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CONTENTS

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NOTES

PLURALISTIC JURIDICAL NIHILISM

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ABSTRACT

This excerpt from my dissertation outlines and explains what I have coined "pluralistic juridical nihilism." I posit that the history of jurisprudence is largely fraudulent. The concept of "law" is not a fixed idea. Rather, law is a word that represents several concepts that change depending on the context in which it is used. To some degree, this essay supports the work of Dr. Glanville Williams on the subject but expands thereon by showing my own internal "pluralism"—several theories of jurisprudence may coexist at the exact same time without any conflict whatsoever. Ultimately, law is a word that evokes both sadness and joy. Importantly to me (and why I decided to write this essay), the word brings up the sadness and anger I felt when a police officer took a family member's life. It brings up the shock I felt when another family member was taunted by a state court judge at a preliminary hearing. It reminds me of the joy I felt when I sued prisons and won injunctions to protect vulnerable individuals.

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This brief discussion is offered on one of the most metaphysical problems faced by jurists—what is law? The study of this question, i.e., jurisprudence, can[1] be broken into three classifications. First, analytical jurisprudence asks what *is* law. Second, normative jurisprudence asks what the law should be. And third, descriptive jurisprudence asks what the law is.[2] Of course, as with many concepts in the law, these three overlap and form what is generally called "jurisprudence."

Law is typically defined as a rule generally considered binding on a society.[3] Dictionaries will, from time to time, list subtypes under their umbrella definition of law, such as "common law," "civil law," or "natural law."[4] Hume would object to my attempt at defining "law" at all on the grounds that I am merely arguing what the term *ought* to be or what the term *ought* to mean.[5] However, Hume did not realize that "law," as we conceive of it today, defines terms by what they ought to be quite frequently.[6]

From a juridical standpoint, the precise definition of "law" has been the subject of debate for millennia. For example, the movie *Legally Blonde* uses Aristotle's phrase, "law is reason, free from passion,"[7] a definition that the main character, Elle Woods, comes to disagree with.

Other scholars have developed their own definitions of "law." Joseph Story considered law "*the very soul of a people*."[8] Notably, others, such as Thomas Aquinas, believed law, at its core, is an ordinance made by one who

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1. To be clear, others have divided jurisprudence into many areas. This is just my view of how one should divide jurisprudence.

2. I use this terminology to describe what most lawyers think when they hear the word "jurisprudence," i.e., the body of laws or judicial decisions that govern a society.

3. *Law*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/law (last visited Nov. 21, 2020).

4. *Id.*

5. *See* DAVID HUME, A TREATISE OF HUMAN NATURE (1896); R. George Wright, *Legal Obligation and the Natural Law,* 23 GA. L. REV. 997 (1989). The "is ought" problem holds that humans often look at what things are and, from that, say that is how things ought to be. Jurists have basically done the opposite. They have said what they think "law" ought to be and said that that's what "law" is. One of my more radical views, far outside the scope of this essay, is that I do not think the "is ought" problem exists. Saying what a thing ought to be is just a matter of opinion. Therefore, it is perfectly logical for one to say that thing ought to be how it is.

6. Indeed, such is technically the very first law on the books at the federal level. *See* 1 U.S.C. § 1 (defining laws and meaning of laws, thus by defining these terms, Congress is defining them by what Congress thinks they ought to mean).

7. Derek Warden, *The Ninth Cause: Using the Ninth Amendment as a Cause of Action to Cure Incongruences in Current Civil Rights Litigation*, 64 WAYNE L. REV. 403, 405 (2018) (citing LEGALLY BLONDE (Metro-Goldwyn-Mayer 2001) and ARISTOTLE, THE POLITICS OF ARISTOTLE: A TREATISE ON GOVERMENT 173 (William Ellis trans., The Floating Press 2009) (translating as "law is reason without desire")).

8. This is said to have been the position of Justice Joseph Story. *See* Matthew A. Kern & Kyle A. Scott, *We Hear You Knocking, But You Can't Come In: The Supreme Court's Application of Common Law in Cases of Knock and Announce Entry*, 7 CONN. PUB. INT. L.J. 55, 80 (2008).

cares for a community. To Aquinas, law is promulgated and is for the general good of that community. All other definitions, to Aquinas, are just secondary definitions.[9] In short, Aquinas was a natural law thinker. Opposed to this natural law school of thought, analytical jurisprudence arose—which objected to natural law combining what the law *is* with what the law *ought to be*.

Numerous other scholars have given and continue to give their own definitions. However, they may be thinking along Thomistic lines without realizing it.[10] John Austin believed that law was a command of a sovereign backed up by force.[11] However, this definition fails to extend to systems like those in the United States, where some "law" is neither commanded nor enforced by a single sovereign body. For example, under the American constitutional law's notion of separation of powers, where the courts strike down an act of Congress or an action of the Executive, no true enforcement of that order is possible.[12] Some scholars, of course, have tried to stretch Austin's thoughts to include such situations, for example, by suggesting that the judicial order itself constitutes enforcement.[13]

Others have taken more of a "legal realism" approach. This "legal realism" approach tends to be very Anglo-centric. Two prominent jurists who defined the law in this way, though, have raised a number of noteworthy issues. Justice Holmes defined "law" as the prophecies of what judges will do.[14] However, his definition fails to understand that (a) judges can—and do—get things wrong; (b) such a view would allow one to defend anticanonical legal opinions as being rightfully called "law;" however, to be a correct theory in the modern world, any theory must show why those cases were wrong and not properly "law;"[15] and (c) this view does not account for

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9. This is very much shorthand for Aquinas' view on "law" for purposes of the above-the-line portion of this essay. It appears that Aquinas had several views about law and that it came in multiple "types." They were: Eternal Law, Divine Law, Natural Law, and Human Law. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA [TREATISE ON LAW] 611-56 (Gateway ed., 1992). For an interesting take on Aquinas' theories, I direct the reader to Ellen S. Pryor, *What Can We Hope for from Law?,* 36 PEPP. L. REV. 547 (2009). Aquinas' views on law in relation to his primary definition of law were succinctly summarized elsewhere. *See, e.g.*, Timothy Cantu, *Virtue Jurisprudence and the American Constitution*, 88 NOTRE DAME L. REV. 1521, 1525 (2013).

10. This was most aptly put in the realm of legal legitimacy. *See, e.g.*, Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37, 38 (1988).

11. *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 166-67 (Wilfrid Rumble ed., 1995).

12. Stephen Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2127-28 (1996).

13. Hugh Evander Willis, *A Definition of Law*, 12 VA. L. REV. 203, 208 (1926).

14. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897).

15. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386-87 (2011) (noting that "any theory worth its salt must show that such cases were wrongly decided") (internal citation omitted).

the concepts behind the original common law judges' thinking or the "law" part of "natural law;" and any true singular definition of law must account for these as well. Judge Posner conceives of law in merely pragmatic terms.[16] Again, this conception does not show why the anticanon cases were wrong. For instance, Judge Posner has outright defended the anticanonical opinion of *Korematsu*—the opinion that upheld Japanese internment.[17] Furthermore, Posner's theory fails to acknowledge that judges can get the law wrong and fails to consider that judges only have this "power" insofar as they are part of a system.[18] Thus, even if it were true that "law" could be classified as "power," it would seem necessary for that definition to be expanded to include the entire system from which that power is derived.

Perhaps the greatest and most inclusive definitions of "law" came in the mid-twentieth century with H.L.A. Hart and Ronald Dworkin. To Dworkin, law should be defined via "interpretivism" and moral terms.[19] On the other hand, to Hart, law should be defined in almost scientific terms. Hart believed that for any legal system to exist, there must be a union of primary and secondary rules internalized by a people.[20] The primary rules are the rules of order or of conduct.[21] The secondary rules are those of (1) recognition ("specifying the criteria of legal validity"), (2) change (changing all the rules in the system), and (3) adjudication, which must be effectively accepted as common public standards of official behavior by its officials.[22] Hart admits that his definition of law does not include the "law" part of natural law.[23]

Hart's definition of "law" purports to be a wholly positivist definition. This is impossible. Hart's definition of "law" is essentially a rule about law that has existed in all legal systems across time and space. To Hart, these

16. Judge Posner's views were summarized elsewhere. *See, e.g.*, Richard A. Posner, *Legal Pragmatism Defended*, 71 U. CHI. L. REV. 683, 683 (2004) ("The ultimate criterion of pragmatic adjudication is reasonableness."). My question to Judge Posner then is this—is he not just returning to Aristotle?

17. Richard Epstein, *The Perils of Posnerian Pragmatism*, 71 U. CHI. L. REV. 639, 655-56 (2004).

18. After all, all power comes from people believing the individual has it.

19. *See* Mathew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law*, 100 NW. U. L. REV. 719, 729-45 (2006); Nicos Stavropoulos, *The Debate that Never Was*, 130 HARV. L. REV. 2082, 2084 (2017).

20. H.L.A. HART, THE CONCEPT OF LAW 113 (1961).

21. *Id.*

22. *Id.*

23. *Id.* at 184. (noting that natural law, "despite a terminology, and much metaphysics, which few could now accept . . . contains certain elementary truths of importance for the understanding of both morality and law."). Doubtless, most scholars now believe Hart was the closest to getting it right. *See* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008).

rules just apply and look different for each society in which they appear. However, this is precisely Thomas Aquinas' definition of natural law—rules that exist everywhere for always, but, like the form of a house, these rules are simply applied differently throughout societies.[24]

Most scholars in the United States seem to have accepted Hart's definition of law. But even some of his most enthusiastic supporters have noted that Hart's definition needs to be updated to fit the concept of "law" as it is understood in the juristocracy of the United States and its constitutional law system.[25] But if Hart's definition needs "updating," then Hart was incorrect in thinking that his definition would capture the whole "concept of law."[26]

I join the jurists who admit that there is no one definition of law. However, I part ways with many jurists with regard to the idea that "law" will never fully reveal itself.[27] I think law has no secrets to reveal. In my view, as it will become more clear below, "law" is a glass house in the desert seen only by the imagination of individuals and the populaces in which they communicate. Humans, in Western society at least, thirsty for order out of the chaos of our lives, have placed in the term "law," their moral, social, and political hopes. Humans use the word "law" to apply to so many things.[28] As such, it is not that I do not believe in defining law—I am simply a jurisprudential pluralist and believe that, in our modern world, one should not attempt to squeeze "law" into any one overarching definition other than what the term denotes or connotes in any given situation. Therefore, I echo the words of Dr. Glanville L. Williams and note that the dispute about the meaning of the word law is merely "a verbal dispute, and nothing else . . . . [The] discussion carried over many generations has been wholly unreal."[29] And I further agree with those scholars who have called the entire history of jurisprudence a "Great Name-Calling."[30] When I was defending my

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24. I have noted this elsewhere. Derek Warden, *Secundum Civilis: The Constitution as an Enlightenment Code*, 8 J. CIV. L. STUD. 586, 619 n.128 (2015).

25. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004). For an interesting discussion on the place of the Civil War and the juristocracy, see Richard Albert, *Constitutional Amendment and Dismemberment*, 43 YALE J. INT'L L. 1 (2018).

26. Fallon, *supra* note 23, at 1125-26.

27. Mitchell Berman, *Judge Posner's Simple Law*, 113 MICH. L. REV. 777, 779-80 (2015) (book review).

28. It is even applied to a personal rule that a fictional television character applies to his social life. *How I Met Your Mother: The Duel* (CBS television broadcast Nov. 14, 2005) (character Barney Stinson discusses his "Lemon Law").

29. Glanville L. Williams, *International Law and the Controversy Concerning the Word Law*, 22 BRIT. Y.B. INT'L L. 146 (1945).

30. Albert A. Ehrenzweig, *Psychoanalytical Jurisprudence: A Common Language for Babylon*,

dissertation, I initially accepted Hart's definition. However, Hart's definition of law operated on the *sweeping* assumption that the concept of "law" in "constitutional law" can be derived from looking at its shared components with other areas of "law" such as "contract law." But this is a bit like defining the word "can" in "trash can" by looking at other instances of "can," such as "you can do it." In the end, like so many other human endeavors, law is messy and convoluted. "Law" is a word. Words convey concepts and ideas. They do not convey words. Thus, "law" is not a concept—it is a word that represents many concepts and ideas. The concepts associated with the word "law" have changed dramatically from its ancient roots such that, today, it primarily means a rule at the meeting of various other rules—i.e., Hart's definition.

Therefore, the many jurists I mentioned above were both correct and incorrect in part. Holmes was partially correct. When lawyers write briefs or advise clients, we consider what judges will do. As such, I also acknowledge that Judge Posner was partially right. "Law," as we often conceive of it, only exists when the person asserting it has some power, and judges often view their decisions pragmatically. On the other hand, Austin was likewise correct in part—there are "laws" enacted by a sovereign that can be enforced. For example, one can see this reflected in how Southerners call the police "the law." Hart was also partially correct—all the above only have their powers or positions because they exist within a system of rules typically recognized by a society as binding. That being said, Aquinas was also partially correct. We call things "law" when they are enacted by governing entities and are for the common good. Like Aquinas, Aristotle was also correct in part when he asserted that "law" was reason, free from passion. People prefer laws that are not written in the heat of passion. Moreover, wholly unreasonable laws are said to have no legal force in the United States.[31]

However, these scholars are also mostly incorrect in some respects. They mostly fail to define the thinking of the old common law judges. Those judges were said to merely be "discovering" the law. But that would mean the "law" had to be there in the first place to be discovered.[32] They also largely fail to define the "law" part of "natural law."

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65 COLUM. L. REV. 1331, 1332-33 (1965).

31. St. Joseph Abbey v. Castille, 712 F.3d 215, 226-27 (5th Cir. 2013).

32. As one commentator put this, "[i]f judges were to discover the law and not make it, it must have been there to discover. To some degree, common law is the custom of the land—conventions from time immemorial." Craig A. Stern, *The Common Law and the Religious Foundations of the Rule of Law Before Casey*, 38 U.S.F. L. REV. 499, 509 (2004).

Not only may it be unrealistic or unwise to seek one unifying definition of "law," but it may also be inappropriate. Lawyers and scholars do not (and should not) have a monopoly on words or concepts. We merely take what is given to us. There is danger in the narrow approach to jurisprudence that has pervaded analytical jurisprudence (especially in the West). That danger has been felt in how the law has impacted various marginalized groups. "Law" is often given blind obedience and moral superiority even when it is certainly immoral. For example, officers arrested homosexuals in the early 2000s simply because, at the time, a "law" said homosexual conduct was illegal.

Law is one of those words that, aside from conveying concepts, also conveys any number of emotions. As noted in the abstract of this essay, it brings up the sadness and anger I felt when a police officer took a family member's life. It brings up the shock I felt when another family member was taunted by a state court judge at a preliminary hearing. It reminds me of the times that I sued prisons and won injunctions to protect vulnerable individuals.

Therefore, one may ask, how do I, a scholar critiquing other definitions of law, define "law." I, considering my education and life experiences in the law, define it in an admittedly circular way—as "a rule that is generally considered to be binding on a society based on that society's understanding of how rules are binding." Another definition that seems to fit the modern understanding in the United States is "law is a vast complex liberal art of rules that governs our society, is typically practiced by judges and lawyers, can often be enforced, and that is often given blind obedience by members of our society."

Admittedly, I believe that there is a natural "law." But it can exist independently of human made "law." This second "law" is the positive law of a society. "Natural law," however, is a means of revolution and of necessarily judging the legitimacy or "rightness" of law or actions. Moreover, I admit that my practice experience has been filled with instances of natural law. Once, a state court judge said to me, "I know what the law is here, but I'm going to use what I call 'country law.'" In other instances, I would start briefs or complaints with the most graphic details of prison cases under the presumption that surely no rational human being could read this and condone the conduct. As one of my mentors once said, "[y]ou win on the equities, not the law because any judge worth his salt can distinguish cases and statutes." The echoes of natural law can be seen in the various social movements of our time: the disability rights movement, the civil rights movement, the Black Lives Matter movement, and so many more. The rallying cry of these protests, "no justice, no peace," is inherently

naturalistic. For this reason, I have had numerous discussions with fellow activists about "positive law theory." They refer to the term as "privileged law theory." Finally, in all candor, one must admit that the realm of international law is still tethered to its natural law roots.[33]

To summarize my theory of pluralistic juridical nihilism: "law" is a term that represents multiple concepts. The most commonly accepted concept by academics, as stated by Hart in his *The Concept of Law*, holds that law is the union of primary and secondary rules. This definition firmly separates law from other things which are not "law." For example, the calling of "dibs" or "shotgun" may well be rules that individuals consider "law," but they are not unified with the necessary secondary rules under the Hartian view. However, "law" can be, and is often, used outside this realm, even by lawyers and scholars. For example, the statement "an unjust law is no law at all" is true to those who hold that "law" can also stand for the rightness or moral correctness of other concepts of "law." Moreover, "law" can also stand for concepts that are essentially the same as Hart's but use different language to describe that concept. For example, what Holmes did in defining law as the prophecies of what courts will do is nothing more than an imperfect shorthand for Hart's definition applied in Anglo-American practice. Further still, and perhaps the most controversial part of my theory of jurisprudential pluralism, is this: "law" is also the images and feelings one conjures while experiencing the law—whether from a practical angle or a more theoretical "tweed-wearing" angle. Law is law and nothing more than that. How one uses the term "law" changes nothing in the real world, and it is time that the area of "philosophy" called "analytical jurisprudence" dies—these people could be devoting their time to worthier pursuits.[34] They should leave the meaning and power of law to be determined by those who interact with it daily.

This theory of jurisprudence, therefore, can be summarized as follows: the meaning and power of law come from conventional verbal usage, context (emotional, cultural, and mental), and social acquiescence. In the end, to say one has faith in the law is to say one has faith in other people. And that is an encouraging thought.

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33. For example, this has been recognized explicitly in the context of raising disability rights to the international level. Derek Warden, *The Americans with Disabilities Act at Thirty*, 11 CAL. L REV. ONLINE 308, 317-18 (2020).

34. Not only do I think the entirety of analytical jurisprudence is nonsense, I think the entirety of analytic philosophy is also a waste of time. But that criticism is far outside the scope of this paper.