and morally worthy way of life or they will lose their meaning. While refuting Austin's single-minded assertion that "the existence of the law is one thing; its merit and demerit another"<sup>4</sup>, this article asserts the opposite instead: that the existence of laws is uniquely tied to its merits and demerits. The second claim this article makes is that it is particularly important for the copyright system, with its distinctive institutional goal of promoting progress, to recognize this essential link between laws and morals. As the normative value of the copyright system is deeply entrenched in the copyright clause of the constitution with a clearly identifiable goal (progress of science and arts), it is easy to lose sight of more objective moral values, such as the facilitation of greater access to educational resources or the encouragement of more authentic works of authorship. As policy-makers and lawyers focus on the practice, enforcement, and endorsement of copyright laws to ensure the production of creative works, they may fail to ask if the laws are so contrary to commonly accepted standards of morality that they have lost their essence, especially when there are observable social practices that support the existence of such laws. This article claims that it is important for us, as a knowledge-based society, to question the essence of laws than run against what we expect a burgeoning socio-cultural environment to be.

A general moral norm in the copyright system prescribes that literary and artistic works be publicly available because education, research, and cultural experiences thrives on the availability of such works to the general public. The public controversy surrounding the sale of artistic works from the Rose Art Museum at Brandeis University to bolster institutional finances<sup>5</sup>, for example, indicates that society as a whole has difficulty conceptualizing art work as a marketable commodity. While universities commercialize the inventions of their scientific communities and protect their market value through patent and trade secret laws, universities treat works of art differently. By making works of art widely accessible to society through public displays, universities affirm a universal norm that creative works are educational and beneficial for socio-cultural growth. It is through careful and meticulous observation of the original art work and the artist's individual style that one learns how to create new works of art. Likewise, the practice of putting movies away for an unspecified time to prompt dealers to order huge supplies of the movie and thus create artificial demand - the practice known as a moratorium - ultimately affects society adversely by increasing prices and therefore erecting access barriers to these movies.<sup>6</sup> Moral norms of this sort, which direct individual action towards certain basic human goods offer a bench-mark for evaluating whether a particular undertaking in the copyright system is ethical or not. As they are integrated into the copyright system, these norms provide the laws with a moral, rather than economic, purpose that in the long-run will support sustainable progress of science and the useful arts.

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<sup>4</sup> AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, *supra* note 2

<sup>5</sup> Robin Pogrebin, The Permanent Collection May Not Be So Permanent, 1/27/11 N.Y. Times C1 (available at 2011 WLNR 1629714)

<sup>6</sup> Peter M. Nichols, Home Video, 4/22/94 N.Y. Times D20 (available at 1994 WLNR 349155)

This article is divided into three major parts. The first part will evaluate broader scholarship and debates that have occurred in legal literature between positivists and natural lawyers to draw out the essential premise for the disagreement between both school of thoughts. It proposes that legal analysis will be more complete by making value-judgements about laws as they ought to be according to moral and ethical principles. The second part of this article will discuss why this analysis, which is central to jurisprudence, is important to copyright law. It examines how the analysis will reshape the manner in which jurists, scholars, and society view and understand copyright law as a legal institution charged with a moral responsibility to promote progress of science and the useful arts. The third part of the paper will present a view of how such an understanding of the copyright system will allow the legal system to more effectively advance society and culture through authentic expressions and freedom to use literary and artistic works. This paper will conclude with a short proposal on how moral norms may be incorporated into the copyright system to achieve the desired result of advancing society and culture.

### Part 1: Legal Positivism and Natural Law

Imagine a society of angels where every individual is a paragon of virtue. Each person in this imaginary society respects the life, property, and dignity of others in their society, conducts business affairs with utmost honesty and is vigilant in performing their day-to-day duties and activities. When a disagreement arises between individuals, the disagreement is immediately resolved through peaceful means to the satisfaction of all involved without incident. In such a society, there probably is no need for laws. People are virtuous, respectful of each other, and behave in ways that unite rather than divide its society. In this state of innocence, people naturally seek the common good and are guided by common truths toward rightful conduct. Natural lawyers would assert that in such a society, where men are governed by laws of nature that are universally binding and discernible through reason, being virtuous is an end in itself because the moral character of the individual will determine actions he or she takes. An honest man, for example, will naturally be honest in his dealings with others. Laws, if ever needed, would only serve the common good or lead individuals to a virtuous life. Classical natural lawyers, such as Aristotle and St. Thomas Aquinas, believe that as long as men are virtuous, laws that are passed will have the same virtues as the men who pass them and are therefore good laws.<sup>7</sup> In this sense, the law's legal authority is derived from its moral worth or goodness. This classical way of thinking about law and morals has influenced more contemporary natural law

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<sup>7</sup> See ARISTOTLE, POLITICS 285 (Dover Publications, Inc. 2000, Benjamin Jowett, trans.) (“a city can be virtuous only when the citizens who have a share in the government are virtuous, and in our state all the citizens share in the government; let us then enquire how a man becomes virtuous”). See also ST. THOMAS AQUINAS ON POLITICS AND ETHICS 53 (W. W. Norton & Co., Inc. 1998, Paul E. Sigmund, ed. & trans.) (“Saint Augustine says “A law that is unjust is considered to be no law at all.” Thus its quality as a law depends on the extent to which it is just. A thing is said to be just in human affairs when it is right because it follows the rule of reason. Now as we have said, the first rule of reason is the law of nature. Hence every human law that is adopted has the quality of law to the extent that it is derived from natural law. But if it disagrees in some respect from the natural law, it is no longer a law but a corruption of law.”)

philosophy by Germain Grisez, Joseph Boyle<sup>8</sup>, John Finnis<sup>9</sup>, Robert George<sup>10</sup>, and William May. Classical natural lawyers have also been very influential in the search for how man ought to conduct his daily affairs and for what would constitute right or wrong conduct in a given society. One of the theories in normative ethics, which provide a framework for evaluating the moral worth of an individual's action, focusses on developing individual virtues (such as faith, hope, and charity) and avoiding vices. It urges one to undertake actions that will exhibit these virtues rather than conform to obligations or be directed by the consequences of such an action.

In a completely different society of brigands, where every individual is wicked and vile, the situation would be a little more complex. Let's imagine that each person in this make-believe society despises other people and seeks to harm, steal, and damage life, property, and anything of human worth. Business activities are conducted with the intent to swindle the other and pillage valuable goods. Disagreements take a menacing quality without sight of any real way of fairly resolving them. In such a society, might makes right, the weak suffer at the hands of thugs, and the need for laws is dire if this society is to prevent itself from self-destruction through war and conflict. In this state of turmoil, laws passed by a sufficiently powerful individual who inspires obedience would be essential to provide order, instill stability, and put an end to chaos. And if, as Aristotle and Aquinas believe, a virtuous and benevolent ruler will enact laws for the common good of his society and guide his men towards a state of virtue and goodness, there will be order in this society of brigands. Laws will correct the wickedness of this society by either enforcing morals or punishing those who commit immoral acts.<sup>11</sup> In a natural law sense, the laws that the benevolent ruler passes are good laws because their contents are derived from, and therefore conform with, a natural order. But what if the ruler is as, or more, wicked as the brigands he tries to govern? What if he passes immoral laws, which instead of seeking the common good and creating social order, produces greater chaos, fear, and destruction? If immoral laws i.e., laws that do not seek the greater good of society, are passed such to produce a place like Auschwitz, what would their status as laws be? To natural lawyers, these laws cannot properly be considered laws because they are fundamentally unjust, immoral, and destructive in nature - even if they purport to seek "the common good" of a particular community, such as building an ideal race, these laws do not meet an objective standard of morality. Natural lawyers such as Saint Augustine have been unyielding in their view that "an unjust law is no law." Laws that are grossly immoral and unjust are legally deficient.

Legal positivists embrace a completely different view point by arguing that a law's validity does not depend on its moral worth. Instead, legal validity is determined by various

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<sup>8</sup> Grisez and Boyle co-authored a book that applied new natural law philosophy to the discussion of political theory by a discussion on the ethically controversial issue of euthanasia. *See*, GERMAIN GRISEZ AND JOSEPH BOYLE, LIFE AND DEATH WITH LIBERTY AND JUSTICE (University of Notre Dame Press 1979)

<sup>9</sup> JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (OXFORD UNIVERSITY PRESS 1980)

<sup>10</sup> ROBERT GEORGE, IN DEFENSE OF NATURAL LAW (OXFORD UNIVERSITY PRESS 1999)

<sup>11</sup> ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (OXFORD UNIVERSITY PRESS 1993)

observable facts or legal conditions about a given society that would give its rules and regulations the status of a valid law. John Austin, for example, argued that as long as individuals in a society have obligations to obey orders by a sovereign that are backed by threats, that society may be said to have legally valid laws, irrespective of their moral (or evil) content. Hans Kelsen, another notable legal positivist, also believed that the study of law is a matter of pure science, which must be separated from ethical concerns.<sup>12</sup> To Kelsen, valid laws can be said to exist in a given society if there is a coercive social order that compels particular human behaviors within that society.<sup>13</sup> While laws may be shaped by conventional morality of various groups in a society, many positivist are clear that there is no necessity that the conditions for assessing the legal validity of particular laws should involve any reference to objective standards of fairness and justice.<sup>14</sup> However, as immoral and wicked laws were passed to create the Nazi legal system, Gustav Radbruch, a notable legal positivist, abandoned the strict separation of law and morals for a morality-centered analysis of the law. As a German legal philosopher and politician who lived through the Nazi regime, Radbruch observed subservient compliance to inherently immoral laws and attributed much of the horrors he observed in Nazi Germany to the failure of the German legal profession to incorporate principles of justice and morality as formal conditions in assessing a law's legal validity.<sup>15</sup> German courts, in the wake of crimes committed with the sanction of Nazi laws, had also refused to uphold Nazi laws on the basis they were "contrary to the sound conscience and sense of justice of all decent human beings."<sup>16</sup> The divergence between natural law and legal positivism on the relationship between laws and morals is perhaps most pronounced in the way both respond to grossly evil laws in depraved societies. H. L. A. Hart's and Lon Fuller's intellectual discourse on this divergence demonstrates this remarkable schism. While Hart saw objective moral standards as providing powerful tools to condemn iniquitous laws and justify civil disobedience<sup>17</sup>, Lon Fuller, a natural lawyer<sup>18</sup>, argues that a legal system that is oblivious to the morality of law cannot be considered law at all because law, if it is to serve its purpose, must strive towards justice and decency.<sup>19</sup>

This deep schism between legal positivism and natural law is not merely a matter of semantics or academic discourse but has far-reaching societal effects instead. What really is at stake in this debate is society's relationship to the institution that governs, guides, and direct it's

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<sup>12</sup> KELSEN, *supra* note 2 at 59 ("The methodological purity of the science of law is jeopardized not only because the bar that separates it from natural science is ignored, but even more so because the science of law is not (or not clearly enough) separated from ethics - that no clear distinction is made between law and morals.")

<sup>13</sup> Kelsen, *id.* at 33-39

<sup>14</sup> HART, *supra* note 1 at 181

<sup>15</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 616-617 (1958)

<sup>16</sup> *Id.* at 619

<sup>17</sup> *Id.* at 620

<sup>18</sup> LON L. FULLER, *THE MORALITY OF LAW* (YALE UNIVERSITY PRESS 1969)

<sup>19</sup> Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661 (1958)

activities. As laws provide legal meaning to the actions one takes within a society, how society develops depend immensely on the type of laws it has. In a more moderate society where men are neither angels nor brigands, laws may be needed where resources are scarce.

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[SUBMITTED FOR IP SCHOLARS CONFERENCE 2011]