Legality

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For Alison

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WHAT IS LAW (AND WHY SHOULD WE CARE)?

What Is Jurisprudence?

When I was applying to high school, my mother advised me to enter "medical jurisprudence" in the section of my application reserved for "future career." Of course I had no idea what medical jurisprudence was: I had never even heard the word "jurisprudence" before. But partly in order to placate my mother and partly because I didn't have any other ideas about my future career, I followed her advice. Inexplicably, they let me into the school anyway.

Thirty years later, I now know that "jurisprudence" in that instance was really just a fancy, and slightly archaic, way of saying "law." And so I can infer that someone who practices medical jurisprudence is someone who practices medical law—though, to be honest, I am still murky on what *exactly* medical law is or would be. And, similarly, I know that when lawyers speak in grand terms of, say, "Fourth Amendment jurisprudence," they mean to refer to the Fourth Amendment to the United States Constitution and the legal doctrine that surrounds it.

I also know now that the term "jurisprudence" has a couple of other well-established uses as well. It is, for example, often employed to denote the *academic study* of the law: that is, the branch of learning in which law professors and legal scholars participate. Following this usage, those who practice jurisprudence are concerned with describing the law of particular legal systems. This typically involves developing theories that set out the general principles that structure a given area of legal doctrine and then going on to enumerate the detailed rules that exemplify the aforementioned principles. Employed in this way, then, "medical jurisprudence" would refer not to the legal rules that regulate medical matters, as in my first example, but rather to a scholarly subdiscipline, like

solid-state physics or Japanese linguistics. It is worth noting too that this usage comports with etymology, since the Latin word *jurisprudentia* means "knowledge of the law."

Most legal academics in English-speaking countries do not however describe themselves as "jurisprudes."[1] The word "jurisprudence" is generally reserved for the *philosophical* study of the law; and a jurisprude, insofar as the word is used at all, is someone who engages in this particular kind of philosophically oriented study. In keeping with this, it is worth noting that the label "Jurisprudence" is not applied to *every* single course title in American and British law schools but is reserved rather for courses that focus on the philosophical issues that the law raises. Some scholars have in fact even aimed for further nuance by distinguishing between jurisprudence on the one hand and legal philosophy on the other. But since the significance of this proposed distinction frankly escapes me, I am going to set it aside in what follows and use the terms "jurisprudence" and "legal philosophy" interchangeably instead.

Jurisprudence: Normative and Analytical

The philosophical discipline of jurisprudence is typically divided into two subareas: normative and analytical. Normative jurisprudence deals with the *moral* foundations of the law, while analytical jurisprudence examines its *metaphysical* foundations. Let's discuss each in turn.

Normative jurisprudence is the study of the law from a moral perspective and comprises two branches, which I will refer to as *interpretive* and *critical. Interpretive* jurisprudes seek to provide an account of the *actual* moral underpinnings or logic of current law. Thus, for example, they might take up the question of why our criminal law punishes criminals. Is it to deter people from committing crimes or to rehabilitate them? Do we punish in order to incapacitate offenders for a certain time or to ensure that they get their just deserts? To take another example, the interpretive theorist is interested in identifying the moral point or function of contract law. Does the law hold contractual parties liable when they make certain contracts because they promised? Or is it because economic efficiency demands that we hold people to their bargains? And so on.

Those who work in the *critical* branch of normative jurisprudence are interested in a different question. Instead of attempting to describe the *actual* moral foundations of current law, they want to know what, from

a moral point of view, the law *should* be. So, for example, a critical theorist does not describe why our existing criminal law punishes criminals, as the interpretive theorist would do, but focuses rather on whether criminals should be punished at all. The object is not simply to recover the moral logic of current criminal law but to see if that logic is justified. As their names suggest, critical legal studies, critical race theory, and feminist legal theory are all examples of critical normative jurisprudence. Each of them is concerned with evaluating existing legal systems according to moral criteria, by showing how current law covertly and unfairly privileges certain groups (capitalists, white people, men) at the expense of others (workers, racial minorities, women).

Analytical jurisprudence, by contrast, is not concerned with morality. Rather, it analyzes the nature of law and legal entities, and its objects of study include legal systems, laws, rules, rights, authority, validity, obligation, interpretation, sovereignty, courts, proximate causation, property, crime, tort, negligence, and so on. Analytical jurisprudes want to determine the fundamental nature of these particular objects of study by asking analytical questions such as: What distinguishes legal systems from games, etiquette, and religion? Are all laws rules? Are legal rights a type of moral right? Is legal reasoning a special kind of reasoning? Is legal causation the same as ordinary, everyday causation? Is property best understood as a bundle of rights? What distinguishes torts from crimes? And so on.[2]

What Is "What Is Law?"?

This book is primarily concerned with analytical jurisprudence. My aim throughout the chapters that follow will be roughly threefold: to take up the overarching question of "What is law?"; to examine some historically influential answers to this question; and, finally, to propose a new, and hopefully better, account of my own.

I realize of course that there are many people out there who wonder why anyone would or should read a book about analytical jurisprudence, let alone *write* one. I have learned the hard way that the relevance of this kind of inquiry is far from obvious to a large number of people, including legal scholars, and is generally regarded with much more skepticism than normative jurisprudence. There is of course an obvious and understandable reason for this. The moral questions that normative jurisprudes address bear directly on the burning questions of our day, such

as: Why punish criminals? Should women have a legally protected right to terminate their pregnancies? Do competent adults have the right to die? Should same-sex couples have the right to marry? What are the limits of state authority in a time of global terrorism? Pretty much everyone understands that the morality of law constitutes a relevant, if not vital, area of inquiry.

Questions to do with the fundamental nature of the law—traditionally formulated as "What is Law?"—seem, by contrast, to exercise and engage a small minority of people. For one thing, there is a very clear and obvious sense in which people *do* know what law is. Virtually everyone is aware that legal systems are composed of courts, legislatures, and police and would have little trouble identifying them from pictures or descriptions. Indeed, legal institutions are highly prominent entities that trumpet their official status every chance they get. Most people also realize that these institutions regulate large portions of contemporary life. They do so by making and enforcing rules that prohibit physical assault, theft, and other immoral activities and that govern property relations, the voluntary undertaking of obligations, and family structure. There are of course heavy tomes that set out these rules and legions of professionals who exist solely to dispense advice about their meaning and implications. It is in fact possible that lawyers and law students are most skeptical about analytical jurisprudence precisely because they really do know a lot about the law already. What remains to be seen in these cases is how posing the question "What is Law?" at a high level of abstraction, as analytical jurisprudes are wont to do, can increase their knowledge. Should analytical jurisprudence matter to anyone other than philosophers and, if so, why?

It is of course impossible to make any real progress with this question—the question of relevance—without first becoming clear about the kind of issues that analytic jurisprudes seek to answer. When one studies *the nature of law,* what *exactly* is one studying? What does the question "What is law?" mean anyway? Getting a firm grip on this question is essential to understanding why it might be worth asking in the first place.

"Law"

Clearly, the key term in this context is "law," and the first thing to notice about this term is its ambiguity. In many cases, "law" functions as what linguists call a mass term, like "snow" or "meat," and thus refers to an

uncountable quantity of legal norms. When we ask, for example, whether a particular legal system has much telecommunications law (a question similar in type to that of whether there is much snow outside) we are employing this particular usage. But, unlike many other mass terms, "law" can also take an indefinite article. You can't play with *a* snow, but you *can* create, apply, study, detest, or obey *a* law. In this first sense, "law" is like "rock" or "lamb": by themselves, they are mass terms but, when they are preceded by an indefinite article or pluralized, they convert into count terms. And so, just as we can ask how many rocks are in the garden, we can also ask if a particular country or legal system has *many* laws governing telecommunications.

The term "law" is also frequently used to refer to a particular social organization. We can say, for example, that the law normally claims the right to use force to ensure compliance with its rules. In this example, "law" does not refer to an indefinite collection of legal norms but rather to an organization that creates, applies, and enforces such norms. And, in cases like this, law *can* receive a definite article—we can talk about "the law"—while to add an indefinite article or pluralize it is to change its meaning.

The term "legal system" is plagued by a similar ambiguity. Following one usage, a legal system is a particular system of rules. For example: the American legal system is constituted by the sum total of all the laws of the United States and their interrelations. In other cases, however, the term "legal system" denotes a particular institution or organization. In these cases, the American legal system is understood as an organization constituted by senators, judges, cabinet secretaries, filing clerks, police officers, and so on. Or, to put it somewhat differently: in the first sense of "legal system," legal systems are constituted by *norms;* in the second sense, they are constituted by *people.*

Since the terms "law" and "legal system" are ambiguous, the questions "What is law?" and "What are legal systems?" are inevitably ambiguous as well. It is hard to know if they refer to an inquiry into the nature of legal norms or an inquiry into the nature of legal organizations. When the first genre of inquiry is assumed, the philosophical analysis will tend to focus on the following sorts of questions: When do legal norms exist? What is their logical structure? Are there different kinds of legal norms? What are the interrelations between different norms in a legal system? When the second genre of inquiry is assumed, the analysis will turn to other kinds of questions, such as: What does the organization do?

What is it supposed to do? What is its general structure? Why do particular legal systems have the specific institutional structures they have? How are the various participants in these systems related to one another?

Analytical jurisprudes have, by and large, taken the first of these two possible routes. They study legal phenomena by analyzing the norms that legal organizations produce rather than the organizations that produce them. In this respect, legal philosophy has resisted the "organizational turn" followed by many other academic disciplines. For the past century, psychologists, anthropologists, sociologists, economists, and political scientists have focused on organizations in order to study individual and group behavior in institutional settings as well as the behavior of institutions themselves. This focus has been extraordinarily fruitful, spawning several new fields, including bureaucracy theory, transaction-cost economics, scientific management, legislative studies, and systems theory. Legal scholars have of course been investigating and analyzing the proper regulation of organizations, such as legislatures, courts, publicly held corporations, employee-owned cooperatives, banks, churches, schools, trade associations, and so on, for a long time. The Legal Process School led by the lawyers Henry Hart and Albert Sacks was an extremely influential approach to the American legal system that analyzed the law through an organizational lens. And in recent years, philosophers of action have begun to analyze the nature of groups in general and collective action in particular.

Legal philosophy has nevertheless remained more or less unaffected by the kind of organizational analysis that has become such a prominent and productive feature of these other disciplines. Given that it is hard to imagine anyone who would deny that legal systems are organizations run by groups from particular cultures, or that they have distinctive institutional structures that are designed to achieve certain political objectives, this apparent lack of interest is surprising. To use an economic analogy, we can think of the law as a kind of firm whose subdivisions include legislatures, administrative agencies, courts, and police departments. This firm does not, of course, produce anything that is sold in the market—it produces laws. But, just as the economist asks why economic actors organize themselves into firms instead of engaging in continuous market-based, arm's-length bargaining, so too philosophers can productively ask why moral agents form legal systems that produce rules rather than deliberate about and negotiate over the terms of social interaction among themselves. As I will try to show, answering such a question not

only illuminates the nature of legal organizations—their distinctive mission, modus operandi, and so on; it is also a prerequisite for tackling questions about the nature of legal norms. In other words, we cannot understand what laws are unless we understand how and for what purposes legal systems produce them in the first place.

I will return to these themes in greater detail in subsequent chapters. My point here has been simply to highlight the ambiguous nature of the terms "law" and "legal system" in a preliminary way so as to be able to resolve the ambiguities and thereby identify the core questions of analytical jurisprudence more precisely. As a practical matter, however, the evocations are largely harmless and I will use these terms in an ambiguous fashion when being more exact would be cumbersome.

If one wanted to be fussy, of course, one could avoid the ambiguities we have identified here entirely by speaking about legality, that is, about the property of being law. Legal norms and legal organizations both instantiate the same property—they are both *legal* things. Thus, I will sometimes speak directly about legality, in which case I will be referring to a property that can be instantiated by rules, organizations, officials, texts, concepts, statements, judgments, and so on.[3]

Law, the Law, and "Law"

It is important to distinguish the question "What is law?" from the similar-sounding question "What is *the* law?" The latter is of course a familiar, garden-variety legal question. It reflects a desire to understand what the law is on a *particular* matter and is the kind of question a client would be likely to ask his or her lawyer. The former question, by contrast, does *not* concern the current state of *the* law. It reflects a philosophical effort to understand *the nature of law in general.*

It is also important to distinguish between the question "What is law?" and the question "What is 'law'?" The latter question concerns the meaning of the word "law," not the nature of the word's referent, namely, law. It is nevertheless sometimes thought that the latter, semantic question is the one that preoccupies analytical jurisprudence—that legal philosophers are mainly attempting to define the *word* "law." But this impression is mistaken. Legal philosophy is not lexicography. It is not an elaborate attempt to contribute to the Oxford English Dictionary but rather an effort to understand *the nature of a social institution and its products.*

One obvious reason why legal philosophy is not solely concerned with the definition of "law" is that "law" is an English word and non-English-speakers can and do engage in legal philosophy. Furthermore, it is not even possible for an English-speaker to do legal philosophy simply by considering the proper use of the word "law," for the word is radically over- and underinclusive at once. It is overinclusive insofar as many things that English-speakers refer to as "law" are not law in the relevant sense, for example, divine law, the moral law, Boyle's law, the law of cosines, and so on.[4] Legal philosophers are not concerned with everything to which any one could conceivably apply the term "law" but rather with *legal* laws and *legal* systems. Conversely, the word "law" is underinclusive as well. As Jeremy Bentham pointed out, English-speaking lawyers normally reserve this word for those rules that have been enacted by legislatures. For example, we say that Congress passed a law, but the Environmental Protection Agency enacted a *regulation.* Similarly, the president issues an executive *order,* not an executive law.[5] Thus, if we attended solely to linguistic usage, we might be fooled into thinking that only Congress makes law, when in fact most of the law in the United States is created in the executive, not the legislative, branch.[6]

The Nature of a Thing

As we have seen, then, to ask "What is law?" is to inquire into the fundamental nature of law. In this section I would like to unpack this question further by asking what exactly it is that we want to know when we inquire into the nature of something.

One possibility is that we are asking about the thing's *identity,* that is, what it is to be that thing. For example, philosophers who study epistemology are inquiring into the nature of knowledge. To ask "What is knowledge" is to ask what it is about knowledge that makes it *knowledge.* The classic answer to the question maintains that knowledge is true and justified belief. This is an answer to the question because it claims that what makes an instance of knowledge *knowledge* is that it is a belief that is at once true and justified.

In general, to ask about the identity of X is to ask what it is about X that makes it X and not Y or Z or any other such thing. Call this the "Identity Question." A correct answer to the Identity Question must supply the set of properties that make (possible or actual) instances of X the things that they are. The identity of water, to take another example, is

H_20 because water is just H_20. Being H_20 is what makes water *water*. With respect to law, accordingly, to answer the question "What is law?" on this interpretation is to discover what makes all and only instances of law instances of *law* and not something else.

It is also possible that an inquiry into the nature of an entity will not be primarily concerned with the Identity Question. In these instances, we are not so much interested in what makes the object the thing that it is but rather in what *necessarily follows from* the fact that it is what it is and not something else. I'm going to refer to this here as the "Implication Question."

Consider the number 3. Arguably, what makes the number 3 the number 3 is that it is the number that comes after 2. The identity of 3, therefore, is being the successor of 2. However, when mathematicians study the number 3, they are clearly interested in more than its identity. Mathematicians want to know all of its mathematical properties. They want to know, in other words, what *follows* from the fact that a certain number is the number 3 and not some other number. To take a trivial finding, mathematicians have discovered that 3 is a prime number. While being a prime number is not part of the number 3's identity (being the successor of 2 is), we might still say that it is part of the nature of 3 because being 3 necessarily entails being prime. Put in another way, being prime is part of the nature of being 3 because if a number is not prime, then it is impossible for it to be 3.

In this second sense of "nature," to discover an entity's nature is in part to discover those properties that it *necessarily* has. An object has a property necessarily just in case it could not fail to have it. Thus, to discover the law's nature, in this second sense, would be in part to discover its necessary properties, that is, those properties that law could not fail to have.

It is important to note that when philosophers ask about the nature of an object, they do not care about *every* property that it possesses necessarily. It is necessarily true, for example, that every piece of knowledge is identical with itself and that the number 3 is not married to the number 7. But their inquiry into the nature of knowledge or numbers does not seek to discover and catalog all these properties because, although necessary, they are also uninteresting. They are uninteresting in part because they are not *distinctive* of the entities in question. Everything is identical to itself and is incapable of marrying the number 7. When asking about the nature of law, for example, we want to know which properties law

necessarily possesses in virtue of being an instance of law and not a game, social etiquette, religion, or some other thing.

Another reason why these properties are uninteresting is that knowing that the entities possess these properties does not answer any interesting question. No one wonders about whether knowledge is self-identical or what the marital status of a given number is. Of course, whether philosophers will find a certain necessary property interesting is to some extent context specific: it depends on which issues and phenomena seem most perplexing at a given time. As a result, we should not expect any theory of law to be complete. Each generation identifies new questions, and these newly salient challenges affect which properties legal philosophers will seek to catalog and study.

It should also be pointed out that when philosophers ask the Implication Question about an object, they are interested not just in what necessarily follows from the fact that the object in question has a certain identity but also in what does *not* necessarily follow. They care, in other words, about the object's contingent properties as well. For example, many legal philosophers have been eager to show that whether there is a moral obligation to obey the law is a contingent feature of legal systems. Thus they maintain that part of the answer to the Implication Question is that it does *not* follow from the fact that something is law that its subjects have a moral obligation to obey. Others, of course, believe just the opposite: they claim that it does necessarily follow from the fact that something is law that it is morally obligatory. On this view, moral legitimacy would be part of the nature of legality in the second sense.

As we have seen, then, when one inquires into the nature of an object, one might be asking either of two possible questions.[7] One might be asking about the identity of the object—what makes it the thing that it is? Or one might be asking about the necessary implications of its identity—what necessarily follows (or does not follow) from the fact that it is what it is and not something else?

The Structure of the Social World

Since my discussion thus far has been rather abstract, I'd like now to reformulate these questions about the nature of law in slightly more concrete terms. We all realize of course that we classify the social world in very complex and subtle ways. We don't, for example, just refer to particular individuals or humanity in general; we distinguish extensively

and elaborately among many different sorts of social groups. We talk about different families, ethnic groups, religious groups, clubs, nations, classes, tribes, work forces, student bodies, faculty departments, sports teams, political parties, personality types, TV fans, and so on.

We also speak, of course, about legal officials. Judges, legislators, regulators, prosecutors, and police officers are generally grouped together as officers of the law in order to distinguish them from those who lack legal power to act. And, not only do we distinguish between legal and nonlegal groups within a particular community, we also differentiate between legal groups across communities. We consider French judges, ministers, legislators, and law enforcement personnel to be part of the French legal system and not of, say, the British legal system. Likewise, we regard British officials as belonging to the same system, but not to the French system.

And, just as we distinguish between different groups, we also differentiate between systems of rules. We refer, for example, to the rules of Christianity, the Smith family, American middle-class etiquette, the Rotary club, French law, morality, medieval canon law, chess, Cambridge University, the Olympic Committee, and so forth.

The fact that we distinguish between different groups and systems of rules reflects an important fact about our social world: namely, that it is highly pluralistic. For a world in which everyone held the same basic beliefs and values and in which the activity of each group was seen as a contribution to an overarching and shared objective would be one in which there was no need to distinguish between different groups and their rules in such an elaborate fashion. The question "Whose rule is that?" would not be particularly urgent precisely because everyone would regard all rules as equally valid. And despite the fact that there would be many different sources of rules in such a world, its inhabitants would not think it important to classify rules on the basis of their pedigree or point of origin.

The ideological diversity of the modern world, by contrast, compels us to distinguish between various groups and the competing demands that they place on us. If we are told that there is a rule prohibiting some action, say, eating meat, we would want to know *whose* rule it is. If it is a moral rule, then we might heed it if we can be persuaded that eating meat is actually immoral (or at least feel guilty if we don't). But if meat eating is merely against the law, we might choose to disobey it and risk the repercussions. There are other possibilities as well: the rule may be