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Introduction

In the early summer of 2008, California highways were dotted with electronic signposts displaying the following message: "Hands Free Phone, July 1st, It's The Law!" California drivers would have known exactly what the signposts referred to: Earlier that year, a new law was enacted by the California legislature that prohibits the use of cellular phones while driving unless using a hands-free device.[1] The signposts were not, of course, the law. They just reminded drivers, informed them, as it were, that "it's the law!" Notice that this is an interesting kind of information, because it conveys two different types of content: descriptive and prescriptive. In one sense, the message informs us about something that happened, some *events* that took place in Sacramento earlier that year. But in a clear second sense, the message reminds us that we *ought* to behave in a certain way—that is, we are now obliged to use a hands-free device if we want to use a mobile phone while driving; after all, it is now *the law*. And of course, these two kinds of content are causally related: The legal obligation to use a hands-free device somehow follows from the fact that certain events had actually taken place, namely, that there were some particular people in Sacramento who gathered in a certain place, talked, raised their hands, signed a document, and so forth.

It is in thinking about this duality of content that philosophy of law emerges. The law is, by and large, a system of norms. Law's essential character is prescriptive: It purports to guide action, alter modes of behavior, constrain the practical deliberation of its subjects; generally speaking, the law purports to give us reasons for action. Needless to say, not all laws impose obligations.

[1] California Vehicle Code 2008, section 23123: "(a) A person shall not drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving."

A great many laws in a developed legal system grant rights of various kinds, provide legal powers to change other rights and obligations, and establish institutions defining their legal powers and authorities. Nevertheless, in spite of the great diversity of types of norms that law comprises, by and large legal norms are of a prescriptive kind. Laws do not purport to describe aspects of the world; they do not consist of propositions about the way things are. In one way or another, laws purport to affect or modify people's conduct, and mostly by providing them with reasons for action. Let us call this aspect of the law its essential normative character.[2]

The law is a rather unique normative system, however, in that the norms of law are typically products of human creation. Although there may be exceptions, by and large the law is something that is created by deliberate human action. Legal norms are enacted by legislatures or various agencies or are created by judges in rendering their judicial decisions. Law is typically a product of an act of will. If we combine these two observations, we can begin to see the main problem that has preoccupied philosophers of law: how to explain this unique normative significance of events in the world that are, basically, human actions, acts of will, so to speak, performed by groups or individuals? And what does this normative significance consist in?

Legal philosophers have understood this problem to consist of two main questions: One is a question about the very idea of legality, or *legal validity*, and the other is a question about the concept of *legal normativity*. Consider the California signposts again. They tell us that there is something we now ought to do, and that we ought to do it because "it's the law!" The first question, about legal validity, is the question of what makes it the case that this normative content (that you ought to use a hands-free device while driving) is, indeed, the law. And the second question is about the nature of the "ought" that is prescribed by such norms.

[2] The law may have other normative aspects that are not directly instantiated by providing reasons for action. The law may set an example or a standard for conduct in various other forms, or it may even purport to influence people's beliefs and attitudes.

Let us begin with the concept of legal validity. When we say that "it is the law that *X*" or "the law requires you to *X*," and similar locutions, we implicitly rely on the idea of legal validity. For any given normative content, it may be legally valid in a given jurisdiction at some given time, or not legally valid, or, possibly, it may be in some doubt whether it is legally valid or not. Unlike moral or logical validity, however, the idea of legal validity is closely tied to a place and time. The hands-free mobile phone requirement is now legally valid in California but not in Nevada (where no such legal requirement applies), and it is valid at the moment, but had not been so two years ago. In short, whenever it is suggested that *the law is* such and such, the question of when and where is relevant. Nevertheless, it is widely assumed that some philosophical account should be available to determine what are generally the conditions that make a certain normative content legally valid. What makes it the case, or what are the kinds of factors that determine, that a certain normative content is the law in a given time and place? In other words, the philosophical question about legal validity is this:

> What are the *general conditions* that make any proposition of the form—"*X* [some normative content] *is the law at time* t *in* C [with respect to a given place and/or population]"—true (or false)?

Note that the generality of this question is of crucial importance. Every lawyer knows what makes the content of, say, the California Vehicle Code legally valid: the fact that the code had been duly enacted by the California legislature according to procedures prescribed by the California Constitution. Philosophers, however, are interested in a much more general aspect of this question: What we seek to understand is, what are, generally, the conditions that constitute the idea of legal validity? Would these conditions consist only in social facts, like actions and events that took place at a certain place and time? If so, what makes those actions, and not others, legally significant? And perhaps the conditions of legal validity are not exhausted by such facts; perhaps there are some further, normative considerations that have to apply as well. Is it the case that the content of the relevant norm

also bears on its legal validity, and not just the manner in which it came to be created? Furthermore, there is also the possibility that legal validity is not necessarily tied to actions and events that have somehow created the norm. Some prominent legal philosophers have argued that the legal validity of norms can sometimes be deduced by moral reasoning. A certain normative content can be legally valid because it is content that reasoning, based on moral and other similar considerations, would lead us to conclude is valid under the circumstances. So these are the general questions that arise with respect to the very idea of legality; what we seek to articulate is an account of the general conditions that constitute the legal validity of norms.

Roughly, three main schools of thought have emerged in response to the general questions concerning the conditions of legal validity: According to one school of thought—called *legal positivism*, which emerged during the early nineteenth century[3] and has retained considerable influence ever since—the conditions of legal validity are constituted by social facts. Legality is constituted by a complex set of facts relating to people's actions, beliefs, and attitudes, and those social facts basically exhaust the conditions of legal validity. As we will see in the first two chapters, a very important aspect of the debate here relates to the possibility of reduction: Can the conditions of legal validity be reduced to facts of a non-normative type?

Another school of thought, originating in a much older tradition, called *natural law*, maintains that the conditions of legal validity—though necessarily tied to actions and events that take place—are not exhausted by those law-creating acts/events. The content of the putative norm, mostly its moral content, also bears on its legal validity. Normative content that does not meet a certain minimal threshold of moral acceptability cannot be *legally* valid. As the famous dictum of St. Augustine has it: *lex iniusta non est lex* (unjust law is not law). Whether this view is rightly attributable to the Thomist natural law tradition, as it often has been, is a contentious issue, but one that I will not consider in any

[3] Although the basic ideas of nineteenth-century legal positivism are clearly traceable to the political philosophy of Thomas Hobbes.

detail here;[4] and whether it is a view that still has any philosophical support is questionable.

A third view about the conditions of legal validity, which has drawn some inspiration from the natural law tradition but differs from it in essential details, maintains that moral content is not a necessary condition of legality, but it may be a sufficient one. According to this view, moral-political reasoning is sometimes sufficient to conclude that a certain normative content is legally valid, that it forms part of the law in a given context. As we shall see in chapter 4, there are two main versions of this view: one articulated by Ronald Dworkin and another that has emerged as a significant modification of traditional legal positivism.

Neither legal positivism nor its critiques form a unified theory about legal validity. There are important variations and divergent views within each one of these jurisprudential traditions. There is a recurring theme, however, that the debate centers on, and it is about the possibility of detaching the conditions that constitute legal validity from the evaluative content of the putative norms in question. Legal positivism maintains that the conditions of validity are detached from content, while critics of this tradition maintain a nondetachment view. According to the latter views, what the law *is* partly depends on what the law ought to be in some relevant sense of *ought*.

Everybody agrees, or so it seems, that the law purports to provide us with reasons for action. Law's essential normative character is not in any serious doubt. The doubts concern the question of what kind of reasons legal norms provide. Take, for example, the simple notion of a legal obligation—that is, assume that a certain legal norm prescribes that "all persons with feature *F* ought to □ under circumstances *C*." What exactly is the nature of this "ought"? And how is it related, if at all, to a moral ought?

The crucial first step here is to distinguish between two different kinds of concerns we may have. One concern relates to the question of a moral obligation to obey a legal obligation. The fact that the law purports to impose an obligation to φ does

[4] John Finnis famously argued that Thomist natural law is not committed to this thesis. See his *Natural Law and Natural Rights*.

not necessarily entail that there is, therefore, a moral obligation to □. Or, put differently, a legal ought is not necessarily an all-things-considered ought. The fact that one has a legal obligation to □ leaves it open to question whether one ought to □, morally speaking, or all things considered.[5] It is widely recognized, however, that the question of whether there is a moral obligation to comply with a legal obligation is a moral issue, not one that can be determined on grounds pertaining to the nature of law. Although the moral issue may partly depend on how we understand the nature of law and its normative character, ultimately it is a moral question, to be determined on moral grounds, whether there is a general moral obligation to obey the law, and under what circumstances.

The question that legal philosophers are interested in, however, is different: It is the question about what a legal obligation (and other types of legal prescription) consists in. What exactly is the nature of this "ought" that the law purports to impose on its subjects? Is it like a moral obligation, just from a different perspective? Or perhaps a species of moral obligation that would arise under certain conditions? Or perhaps a legal ought is reducible to a predictive statement that, if one does not comply with the legal requirement, one is likely to incur some undesirable consequences?

It is very difficult to subsume the various answers philosophers have offered to these questions about the nature of legal normativity under particular schools of thought. It might be tempting to think that the different schools of thought about the concept of legality would also entail correspondingly different views about the concept of legal normativity. Unfortunately, this is not quite so. There is, however, this general connection: The more you tend to regard legal obligation as a kind of, or on a par with, moral obligation, the more you would be inclined to resist a detachment of legal validity from morality. There is, in other words, some pressure here: If you think about the content of the law as the kind of normative content that provides us with moral reasons for action,

[5] I am not suggesting that a moral ought is an all-things-considered ought, or vice versa. These are just two similar ways to think about the question.

you would tend to think of legality itself as conditioned on some moral content. If you allow for the conditions of legality to be detached from the moral content of the law, it becomes difficult to hold the view that the law necessarily, or even typically, provides us with moral reasons for action. To be sure, this is just a pressure, not an entailment relation. Whether there are ways to resist this pressure is something that we will have to see in some detail as we go along.

These two main questions about the nature of law, about the conditions of legal validity and about legal normativity, have recently generated another kind of debate in contemporary philosophy of law, one about the nature of the enterprise itself. If, indeed, the factual aspects of law cannot be detached from its normative content, perhaps a philosophical account of what the law is cannot be detached from the normative content that is ascribed to law. Philosophy of law, according to this nondetachment view, is necessarily a normative type of philosophy—that is, a type of philosophy that necessarily engages in questions about what law ought to be. So here we get to a controversy about the nature of legal philosophy: Is it the kind of theory that purports only to describe something, telling us what it is, or is it the kind of philosophy that necessarily incorporates some views about the way things ought to be? This methodological debate about the nature of legal philosophy has become one of the central themes in contemporary philosophy of law. Not surprisingly, those who hold a nondetachment view about the relations between law's factual and normative aspects also tend to hold a nondetachment view about legal philosophy's descriptive and evaluative components. Whether these two types of nondetachment views are necessarily linked and, if so, how precisely they are linked, is a difficult question that will be addressed at different parts of the book.

These two main themes, namely, the relations between the factual and the normative and between substance and method, will inform the main argument of this book. I will try to show that the debates about the possibility of detachment in both substance and method, and the subtle relations between them, have informed a great deal of the theorizing in legal philosophy during the last century. And I will try to show that a substantial

part of these debates centers on the question of the possibility of reduction.

In chapter 1, I will discuss Hans Kelsen's influential attempt to present a "pure" theory of law, and the reasons for its failure. I will try to show that Kelsen's pure theory of law is the most striking—and in many ways, still the most interesting—defense of a complete detachment view, both in method and substance. The main reason for the failure of this project, I will argue, is that it identified the detachment view with antireductionism. Kelsen thought that a theory about the nature of law should avoid any reduction of legal facts to facts of any other type, either social or moral.

In chapter 2, I will present some of H.L.A. Hart's main contributions to legal philosophy. Hart's *The Concept of Law* is widely regarded as the single most important contribution to legal philosophy in the twentieth century. Indeed, I will try to show that Hart's theory is the most consistent and sustained attempt to develop a detachment view of law and legal philosophy, and one that is thoroughly reductive. But here I will introduce another separation, or detachment, that Hart's theory attempted, and one that I think is less successful: the detachment of law from state sovereignty. The legal positivist tradition, from Hobbes to the main positivists of the nineteenth century, conceived of law as the instrument of political sovereignty, largely influenced by the emergence of the modern state. Law, according to this view, consists of the commands of the political sovereign. Hart was at pains to show that this identification of law with state sovereignty is profoundly misguided; law is independently grounded on social rules, not on political sovereignty. In fact, Hart argued that traditional legal positivism got the direction wrong here: Law does not emanate from political sovereignty because our concept of political sovereignty is partly dependent on legal norms. I will argue that Hart's attempt to separate our understanding of law from the concept of sovereignty is only partly successful. He is right that we need to avoid forging too tight a connection between law and state, but, as Joseph Raz has shown, it is equally important to realize that there is an essential connection between law and authority. An analysis of the essentially authoritative nature of law, and an attempt to reconcile it with Hart's conception of law as based

on social rules, forms the topic of chapter 3. In this chapter I will bring together some of Hart's main insights about the nature of law with those of Raz, arguing that a conventionalist account of law's foundations can accommodate the best insights of both, at least with certain modifications.

In chapter 4, I will consider the contemporary versions of the *substantive* nondetachment view about the nature of law. As noted earlier, this view takes two main forms: According to Dworkin's influential theory, law's content can never be detached from normative considerations. What the law is—always, and necessarily—depends on certain evaluative considerations about what it ought to be. A more moderate version of this nondetachment view holds that whether the content of law can or cannot be detached from normative considerations is a contingent matter, depending on the norms that happen to prevail in a given legal system, and thus the nondetachment view is at least sometimes true. The main argument of this chapter will be that both of these views are mistaken. The argument here will be completed, however, only in the last chapter. Before that, in chapter 5, I consider the *methodological* variant of the nondetachment view. According to this variant, any philosophical theory about the nature of law, including legal positivism, necessarily implicates some normative views about what the law ought to be. There are several versions of this claim, and I will distinguish among them, arguing that some versions of this type of nondetachment thesis are actually not at odds with the descriptive aspirations of Hart's legal philosophy, while those that are, fail on their merits. Properly understood, Hart's methodological detachment view is defensible.

Chapter 6 focuses on the role of language and interpretation in understanding the content of the law. The argument here is motivated by Dworkin's argument that we can never grasp what the law says without interpretation. Since, as he argues, interpretation is partly, but necessarily, an evaluative matter, understanding what the law requires is necessarily dependent on some evaluative considerations. I will argue in this chapter that this conception of what it takes to understand a legal directive is based on a misunderstanding of language and linguistic communication. An attempt to clarify some of the semantic and pragmatic aspects of

what the law says forms the main objective of this chapter. One purpose is to show that when linguistic considerations are taken into account in the appropriate ways, we will realize that interpretation becomes the exception, not the standard form of understanding what the law says. Another purpose of this chapter is to show how certain pragmatic aspects of understanding a speech situation can be used to clarify the distinction between understanding what the law says and interpreting it. This last chapter, then, completes a defense of a fairly strong detachment view about the nature of law, both in method and substance.

Legal philosophy is not confined to the kinds of issues that are discussed in this book. A great deal of philosophical work is brought to bear on particular legal domains, such as torts, contracts, criminal responsibility and state punishment, statutory and constitutional interpretation, and many others. This book is focused on the philosophical controversies that concern the general nature of law. Philosophy of tort law and of contracts, and such, each deserves a book-length introduction of its own. Furthermore, it would be presumptuous to claim that a philosophical understanding of the nature of law must be a prologue to any philosophical inquiry into the nature of particular legal domains. Many issues that interest philosophers in such domains as criminal law, or torts, or contracts, are mostly moral issues about the underlying justifications of particular legal doctrines. As such, they do not really depend on any particular understanding of the general nature of law. The question of whether legal validity can be reduced to social facts or not, which will be discussed in this book at some length, has simply no bearing on the question of how best to account for the various notions of responsibility deployed in criminal law, or on the question of whether the main doctrines of tort law are best understood in terms of corrective justice. These lines of inquiry are quite independent of one another.

There are, however, several philosophical interests in law that do depend, albeit sometimes indirectly, on general jurisprudence and the kinds of questions discussed in this book. As we will see in chapters 4 and 6, some of the main questions about the nature of statutory interpretation are closely entangled with the main questions about the nature of law and how best to account for it.

The rule of law—and its virtues—is yet another issue, widely discussed in the literature, that also depends on some of the general philosophical views about the nature of law. Most writers on the rule of law—philosophers, lawyers, and political scientists—assume that there is something special about *rule by law* that makes it a desirable form of governance. Thus their assumption has to be that legalism, per se, is good in some respect and worthy of appreciation. But of course, any such view must be based on some conception of what legalism is—which is to say that it must depend, at least to some extent, on what law, in general, is, and what makes it a special instrument of social control.

This book is focused on some of the main issues that have preoccupied philosophy about the nature of law in the last century and a half or so. The book is not meant to be comprehensive, even in its limited focus, and it certainly does not cover most of the issues that philosophers interested in law work on. The book is not written as a report but as an argument for a particular position. Many of my colleagues would disagree with the position. Philosophy, however, aims at truth, not consensus. A fruitful disagreement is the best one can hope for.

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